This study analyses certain controversial issues commonly arising when a claim for restitution is brought against a bank. Chapter 1 considers the equitable claim traditionally labelled ‘knowing receipt’. Three issues are discussed: (i) the basis in principle of the claim for ‘knowing receipt’; (ii) whether the claim requires proof of fault on the part of the recipient; and (iii) whether the claim can be brought in relation to the receipt by a bank of a mortgage or guarantee offered to the bank in breach of trust or fiduciary duty. The conclusions are (i) that ‘knowing receipt’ is often a claim in unjust enrichment, though the dishonest recipient will also be liable for an equitable wrong; (ii) that when the unjust enrichment version of ‘knowing receipt’ is in issue, the claim should be one of strict liability; and (iii) a claim in unjust enrichment can be brought against a bank to defeat its interest in a mortgage or guarantee offered in breach of trust.

Chapters 2 to 4 concern a concept within the law of unjust enrichment that has come to be called ministerial receipt. A ministerial receipt is a receipt of money or property by an agent on behalf of his or her principal. Banks often receive money as agents on behalf of account holders. Chapters 2 and 3 analyse that concept as it is dealt with at common law and in equity respectively. At common law, ministerial receipt is a defence which exists only if the agent pays over the money in question before receiving notice of the right of the plaintiff to restitution. By contrast, ministerial receipt in equity operates to restrict a right to restitution which would otherwise arise. A claim for ‘knowing receipt’ cannot be brought against an agent in equity. Chapter 4 argues that the equitable treatment of agents is correct as a matter of principle, and that no common law claim in unjust enrichment should be maintainable against a person who receives as agent. Special attention is given to banks.

Chapter 5 analyses three other defences which a bank can plead in answer to restitutionary claims: ‘good consideration’, bona fide purchase and set off. It is concluded that there is no general defence of ‘good consideration’; that the bank can plead bona fide purchase in relation to money deposited into an account in credit; and that in the context of combining two or more bank accounts set off is merely a species of bona fide purchase.
RESTITUTION FROM BANKS

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Restitution From Banks

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ABBREVIATIONS

*Bowstead and Reynolds*  

*Burrows and McKendrick*  

*Goff and Jones*  

LD Smith, ‘Property’  

Lord Nicholls, *Restitution Past, Present and Future*  

M Bryan, *Restitution and Banking Law*  

*Paget*  

P Birks, *Restitution and Banking Law*  

P Birks, *Laundering and Tracing*  

RLR  
*Restitution Law Review.*
INTRODUCTION

This thesis is not concerned with every kind of case in which the law of restitution of unjust enrichment comes to be applied to a bank. As the title suggests, the general focus is upon claims against banks. Claims brought by banks are not considered. Even within the confines of claims against banks many difficult legal issues might be selected for analysis. The study focuses its main attention on two seemingly intractable problems. The first concerns the equitable claim traditionally labelled ‘knowing receipt’. What are the elements of this claim, and when can it be brought against a bank? The second concerns a concept which has come to be labelled ‘ministerial receipt’. A ministerial receipt is a receipt by an agent on behalf of a principal. A beneficial receipt, by contrast, is the receipt by a person on his or her own behalf. A bank acts as an agent when it collects money on behalf of a customer from a third party. What is a bank’s liability to make restitution in respect of a ministerial as opposed to a beneficial receipt?

The seemingly tiny topic of ministerial receipt is of enormous practical importance. Banks are popular defendants. And they often receive ministerially. Yet it cannot be said with certainty exactly when a bank will be liable to make restitution of money received as agent. More importantly, there is a strong argument that calls for a change to the way the common law treats ministerial recipients at present. The analysis of banks as ministerial recipients therefore features most prominently in this thesis. In order to fully understand the position of banks as ministerial recipients, it is also necessary to explore three defences
upon which a bank might rely to defeat a claim for restitution: bona fide purchase; set off; and ‘good consideration’.

This Introduction briefly outlines the debates surrounding ‘knowing receipt’, ministerial receipt and the three defences just mentioned. Chapter 1 then analyses ‘knowing receipt’ claims in general, and in relation to the receipt by a bank of a guarantee or mortgage in particular. Chapters 2 to 4 are concerned with ministerial receipt. Chapter 2 considers how the common law treats restitutionary claims brought against agents, especially banks. Chapter 3 considers the same issue in relation to equity. Chapter 4 presents the case in favour of a change to the common law as considered in Chapter 2. The argument will be that the common law of unjust enrichment should treat receipts by agents in the same manner that such defendants are treated in equity. The last chapter, Chapter 5, considers three defences which are frequently raised by banks in defence of claims for restitution: bona fide purchase; set off; and ‘good consideration’. It will be submitted that misconceptions exist in relation to all three defences when raised by banks.

A. ‘**KNOWING RECEIPT**’

A claim in ‘knowing receipt’ arises when property to which the plaintiff is beneficially entitled in equity is transferred to the defendant in breach of trust or fiduciary duty. Three issues relating to such claims are addressed in Chapter 1:

(1) the correct classification of the claim;

(2) the degree of fault, if any, which a defendant must display in order to
(3) whether the receipt by a bank of a mortgage over trust property can form the basis of a claim for ‘knowing receipt’, and in particular whether a bank is liable if the mortgage was taken with the consent of the beneficiary of the trust, but the beneficiary later claims that his consent was vitiated by mistake or undue influence?

The long-standing debate over the proper classification of the claim for ‘knowing receipt’ has raised two main candidates. Some argue that it is properly regarded as a claim in unjust enrichment. Others see it as a form of equitable wrongdoing. A third and more recent view is that the claim is sometimes one, and sometimes the other. The claim for ‘knowing receipt’ is centuries old, but its proper classification remains unresolved today. The right answer has a significant, though not determinative, impact upon the resolution of the second issue.

The second issue is whether ‘knowing receipt’ is a claim of strict liability or requires proof of fault on the part of the defendant. If it is the former then the cause of action is poorly named. The defendant need not ‘know’ anything to be liable to restore the value received to the trust’s beneficiaries. It is the contention of this thesis that liability for knowing receipt is, or should be, strict. That explains the use of quotation marks whenever the label ‘knowing receipt’ appears. Ideally, recipient liability in equity is a better name. But until some alternative phrase gains acceptance the cause of action is more immediately brought to mind by the traditional term.
Both of the issues just described are crucial for all recipients of trust property. But banks are particularly susceptible to claims for ‘knowing receipt’. Trust money paid away in breach of trust frequently finds its way into a bank account. At present, it is impossible for a bank to know for certain what its liability is. An important recent paper by Lord Nicholls¹ suggested the following answers. A ‘knowing receipt’ claim could either be a claim in unjust enrichment or a claim in equitable wrongdoing. If it was the former it should be a claim of strict liability. If it was the latter the claimant must prove that the recipient was dishonest. In general those answers reflect a consensus of academic opinion. But serious attempts have recently been made to cast doubt on whether the law should accept the position for which Lord Nicholls contends. Chapter 1 gives most of its attention to these recently expressed doubts and seeks to dispel them.

The third issue relating to ‘knowing receipt’ claims considered in Chapter 1 concerns mortgages and guarantees. If a trustee offers a bank a mortgage or a guarantee in breach of a duty of trust owed to the claimant, can the bank be liable for ‘knowing receipt’? If the answer to that question is yes, how is the bank’s position affected where the claimant apparently consented to the relevant guarantee or mortgage at the time it was given but later says that his consent was affected by mistake or some other vitiating factor? Both these issues recently divided the Supreme Court of Canada in *Gold v Rosenberg*,² and that case will be

¹ Lord Nicholls, *Restitution Past Present and Future*.
² [1997] 3 SCR 767, to be read with *Citadel General Assurance Co v Lloyds Bank Canada*
the basis of discussion.

A large number of cases fall within the scope of the first two issues – whether ‘knowing receipt’ is a wrong or a claim in unjust enrichment or both, and whether fault is always an element of the claim. Over the last ten years these cases have been examined by a number of people very thoroughly.\(^3\) It would be wrong to review them all. The study of those issues in Chapter 1 essentially begins where the conclusions reached have subsequently given rise to new controversy.

**B. MINISTERIAL RECEIPT**

Agents pay and collect debts on behalf of their principals. Banks frequently act as paying or collecting agents. They do so by offering cheque or electronic funds transfer facilities both to their customers, and to their customers’ customers. Banks also collect money in cash over the counter for credit to their customers’ accounts. In these sorts of transactions difficult problems can arise. What happens, for example, when one bank transfers too much to the another? Take the following case. A owes B £1,000. A instructs his bank to pay B £1,000. Using the electronic transfer facilities at Bank A, the operator transmits £1,000 to Bank B on two occasions, a split second apart. Discovering the error some time later,

Introduction

Bank A requests Bank B to remit (the second) £1,000. If Bank B is satisfied that there has been a mistake common sense might suggest that it should comply with the request. But legal experience reveals that Bank B faces a dilemma.

First, Bank B may have already reported the receipt of £2,000 and credited the proceeds to the account of B. Unaware that there has been a mistake B may have changed his position materially on the assumption that he is entitled to the £2,000. Were Bank B to comply with the request and return the £1,000, it might not be able to recover the money from B. Secondly, for all Bank B knows, B may have a running account with A such that the receipt of £2,000 has discharged the outstanding indebtedness of A to B. Were Bank B to comply with the request it might destroy B’s ability to recover from A. Finally, it may be that, just as in the first situation, B may demand that his account remain credited with the full £2,000.

In Germany Bank B would never be faced with such a dilemma. German law has long said that a payment to a disclosed agent must be regarded as having been made to the principal directly. Provided that the agent commits no wrong in receiving a payment on behalf of his principal, the agent is viewed by German law as a piece of machinery; a mere conduit pipe for the transfer of value. As such, the agent drops out of the legal picture. Any claim for restitution must be brought against the intended and true payee. As will be seen, there is a strong argument that the German position is correct as a matter of general principle. Indeed, it

4 The German position is discussed below 248.
seems that in England and Australia equity takes the same position – the agent drops out where he has committed no wrong in receiving money on behalf of another. But the stand taken by the common law is markedly different. One case highlighting the contrast between the common law on the one hand, and equity and German law on the other, is *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (‘*ANZ v Westpac*’). That case is an excellent example of the difficulties that arise when claims for recovery are permitted against those who receive only as agent. *ANZ v Westpac* is considered in detail in Chapter 2. It will be contended that the common law should adopt the position adopted in equity, and that agents should be immune from all claims in unjust enrichment. This immunity is referred to below as a genuine defence of ministerial receipt.

One point should be noted now about the proposed genuine defence of ministerial receipt. The argument will be that no cause of action should be maintainable against an agent in unjust enrichment. At present, agents have a common law defence of payment over. That defence allows an agent to defeat a restitutionary claim for the return of money paid to an agent where, before he received notice of the plaintiff’s claim, the agent paid over the money in question to or on the direction of his principal. This orthodox version of payment over is a true defence. It is a substantive reason why an established *prima facie* cause of action must fail. Pursuant to a genuine defence of ministerial receipt, no cause of

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action can be made out against a person in relation to his receipt as an agent.

C. DEFENCES

Part III of the thesis examines three defences available to a bank to defeat a claim for restitution: bona fide purchase; set-off; and ‘good consideration’. A typical instance of the defence of ‘bona fide purchase’ occurs where a bank resists a claim for the repayment of trust funds paid to it by a delinquent trustee in reduction of his personal indebtedness to the bank. A typical instance of the defence of ‘set-off’ occurs where a bank resists a claim for the repayment of trust funds because it says it has a right to combine the credit balance of an account in the trustee’s name with the debit balance of another account held by the trustee. A typical instance of the defence of ‘good consideration’ arises where, in order to improve its security, a second mortgagee pays out the debt of the first mortgagee in circumstances in which both mortgages were fraudulently created by the debtor, so that no security in fact exists for either creditor. Part III explores controversies surrounding these three defences, in particular: whether bona fide purchase and set-off are distinct; and whether ‘good consideration’ is truly a defence. It is uncertain whether in this context what is known as ‘set-off’ is simply a particular application of the rights given to a person who is a bona fide purchaser. Although some contend that the giving of good consideration by itself is always a defence to a claim in unjust enrichment, it will argued that there is in fact no general defence of good consideration.
CHAPTER 1 - THE BANK’S RECEIPT OF MISDIRECTED PROPERTY

A. INTRODUCTION

On some occasions, plaintiffs seeking restitution of money from a bank pursuant to a claim in unjust enrichment experience little difficulty in establishing the elements of that cause of action. The real interest in such cases lies in the question whether the bank can establish a defence to the claim. *State Bank of New South Wales v Swiss Bank*¹ provides a good example. The records of the plaintiff erroneously showed that it owed $20m to the defendant bank. Employees of the plaintiff electronically transferred that amount to Swiss Bank. In fact, no such debt ever existed. It was abundantly clear that the plaintiff had a *prima facie* cause of action against the defendant to recover the money paid by mistake. The claim lay in unjust enrichment or, as we used to say, in money had and received. Each of the essential elements of a claim in unjust enrichment was established: (1) The defendant was enriched: $20m was paid to the defendant, and as the bank was not in fact acting as an agent in receiving that money, there was no doubt that the defendant was enriched by that receipt; (2) The enrichment was at the expense of the plaintiff: The defendant’s enrichment came directly from the plaintiff; (3) The enrichment was unjust: The enrichment was caused by the mistake of the plaintiff. Mistake gives rise to a claim of strict liability. It is not one of those exceptional

unjust factors which require proof of some fault on the part of the defendant.²

The great controversy in State Bank of New South Wales v Swiss Bank was whether the defendant could establish the defence of change of position. The specific issue was whether that defence was established when the defendant’s change of position was caused both by the receipt of the enrichment from the plaintiff, and by the receipt of information from a third person. The court concluded that there was no defence of change of position in those circumstances. The NSW Court of Appeal’s analysis of the defence of change of position has been strongly criticised,³ but that issue falls outside the scope of this thesis.

The elements of a claim to recover money mistakenly paid to a bank are fairly well settled when the payment was made to the bank as principal and not as agent. There are some cases, however, where there is contention as to the elements of the cause of action. One such controversy involves the equitable claim for ‘knowing receipt’. Frequently, the defendant against whom such a claim is brought is a bank. The plaintiff alleges that the bank has received money or property transferred to it in breach of trust or fiduciary duty. In what circumstances is the bank liable to make restitution of the value received? That question is tackled next.

B. RECIPIENT LIABILITY IN EQUITY

In order to understand those cases which directly fall under the label ‘knowing receipt’, it is important to be aware of a number of quite distinct claims which can be made in relation to misapplied trust property. Failure to distinguish these claims inevitably leads to the misclassification of a host of cases. Moreover, the availability of these other claims must be kept in mind when determining the elements of the ‘knowing receipt’ cause of action.

1. CLAIMS TO VINDICATE PRE-EXISTING PROPRIETARY RIGHTS

In these cases the plaintiff says that the defendant is in possession of an asset that was transferred to the defendant in breach of trust or fiduciary duty owed to the plaintiff. T holds a car on trust for B. In breach of trust T gives the car to D as a gift. It is clear that B has an equitable proprietary interest in the car, and that as D is a donee B’s proprietary interest survives the transfer to D. B can directly enforce that proprietary interest against D. An equitable proprietary claim such as this is often referred to by its Roman law tag *vindicatio*. A *vindicatio* is the assertion of ownership. In more familiar language, the claim represents the direct assertion of a proprietary right. The plaintiff points to an asset in the hands of the defendant and says ‘That thing is mine!’ There is no *vindicatio* at common law, but there is in equity. The equitable *vindicatio* exists because ‘the fundamental rule of equity is that an equitable interest is binding on everyone, except a bona

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fide purchaser for value without notice’.

Unless that defence applies, the transferee of trust property holds it subject to the beneficiary’s equitable interest, even if the transferee ‘is not aware that what he has received is trust property’.

**A new meaning of ‘vindication’?**

The use of the word ‘vindicatio’ as defined above is not accepted by Mr Virgo. His work divides the law of restitution into three areas: unjust enrichment, restitution for wrongs, and ‘the vindication of property rights with which the defendant has interfered’. Restitutionary claims said to fall under this last limb include not only the assertion of a proprietary right through a constructive trust or subrogation, but *personal* claims for money had and received and ‘knowing receipt’ as well. Thus ‘vindication of property rights’ is for Mr Virgo any claim which directly or indirectly protects the plaintiff’s property rights, whether or not that property right still exists, and whether or not the property to which the right attaches is still in the possession of the defendant. That is an idiosyncratic usage of the word vindication. As Bracton says, one asserts a *vindicatio* ‘when one alleges that some corporeal thing belongs to him’. The verb thus relates to a presently existing object. One cannot vindicate a right in property if the property does not exist. That is why Justinian’s *Institutes* say that while ‘the vindication

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may lie against someone in possession’,\(^9\) ‘when something has ceased to exist it is no longer possible to bring a vindication.’\(^10\) Again: ‘Without first identifying the possessor, it is impossible to bring the vindication. Logic and law both require one party to possess and one to claim from that possessor.’\(^11\) \textit{A fortiori}, a plaintiff is not vindicating a right in property if he is seeking from the defendant only a personal remedy such as a sum of money, even if that sum is calculated by reference to property which the plaintiff or the defendant once had or even still has. ‘Pay me £X!’ is not a claim to recover property. A \textit{vindicatio} is advanced only when the plaintiff’s claim in effect says to the defendant ‘That thing is mine! Give it to me!’

There is in any event an inherent difficulty with Mr Virgo’s explanation of some cases as based on the ‘vindication of property rights’. His analysis of \textit{Lipkin Gorman v Karpnale Ltd}\(^12\) exposes the error. In that case a partner (Cass) of the plaintiff firm of solicitors withdrew money from the firm’s bank account to fund his gambling at the defendant casino. The House of Lords held that the plaintiff was entitled to recover a large proportion of the money from the casino in money had and received. Mr Virgo says that the basis of the decision was not unjust enrichment; instead the plaintiffs recovered because they had ‘a \textit{continuing}


\(^10\) Justinian, \textit{Institutes}, 2.1.26, Birks and McLeod 57.

\(^11\) Justinian, \textit{Institutes}, 4.15.4, Birks and McLeod 143.

\(^12\) [1991] AC 548 (HL).
proprietary interest\textsuperscript{13} in the money which Cass gambled away at the casino. That cannot be right. Legal title to the cash withdrawn from the firm’s bank account vested in Cass, not the firm.\textsuperscript{14} It may be that the firm also had some form of proprietary right in the cash withdrawn by Cass. Lord Goff said that the plaintiff firm could trace from a chose in action (the debt owed to the firm by its bank) into the product of that chose in action (the cash withdrawn from the account). But if that process of tracing did give the firm a proprietary right in the cash, it was undoubtedly a new proprietary right. It was not a continuing proprietary right which the firm had before the story began. An analysis cannot be based on any such fiction.\textsuperscript{15} As is discussed in more detail below, the right to a traceable substitute of an asset is different from the right to the original asset itself. The right to a traceable substitute arises in response to an event of unjust enrichment.\textsuperscript{16}

\textit{Change of position and the pre-existing vindicatio}

With the proper definition of \textit{vindicatio} in mind, consideration of the example introduced above can be continued. B has a proprietary right in the car. What created that right? Proprietary rights can be generated by four types of events: an event of consent, some form of wrongdoing, an event of unjust enrichment, or some other event.\textsuperscript{17} It can be assumed here that B’s interest arose by consent. B’s


\textsuperscript{14} Ibid 573. The House of Lords refused to overrule the two Privy Council decisions which established that fact: \textit{Union Bank of Australia Ltd v McClintock} [1922] 1 AC 240 and \textit{Commercial Banking Co of Sydney Ltd v Mann} [1961] AC 1.

\textsuperscript{15} \textit{Burrows and McKendrick} 171.

\textsuperscript{16} Below 22.

\textsuperscript{17} P Birks, \textit{An Introduction to the Law of Restitution} (1985) 52 \textit{et seq}; P Birks, ‘Definition and
equitable proprietary interest was created some time before the gift of the car to D by an express transfer from a settlor to T on trust for B. The *vindicatio* advanced by B therefore relates to what can usefully be termed a pre-existing proprietary interest. ‘Pre-existing’ is used as short-hand for the fact that the proprietary interest asserted by the plaintiff was created by a consensual transfer long before D entered the picture.

As B’s equitable property interest was created by an event of consent (the consensual transfer from the settlor to the trustee), B’s claim *ipso facto* has nothing to do with the law of unjust enrichment. It is a right which is directly enforceable against anyone in whose hands the asset comes until a *bona fide* purchaser intervenes.\(^\text{18}\) A proprietary right that is not generated by an event of unjust enrichment cannot be defeated by the defence of change of position. That defence is peculiar to the law of unjust enrichment. This last proposition has recently been challenged.

It is clear that the defence of change of position is available to defeat rights generated by unjust enrichment.\(^\text{19}\) There is no suggestion in the case law that

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\(^\text{18}\) The defence of *bona fide* purchase is dealt with in Chapter 5.

\(^\text{19}\) *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).
change of position is a defence to any other type of claim. However, some commentators have suggested that change of position is available to defeat claims other than those based on an event of unjust enrichment. In particular, it has been said that the defence will defeat a claim to enforce a pre-existing proprietary right.

This seems to be the view adopted in Underhill and Hayton:

‘If trust property … is found in the hands of any person in circumstances inconsistent with the trust, he will hold it as constructive trustee subject to the interests of beneficiaries under the trust except to the extent that the defence of change of position is available to him…’.  

Scott on Trusts also sees change of position as available to defeat a proprietary claim to the original trust property:

‘If an innocent donee of trust property has not disposed of the property, and has not so changed his position before receiving notice of the trust that it is inequitable to compel him to restore the property to the trust, he can be compelled to restore the property.’

Similarly, Mr Oakley says:

‘… whatever the nature of the property, any claim of the beneficiaries to enforce their interests will additionally be subject to the defence of change of position…’.

The suggestion is that an innocent donee of express trust property will have the defence of change of position available even if he is still in possession of the very same property. That is doubtful. The proprietary right in question is not

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generated by an event of unjust enrichment. Instead, the proprietary right existed long before the innocent donee’s receipt, probably having been created by a consensual act of the original settlor of the trust.

In this context, it is necessary to distinguish the original trust asset from the traceable substitute of that asset. Whilst proprietary rights to traceable substitutes are generated by unjust enrichment (as the next section explains), the right to the original trust asset is not. The proprietary right to the original trust asset was generated by an event of consent, not an event of unjust enrichment. That consent-based right survives the transfer to a donee, and it is that right that the beneficiary vindicates. As this subsisting right to the original trust asset has nothing to do with unjust enrichment, it cannot be defeated by a defence which is available only within that part of the law. As Mr Swadling says, the defence of change of position ‘is inextricably bound up with the event of unjust enrichment’. 23 The fact that a donee of express trustee property changes his position does not provide him with a defence if he still has the very same property transferred to him. As a matter of present law, it is wrong to assert that change of position is available to defeat pre-existing proprietary rights.

**Implications for banks**

The importance to banks of this principle is demonstrated by the massive litigation

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which followed the fraudulent activities of the late Robert Maxwell. The essential facts in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*, so far as relevant here, can be shortly stated. A trustee of a large parcel of shares mortgaged them in breach of trust without the knowledge of the beneficiaries. The shares were mortgaged as security for a loan from the defendant for the trustee’s personal benefit. When the defendant sought to enforce its security interest by selling the shares, the beneficiaries claimed that their beneficial interest took priority over the lender’s security and that the lender’s interest was subsequently unenforceable. In other words, the beneficiaries asserted that they were entitled to vindicate their equitable proprietary rights in the shares.

The success or failure of the beneficiary’s claim (ignoring conflict of laws issues) turned on whether or not the lender was a *bona fide* purchaser of its security interest in the shares. There was no suggestion at all that the lender could repel the beneficiary’s attack by relying on the defence of change of position. Moreover, the lender clearly had changed its position. On the strength of the seemingly valid and enforceable mortgage it held over the shares, the lender had advanced the loan funds to the borrower – a huge and irrecoverable outflow of wealth on the faith of the receipt of the shares. If the lender could have pleaded change of position then it almost certainly would have won. Mere notice, sufficient to defeat *bona fide* purchase, is not enough to defeat change of position. The better view is that only dishonesty will perform the latter task. But the

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24 [1996] 1 WLR 387 (CA) (*Macmillan v Bishopsgate*).
25 *Goff and Jones* 821, 825; P Birks, ‘The Role of Fault in the Law of Unjust Enrichment’ in
lender could not plead change of position because that defence was irrelevant in *Macmillan v Bishopsgate*. The right which the beneficiaries sought to vindicate was not generated by unjust enrichment.

There is one small hurdle in the way of this conclusion. That is the assessment of the claim by Millett J. His Honour said that it was ‘manifestly correct to characterise Macmillan’s claim as lying in restitution’. The judgments in the Court of Appeal did not directly discuss but nonetheless seemed content to approve Millett J’s suggestion that the plaintiff’s claim lay in restitution. Millett J’s characterisation immediately provoked a veritable litany of critical literature, most of which argued that the case did not lie within the law of unjust enrichment at all. That is correct. As pleaded, the claim in *Macmillan v Bishopsgate* was not a claim in unjust enrichment. Rather, it was a claim that the plaintiffs were entitled to restitution of their shares, that right being generated outside the law of unjust enrichment. Although the plaintiffs were seeking restitution, they were not seeking restitution of an unjust enrichment. The confusion, it is submitted, was caused by a terminological issue. If one refers to ‘the law of restitution’ rather than the ‘law of unjust enrichment’ without making it clear that the latter is only

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27 *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1995] 1 WLR 978, 988G.

one type of case where the plaintiff claims a right to restitution of some value or asset, there is a real danger that people will assume that a plaintiff who claims ‘restitution’ is advancing a claim in unjust enrichment which can be defeated by change of position. Again, the beneficiaries in Macmillan v Bishopsgate were claiming restitution of the shares, but not on the ground that the lender had been unjustly enriched by the receipt of those shares. The beneficiaries’ claim could not therefore be defeated by change of position, but only by a successful plea of bona fide purchase. The same proposition will apply whenever a bank faces a claim which seeks to vindicate a proprietary right that did not arise in response to an event of unjust enrichment.

An anticipatory change of position

There is another point arising from the discussion of Macmillan v Bishopsgate. It was stated above that if the pleaded claim in that case could be treated as a claim in unjust enrichment (which it could not be), then the defendant could have successfully relied on the defence of change of position. The defendant had lent money on the faith of its receipt of a security interest in the shares. The correctness of that proposition depends on whether or not it is possible to plead change of position when the outflow of wealth relied upon by the defendant took place at the time of, or even before, the receipt of the enrichment in question. This is an important question for banks. Banks frequently make loans on the basis that

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29 No other defence, such as laches or illegality, having been advanced by the defendant.
Mr Barker has asserted that a defendant raising change of position must point to something which took place after the enrichment in question was received.\textsuperscript{31} Professor Burrows’ text was called in support of that proposition,\textsuperscript{32} but that part of \textit{The Law of Restitution} has since been retracted.\textsuperscript{33} In fact a change of position in anticipation of receiving the enrichment in question should count for the purposes of the defence. As Professor Tettenborn argues, if X is about to make a mistaken payment into Y’s bank account, and X gives Y advance warning that the deposit is about to be made, Y should have a defence to X’s claim for restitution if in expectation of and reliance upon that receipt he changes his position.\textsuperscript{34} There is first instance authority for the contrary proposition.\textsuperscript{35} But that position is logically indefensible. A disenrichment caused by a receipt, even if in anticipation of it, must count for the purposes of the defence of change of position. It seems likely that the common law will accept that the defence can operate in such circumstances. Mr Jewell, in a recent article devoted to this issue, concluded that the law would accept anticipatory changes of position.\textsuperscript{36} If that is so, it must surely count if the defendant changes his position at the same time that he receives

\textsuperscript{34} A Tettenborn, \textit{Law of Restitution in England and Ireland} (2\textsuperscript{nd} edn, 1996) 253.
\textsuperscript{35} \textit{South Tyneside BC v Svenska International Plc} [1995] 1 All ER 545 (Clarke J).
the enrichment in question. That happens when, as in *Macmillan v Bishopsgate*, the defendant takes a security interest in assets transferred in breach of trust, and at the same time makes a loan to a third party which turns out to be irrecoverable.

2. **Claims to the Traceable Proceeds of Trust Assets**

Let us introduce one more fact into our example. After T gives D the car as a gift, D sells the car to X. What rights does B have in relation to the money received by D when he sold the car? The answer, explained below, is that B can recover those proceeds from D. Moreover, D can also claim an equitable proprietary interest in that money. There is some controversy over the exact nature and timing of the proprietary right that B holds in the proceeds. In the view of some, B has an immediate equitable proprietary interest in the money received by D when he sells the car. A close reading of Lord Browne-Wilkinson’s judgment in *Westdeutsche Landesbank Girozentrale v Islington London BC* suggests that his Lordship shares that view. Lord Millett appears to interpret Lord Browne-Wilkinson’s judgment in *Westdeutsche* differently. According to Lord Millett, Lord Browne-Wilkinson would say that no proprietary interest in traceable proceeds can arise until the recipient’s conscience becomes affected by knowledge of the facts.

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38 *Re Diplock* [1948] Ch 465 (CA).
underlying the plaintiff’s claim. In fact, it seems that Lord Browne-Wilkinson’s view is rather that, while there is an immediate proprietary interest in a traceable substitute, that proprietary interest is not held under a trust. In other words, a donee of trust property is not a trustee thereof until his conscience is affected. There are reasons to doubt the latter point, but it is not relevant here. The important point is that both Lord Millett and Lord Browne-Wilkinson seem to belong to the ‘immediate interest’ camp. Others take the view that B’s rights in relation to a traceable substitute first arise in the nature of a power in rem which floats over the substitute until such time as B exercises the power by making a claim.

Whether one takes the immediate interest or the power in rem view, it is unanimously agreed that B can claim a proprietary interest in the traceable proceeds of trust assets disposed in breach of trust. Traditionally, this claim has been referred to as a ‘tracing claim’. That phrase is misleading. The exercise of tracing is merely a process of identifying the location of value, quite separate from the determination of whether any claim lies in respect of that value. It is better to

42 Ibid.
refer to this form of *vindicatio* as a proprietary claim contingent on tracing. The word contingent highlights the fact that tracing is a necessary but not sufficient element of the claim to the substitute.

There is a crucial difference between the right to the proceeds, and the right which B has in relation to the original trust asset. The claim to the proceeds of a trust asset is a new right. In no sense is it the same right that the beneficiary has in relation to the original trust property. It has been suggested that a proprietary right is ‘automatically transferred’ from one asset to another,\(^{47}\) but that is a fiction.\(^{48}\) ‘A right is not like a leech waving around looking for a *res* to sink its teeth into.’\(^{49}\)

All proprietary rights are the legal consequence of certain events. The beneficiary of trust property sold to another gains a new proprietary right in a new subject matter by reason of a new event.\(^{50}\) The cases clearly establish that the right to the proceeds is not a pre-existing right but comes into existence for the first time upon the happening of the relevant events.\(^{51}\)

The error of thinking that B’s right to the proceeds is the ‘automatically transferred’ right in the original trust asset can be exposed in another way. If the


circumstances are right, B will have a prima facie claim in relation to both the original trust asset and the proceeds thereof. Suppose X, the person who bought the car from D, knew that the trustee had acted in breach of trust in giving the car away to D. X’s knowledge would destroy the otherwise available defence of bona fide purchase. If X cannot plead bona fide purchase, B’s right in relation to the car subsists after the sale of the car. If B elects to do so, he can vindicate his right to the car. Obviously, B cannot claim both the car from X and the proceeds of sale from D. Principles preventing double recovery ensure that B is not returned to a better position than he was before the breach of trust. B will be put to an election.

The important point here, however, is that B’s right to vindicate a pre-existing interest in the car does not destroy his ability to claim the proceeds of the car. Until B elects to do one or the other, he has rights in relation to both the proceeds and the car. This was well established by the 15th century:

‘If my trustee conveys the land to a third person who well knows that the trustee holds for my use, I shall have a remedy in the Chancery against both of them: as well against the buyer as against the trustee: for in conscience he buys my land.’

That shows quite clearly that B’s right to the proceeds is not a new manifestation of B’s old right to the car. Instead, it is a new right altogether. What, then, explains B’s new right to the proceeds?

One candidate is an event of consent, but that can be immediately rejected. The only person who consented to the creation of any rights in B was the original

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52 Anonymous, BY (1471) Year Book, Trin 11 Edw IV fol 8, pl 13, translated in HD Hazelgrove et al, (eds), Maitland – Selected Essays (1936) 166.
settlor of the car. The settlor’s consensual act in creating an express trust gave B an equitable proprietary right. But the settlor is well and truly out of the picture by the time the car is sold by D. And before the transfer of the car, B clearly had no rights whatsoever to the money in the pocket of X. So it is clear that the consensual act of the settlor does not explain the beneficiary’s right to the proceeds of the car.

The best explanation of the creation of the beneficiary’s right is that it arises in response to an event of unjust enrichment.\footnote{LD Smith, \textit{Law of Tracing} (1997) 300; A Burrows, \textit{Understanding the Law of Obligations} (1998) 117.} In order words, B’s claim to the proceeds arises by operation of law in order to effect restitution of what would otherwise be the unjust enrichment of D. D has been enriched by receiving money from the sale of the car. The enrichment was at the expense of B because the car was beneficially owned by B. D’s enrichment is unjust, either because B was completely ignorant of and hence did not consent to the disposal of the car taking place, or because the enrichment was gained by D selling something to which he was not beneficially entitled. The law thus gives B a right to require D to make restitution of the proceeds of the sale of the car. That right is the law’s response to an event of unjust enrichment.

\textit{Resulting trusts}

B is not restricted to a personal claim that D give up the proceeds of the
misapplied trust asset. B also a proprietary right over that money. D holds the proceeds on trust for B. This proprietary right exists, in the view of Lord Millett, under an ‘old fashioned institutional resulting trust.’\(^{54}\) The definition of a resulting trust propounded by Dr Robert Chambers, and accepted by Lord Millett\(^ {55}\) and by the Court of Appeal,\(^ {56}\) is a trust which arises over property derived from an asset provided by a person ‘in circumstances in which the provider of that property did not intend to benefit the recipient’.\(^ {57}\) The resulting trust explanation is convincing. The trust over the proceeds in the hands of D is just like a purchase money resulting trust: the beneficiary provided the value used by D to acquire the proceeds, and B lacked any intention to benefit D.

Dr Chambers argues that ‘all resulting trusts effect restitution of what would otherwise be the unjust enrichment of the recipient’.\(^ {58}\) Though there are differences between them, Dr Chambers and Lord Millett agree that when property is transferred in breach of trust to D and D substitutes the asset so transferred for another asset, then:

\(^{54}\) *El Ajou v Dollar Land Holdings PLC* [1993] 3 All ER 717, 733-734 (Millett J), rev’d on other grounds *El Ajou v Dollar Land Holdings PLC* [1994] 2 All ER 685 (CA). Others would view the trust as constructive, based on the ‘unconscionable’ assertion by the defendant of a beneficial title against the plaintiff beneficiary; see for example *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, 552 (Gummow J).


\(^{58}\) Ibid.
(1) D will hold the new asset on resulting trust in favour of B; and

(2) That resulting trust reverses the unjust enrichment of D.

The proprietary right which the law gives B in the traceable substitute of the original trust asset applies not only in relation to that particular substitute, but to the substitute of the substitute. In this way, the law allows B to make a proprietary claim against D in relation to any asset which represents the final traceable product of the car. The principles of tracing determine which asset (if any) in D’s possession is to be regarded as the product. That is what the principles of tracing are all about: a process of tracking the value of one asset through one or more substitutions in order to determine whether the value inherent in the asset at the start of the story can be said at any particular moment to survive in another form.

So one can start from the beginning, and say that when trust property is transferred to a donee who sells it, the donee must give up the proceeds to the beneficiary because otherwise the donee would be unjustly enriched at his expense. Or one can start from the end and say that, in this situation the law states that the donee holds the proceeds on resulting trust for the beneficiary, and resulting trusts effect restitution of unjust enrichment. Either way the beneficiary’s right to restitution should be seen as arising in response to an event of unjust enrichment. As Dr Smith notes, this does not mean that B, in seeking to

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59 Burrows and McKendrick 724-725.
establish a trust over the proceeds of a trust asset disposed of in breach of trust, needs to plead the cause of action in unjust enrichment. Instead, the principles of unjust enrichment explain the generation by operation of law of a right to restitution of the proceeds.\textsuperscript{61}

It is important to note that this analysis is not inconsistent with Lord Browne-Wilkinson’s speech in \textit{Westdeutsche Landesbank Girozentrale v Islington London BC}.\textsuperscript{62} Lord Browne-Wilkinson rejects the notion that property can be held on resulting trust without the trustee’s conscience being affected. That proposition means that the donee of a trust asset or its traceable substitute will not hold the asset received on trust for the beneficiary if he is not aware of the beneficiary’s rights. But it is almost certain that Lord Browne-Wilkinson would agree that the beneficiary has a proprietary right in the asset held by the donee,\textsuperscript{63} even if the donee does not know the relevant facts giving rise to the beneficiary’s right. In the present context, the question is one of appropriate nomenclature. Is it appropriate to say that the donee holds the property on trust for the beneficiary? There is no need to resolve that debate here. It is enough to say that Lord Browne-Wilkinson’s judgment is consistent with the existence of a proprietary right in traceable proceeds independent of the recipient’s knowledge. Further, the judgment is not inconsistent with the notion that this proprietary right arises in response to an event of unjust enrichment. That said, it is here assumed the correctness of the

\textsuperscript{61} L\textsc{d} \textsc{s}mith, \textit{The Law of Tracing} (1997) 300.

\textsuperscript{62} [1996] AC 669 (HL).

\textsuperscript{63} Ibid 707D.
proposition that the proprietary right is held under a resulting trust as a response to an event of unjust enrichment.

The impact of the unjust enrichment analysis

The rationalisation of B’s right to recover the proceeds of the car from D is that it is a right raised by the law in response to D’s unjust enrichment. For present purposes, the most significant effect is that D now has available the defence of change of position. All rights, personal or proprietary, which arise in response to unjust enrichment are susceptible to the defence of change of position. It is no doubt for this reason that Lord Goff envisaged that change of position would be recognised as a defence to ‘tracing claims’ in equity.\textsuperscript{64} As stated above, ‘tracing claims’ is the traditional label for the claims presently under discussion – claims to the traceable proceeds of trust assets.

It has been suggested that proprietary rights are never subject to the defence of change of position. That suggestion must be rejected, notwithstanding its highly authoritative source. In \textit{Westdeutsche Landesbank Girozentrale v Islington London BC}\textsuperscript{65} the House of Lords discussed whether there might be a proprietary claim in unjust enrichment engendered by a failure of consideration. In rejecting that proposition in the circumstances then present, Lord Goff said that one of the ‘problems which would flow from the imposition of a resulting trust in a case such as the present … [would be] the inability of the payee to rely upon the defence of change

\textsuperscript{64} \textit{Lipkin Gorman v Karpnale Ltd} [1991] 2 AC 548 (HL) 581.
\textsuperscript{65} [1996] AC 669 (HL).
of position’. 66

That is not right. If proprietary rights generated by unjust enrichment were immune from the defence of change of position, completely arbitrary results would follow. One simple example illustrates the point. Take our case. In breach of trust, T gives trust property to D who sells it. It was seen above that D holds the proceeds of sale on resulting trust for B, and that this resulting trust arises in order to effect restitution of what would otherwise be the unjust enrichment of D. Now suppose that D, not knowing of B’s entitlement to the proceeds, decides to use the money to speculate on potato futures. The market moves against him, and D’s investment is wiped out. If B were to claim restitution from D, the claim would be defeated by D’s change of position. D has spent the money in a way he would not have done otherwise, and that spending has produced no substitute. The value of D’s enrichment has vanished. Suppose, however, that D did not use the actual proceeds from the sale of the trust asset to make his investment. Instead, D deposits the money into his account at Bank A. To fund his investment, D makes a withdrawal from his account at Bank B. As a matter of principle, exactly the same result should follow. D, having once been enriched, has changed his position on the faith of the receipt of the money in question. It should make no difference whatsoever that the money in question still exists (in the traceable form of a debt owed to D by Bank A), and that B can claim a proprietary right over that asset in the hands of D. B’s proprietary right is still the result of an event of unjust enrichment. If that is so, then when D honestly changes his position he is no

66 Ibid 690.
longer enriched, and B’s claim must fail.\footnote{Goff and Jones 203; A Burrows, The Law of Restitution 431; P Birks, Laundering and Tracing 326-327; LD Smith, The Law of Tracing (1987) 384-385; .} If B’s claim succeeded, the very purpose of introducing the defence of change of position would be defeated: to protect honest persons from the consequence of disposing of wealth which appears to be at their disposal.

In suggesting that change of position could not defeat any proprietary right, even one generated by unjust enrichment, Lord Goff relied on an article by Professor Burrows.\footnote{A Burrows, ‘Swaps and the Friction between Common Law and Equity’ [1995] RLR 15, 27.} But Professor Burrows was there discussing a different issue – whether all the incidents of trusteeship apply to the resulting trustee, including liability for breach of fiduciary duty.\footnote{Dr Chambers persuasively argues that not all the incidents of trusteeship apply to the resulting trust: R Chambers, Resulting Trusts (1997) Chapter 9.} In fact, it is certain that Professor Burrows agrees that change of position is available to defeat (or reduce the value of) a proprietary right generated by unjust enrichment.\footnote{Burrows and McKendrick 811; A Burrows, Understanding the Law of Obligations (1998) 116.} Once it is recognised that a resulting trust is a proprietary right generated by an event of unjust enrichment, the defence of change of position must logically be able to defeat that right.

**Implication for banks**

Assuming Lord Goff’s *dictum* is wrong, three propositions follow. The first is that change of position defeats all rights (including proprietary rights) arising in response to unjust enrichment. The second is that change of position does not
defeat rights which are not generated by an event of unjust enrichment, such as a subsisting proprietary right under an express trust. The third proposition is that the right of a beneficiary to claim the traceable proceeds of trust assets is a right generated by unjust enrichment, and thus liable to defeat by the defence of change of position.

It is therefore crucial for defendants to ascertain whether the right being asserted is directed towards an original trust asset, or a traceable substitute of that asset. For banks in receipt of money, the answer will almost always be the latter. Payments of money to or via banks always result in a substitution of assets. Suppose that in breach of trust a trustee withdraws cash from a trust account held at Bank A. The cash now in the trustee’s hands is held by the trustee on trust for the beneficiaries. The trustee then deposits that cash into his personal account at Bank B. At that point, a substitution of the trust asset occurs. The cash is substituted for a chose in action, the debt owed by Bank B to the trustee.

When a trustee disposes of an asset in breach of trust, the beneficiary of the trust has a choice. He can make a proprietary claim to the traceable proceeds of the trust asset,71 or he can follow the original trust asset and assert proprietary rights in it against the person who holds the asset for the time being. In relation to cash, however, it is almost always impossible to establish a claim of the latter kind. In our example, the cash held by the trustee on trust is passed to the teller at Bank

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71 Above 22.
B and placed in her drawer. Leaving aside the question of defences, a proprietary claim to that cash must physically identify the very same notes and coins that the trustee handed to the teller. That will often be impossible. And if Bank B has disposed of the cash, for example by depositing it in Bank B’s account at the Bank of England, then the asset being followed has gone through another substitution. Any claim against Bank B must therefore be in relation to the traceable proceeds of the cash being followed. Here, the traceable proceeds of the cash is the chose in action held by Bank B in the form of its account at the Bank of England. As the claim against Bank B is now in relation to a traceable substitute of a trust asset (the cash), the claim against Bank B is one lying in unjust enrichment. Bank B will therefore be entitled to plead the defence of change of position.

3. ‘Knowing Receipt’

So far two types of claim that may arise in favour of a beneficiary upon the misapplication of trust assets have been discussed: (1) the claim against a defendant found in possession of the trust asset itself; and (2) the claim against a defendant found in possession of the traceable proceeds of a trust asset. A third type of claim flows naturally from the inability to assert either of the first two. The proprietary claim to the original trust asset, and the proprietary claim to the traceable proceeds thereof, will each be out of reach for the plaintiff if he cannot point to any particular asset in the hands of the defendant and prove that that asset is either the original trust asset or its traceable proceeds. Unable to assert a proprietary claim in the first two categories, when can the plaintiff pursue what is
of necessity a personal claim against a defendant who received property
transferred to him in breach of trust, and what is the nature of that claim?

There has been an abundance of literature and case law analysing what is
said to be the leading case in this area, *Barnes v Addy*. One pursuit has been the
definition of the elements of the claim in question. The attention devoted to this
issue was justified by the persistently inconsistent approaches taken by the courts
to defining the circumstances in which a third party who received trust property
but no longer retained it or its proceeds could be made liable to make restitution to
the beneficiary of the trust. It would be superfluous for this work to conduct its
own survey of the relevant authorities. The whole history of the present position
is captured in a very important article by Lord Nicholls:

‘Trusts are the creation of the law of equity. The common law knew nothing of these
matters of conscience. So the law of equity developed its own principles concerning
the circumstances in which a third party recipient would become personally liable.
The approach adopted was that, in general, the mere receipt of another’s property did
not trigger any personal liability. If the recipient still had the property or its
identifiable proceeds, he must return it. If not, he incurred no personal liability unless
he had been at fault in some way. If he was guilty of fault in the eyes of equity, equity
treated him as though he were a trustee. He was clothed with the mantle of a
“constructive” trustee.’

As this passage indicates, it was assumed by most commentators and judges
that some degree of fault was required before a recipient of misapplied trust
property would be held personally liable to restore the value received to the trust’s

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72 (1870) LR 9 Ch App 244 (CA).
73 See the works referred to in the Introduction above 5 n 3.
beneficiaries. Until recently, the main debate centred on the degree of fault necessary to render the defendant subject to that personal liability. The majority of cases and commentators suggested that it was sufficient if the defendant had constructive knowledge of the plaintiff’s equitable interest and the trustee’s breach of trust. Others, however, said that ‘knowing receipt’ would not render the defendant liable as a constructive trustee unless he had acted with actual knowledge of the beneficiaries’ conflicting interest. Lord Nicholls noted that what was missing in much of the debate was an analysis of the underlying principles – the reasons for relief, and the relationship of those reasons to other areas of the law:

‘Controversies over the definition or scope of legal principles cannot be resolved without identifying their rationale.’

Building on the earlier work of Professor Birks, Lord Nicholls has argued strongly in favour of a principled position different from the traditional view. He says that there are in fact two types of claim which have hitherto been hidden by the misleading phrase ‘liability to account as a constructive trustee for knowing

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77 Lord Nicholls, Restitution Past Present and Future 236.
79 Lord Nicholls, Restitution Past Present and Future.
receipt’. Those two claims are:

(1) the fault-based liability of the person who dishonestly receives trust property; and

(2) the liability of a person who is unjustly enriched at the expense of the trust’s beneficiary.

Lord Nicholls argues that the principle underlying the liability in (2) is unjust enrichment. In other words, the plaintiff’s right to restitution from the defendant arises in response to an event of unjust enrichment. Moreover, Lord Nicholls says that liability should accord with the general model of liability in unjust enrichment: strict liability subject to defences. In particular, the defence of change of position should be open to the defendant, as it is in all claims of unjust enrichment. The liability in (2) is thus a personal liability to make restitution of unjust enrichment. It has nothing to do with imposing the incidents of trusteeship or a constructive trust on the defendant. Nor has the defendant’s liability anything to do with locating some trust property, or proceeds thereof, in the possession of the defendant. Thus, to almost universal agreement, commentators agree that if there is only personal liability in these circumstances the defendant should not be referred to as a ‘constructive trustee’.

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80 Ibid 238-239.
81 Ibid 237, 238-239. Exceptionally, fault is required as part of the cause of action: see below 60.
82 Ibid 237.
83 See also Sir Peter Millett ‘Restitution and Constructive Trusts’ (1998) 114 LQR 395, 400.
The liability in (1) is a form of equitable wrongdoing. The wrongdoer is liable to fiercer remedies than a mere personal liability to make restitution of the value received. He will, for example, have to give up any profits made as a result of receiving the misdirected trust property. Moreover, the distinction between liability in unjust enrichment and liability for an equitable wrong may well have other implications with respect to limitation periods, rates of interest, service outside the jurisdiction, tracing rules, consequential losses and increases in the value of the property. It is therefore important to always bear in mind two possible claims in a ‘knowing receipt’ case – a claim in unjust enrichment, and a claim that the defendant is an equitable wrongdoer. With that caveat, when this study uses that phrase, only the unjust enrichment version of liability is intended.

Many commentators have come to share the view that the innocent recipient of trust property should be subject to strict liability in unjust enrichment subject to the defence of change of position. Indeed, two of the strongest English proponents of the view that liability for knowing receipt should always be fault-based – Professor Burrows and Mr Harpum – now say that the innocent recipient of misdirected trust property should be strictly liable in unjust enrichment. The

Contrast Giumelli v Giumelli (1999) 73 ALJR 547, para [4] where the High Court insisted on continuing the condemned practice of referring to ‘constructive trusts’ when what is in issue is a mere personal liability.


earlier views of those two jurists were advanced at a time when English law knew no general defence of change of position to claims in unjust enrichment. The existence of that defence is crucial to the force of the case in favour of strict liability in unjust enrichment. Without the availability of the defence of change of position, strict liability to make restitution of the value of property received in breach of trust can work undue harshness. That harshness will be inflicted on defendants who deserve the benefit of that defence.

Other jurists now support the strict liability view of liability for ‘knowing receipt’. *Goff and Jones,* 88 Lord Millett, 89 Lord Hoffman, 90 Justices Meagher and Gummow, 91 Professor Hayton 92 and Professor Martin 93 all support that approach. Signs of its acceptance by the courts are also emerging. 94 A recent dictum of Lord Browne-Wilkinson might be taken to suggest that his Lordship rejects the possibility of strict liability in unjust enrichment. 95 But it is not clear that this is


88 *Goff and Jones* 743-746.


94 *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16, 100-105 (Hansen J, obiter); *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 902-3 (Knox J).

95 *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669 (HL) 705-
his Lordship’s view. In any event, a central aspect of this dictum – that equity only acts when the conscience of the recipient is affected by knowledge of the claim – has been persuasively rejected by Lord Millett. Lord Millett rightly relies on the following passage from *Ministry of Health v Simpson* to reject that proposition:

‘The Court of Chancery, it was said, acted upon the conscience, and, unless the defendant had behaved in an unconscientious manner, would make no decree against him. The appellant or those through whom he claimed, having received a legacy in good faith and having spent it without knowledge of any flaw in their title, ought not in conscience to be ordered to refund. My Lords, I find little help in such generalities.’

Courts of equity do often intervene because the defendant knew, or ought to have known, that he or she had no right to do the thing complained of. But it is not an indispensable prerequisite to equitable liability, as the result in *Ministry of Health v Simpson* shows. If it is really necessary to talk of conscience, then the conscience of the defendant should be affected simply by reason of the fact that he is enriched by the receipt of something, and the person who was beneficially entitled to that thing did not mean the defendant to have it. That was clearly the approach of the Court of Appeal in that case:

‘as regards the conscience of the defendant upon which in this as in other jurisdictions equity is said to act, it is prima facie at least a sufficient circumstance that the defendant, as events have proved, has received some share of the estate to which he

706 and 707D.

96 Lord Millett, ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399; see esp 410 and 412-413

97 [1951] AC 251 (HL) (often referred to as ‘Re Diplock’).

98 Ibid 276 (Lord Simonds).
was not entitled…’. 99

The strength of the strict liability position, and the unjust enrichment rationale which explains it, is clear from a simple example discussed by Lord Nicholls. 100 A trustee gives £1,000 of trust money as a present to the defendant. The defendant spends the very notes and coins received on ordinary living expenses. There is now no hope of the beneficiaries following the original trust property (the cash) into the hands of a new defendant, or tracing the trust property into some asset purchased with the trust money. In other words, the beneficiaries cannot bring either of the claims discussed above: a proprietary claim vindicating the beneficiaries' right to the original trust money, 101 or a proprietary claim in relation to proceeds of that money. 102 Yet the defendant has obviously been unjustly enriched at the expense of the beneficiaries. The defendant’s wealth was enhanced by the receipt of money which the trustee had no right to give away, the beneficiaries’ wealth was reduced by the same amount, and the defendant has not spent one penny more than he would have had he not received the windfall. The enrichment was unjust because the persons beneficially entitled to the money in question gave no consent at all to the transfer to the defendant. Is it truly to be said that the defendant is free from liability simply because he is innocent? The answer must be no. But there are those who would indeed grant such immunity. That view, considered next, must be rejected.

100  Lord Nicholls, Restitution Past Present and Future 237, 239.
101  Above 11.
102  Above 22.
Recent arguments in favour of fault liability

In a powerful recent article, Dr Smith has argued that ‘knowing receipt’ cases should be fault-based.¹⁰³ In Dr Smith’s view equity does not, and should not, have a personal claim in unjust enrichment based on the *innocent* receipt of equitable title belonging to another. ‘Knowing receipt’, in other words, is not the equitable counterpart of money had and received as Millett J said it was in *El Ajou v Dollar Land Holdings PLC*.¹⁰⁴ Dr Smith says instead that knowing receipt is ‘equity’s analogue to the common law’s claim in conversion’.¹⁰⁵ Conversion is a wrong, and so is ‘knowing receipt’. Although conversion is a wrong of strict liability, that is only because of the absence of a *vindicatio* at common law.¹⁰⁶ Equity does have a *vindicatio*. A person who innocently receives property belonging in equity to another is strictly liable to a proprietary claim. But if he no longer has the trust property or its proceeds, the innocent recipient is subject to no liability at all. And that position, according to Dr Smith, is right both in principle and in policy.

Dr Smith’s view gains support from a recent decision of the Supreme Court of Canada. In *Citadel General Assurance Co v Lloyds Bank Canada*¹⁰⁷ the Court held that ‘knowing receipt’ was fault-based. That was so even though the Court

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¹⁰³ LD Smith, ‘Property’ *passim*.
¹⁰⁴ [1993] 3 All ER 717, 738, rev’d on other grounds *El Ajou v Dollar Land Holdings PLC* [1994] 2 All ER 685 (CA).
¹⁰⁶ Ibid 396-397.
expressly recognised that the claim lay in unjust enrichment.\textsuperscript{108} \textit{Citadel v Lloyds} is considered in Chapter 3,\textsuperscript{109} but the central argument of the Court in favour of the requirement of fault needs to be dealt with here. The Court said that the logic of liability in unjust enrichment demands an element of fault on the part of the recipient. This suggestion must also be rejected. Dr Smith’s argument, which does not incorporate the \textit{Citadel v Lloyds} view of unjust enrichment, is discussed first. Five aspects of Dr Smith’s reasoning are considered here:

(1) the analysis of \textit{Re Diplock},\textsuperscript{110} trust interests and legal title;

(2) the suggestion that the strict liability view involves an attack upon the institution of the trust;

(3) the justification of the innocent recipient’s windfall;

(4) the lack of authority in favour of strict liability;

(5) the suggestion that the strict liability view will cause commercial chaos, particularly for banks.

\textbf{Re Diplock, trust interests and legal title}

A significant part of Dr Smith’s article\textsuperscript{111} is devoted to an historical review of \textit{Re Diplock}.\textsuperscript{112} Part of Diplock’s deceased estate was mistakenly transferred by his executors to certain charities. The executors had made a mistake of law in

\begin{footnotesize}
\begin{enumerate}
\item \textit{Gold v Rosenberg} [1997] 3 SCR 767 (SCC).
\item Below 214.
\item \textit{Re Diplock} [1948] Ch 465 (CA).
\item LD Smith, ‘Property’ section VI ‘The Diplock Principle’.
\item \textit{Re Diplock} [1948] Ch 465 (CA).
\end{enumerate}
\end{footnotesize}
construing the will, and should not have paid the charities. Diplock’s next of kin should have been paid instead. The executors had no right of recovery against the charities. At that time no claim existed for the recovery of payments made by mistake of law.\(^\text{113}\) But the House of Lords held that the true beneficiaries under the will had a claim. The recipient charities were strictly liable to the beneficiaries for the return of the money which each charity had received.\(^\text{114}\) The innocence of the charities provided them with no defence to the claim by the beneficiaries.

Professor Birks has referred to this decision as part of his argument that all recipients of misdirected trust property should be strictly liable in unjust enrichment.\(^\text{115}\) He highlighted the inconsistency between the strict Diplock liability when property is misdirected by an executor of a deceased’s estate, and the fault-based liability when property is misdirected by a trustee of an *inter vivos* trust.

Dr Smith rejects that comparison. He correctly notes that an expectancy in an unadministered estate is not a beneficial interest in a trust.\(^\text{116}\) On that basis he argues that claims which exist to ensure the proper distribution of an estate need not, as a matter of logic, have the same elements as claims based on interference


\(^{114}\) The beneficiaries’ entitlement to sue the recipient was held to be conditional on the beneficiaries first having unsuccessfully sought to gain full compensation from the executors. That precondition has been strongly criticised: see, for example, *Goff and Jones* 110-111, 701-703.

\(^{115}\) Note 78 above.

\(^{116}\) *Commissioner for Stamp Duties (Queensland) v Kingston* [1965] AC 694 (PC) 712.
with trust property.\textsuperscript{117} As a matter of pure logic, that must be right. There is nothing that says that the misdirection of one type of asset must logically lead to the same legal result as the misdirection of another type of asset. But for the purposes of determining whether the principles of unjust enrichment should apply, the crucial question is not whether there is any difference between a beneficiary’s right to part of an unadministered estate and a beneficiary’s right to an asset held on trust. The crucial question is whether there is any \textit{material} difference between those two things. If the recipient is strictly liable to make restitution of a misdirected estate asset, why is the recipient of a trust asset not similarly liable? In particular, why should the person with a stronger right (a proprietary interest in \textit{inter vivos} trust assets) have a weaker claim than the person with the weaker right (a non-proprietary interest in unadministered estate assets)?

In fact there is no material difference in this context between a beneficiary under an existing trust, and a beneficiary of a will. That is borne out by the fact that the Court of Appeal in \textit{Re Diplock} made no mention of the fact that the true beneficiaries under Diplock’s will did not have an existing proprietary interest in the estate assets. Indeed, much of the judgment seems to assume that the beneficiaries did have an existing proprietary interest. For example, the Court of Appeal characterised the personal claim against the charities as based on the fact that

\begin{quote}
‘… the payers in the present case (namely the executors) were handling not their own money but the money of others who had a proprietary interest unknown to and
\end{quote}

\textsuperscript{117} LD Smith, ‘Property’ section VII ‘Conclusion’.
unrecognized by the executors…’. 118

The same point can be made about Dr Smith’s criticism of the comparison between claims at law and those in equity. One part of the argument of those who favour strict liability highlights the contrast between the approach of the common law and that in equity to claims for the recovery of money paid away without the knowledge or consent of the beneficial owner. At common law the innocent recipient is strictly liable. 119 In equity the innocent recipient is free from personal liability. As Professor Burrows notes:

‘We therefore have needless irrationality and inconsistency between the strict common law and the fault-based equitable approaches to what is essentially the same fact situation. The importance of recognising the unjust enrichment principle is that it enables us suddenly to see that inconsistency and to question its validity and to argue for its eradication.’ 120

Again, Dr Smith rejects the comparison. He says that a beneficiary’s interest under a trust does not carry with it the same incidents as does legal title. Claims based on the former therefore need not, as a matter of logic, have the same elements as claims based on the latter. 121 But again, this logical point, which cannot be gainsaid, avoids the more fundamental issue: is there any material difference between legal and equitable title which can justify strict liability in unjust enrichment for one but not the other?

118 Re Diplock [1948] Ch 465 (CA) 481; also see 517, 522, 525, 547.
121 LD Smith, ‘Property’ section VII ‘Conclusion.
In fact, it seems that Dr Smith has turned the logical argument on its head. His conclusion is that because of the difference between property in equity and property at law, there is no logical reason why the two should be treated the same in the law of unjust enrichment. In other words, he says that the two are not the same and therefore do not logically have to be treated the same. But earlier he argues that, because property in equity and property at law are different, the two must logically be treated differently in the law of unjust enrichment.\textsuperscript{122} The mere fact that there are differences between equitable property and legal property does not, of necessity, mean that the law of unjust enrichment must treat the two forms of property differently. Again, the crucial question is whether the differences are material. The true test of whether there should be a requirement of fault is this question: is the law prepared to countenance an irreversible enrichment of the innocent recipient of misdirected trust property who has not changed his position? That question, which must be answered no, is discussed below.\textsuperscript{123}

\textit{An attack on the institution of the trust}

There is a hint in Dr Smith’s work of a perceived campaign by those who favour strict liability to remove the trust as an institution in English law. He says, for example, that the argument for strict liability would make the most sense as part of an agenda which sought the abolition of the trust and the return to a regime in which only one person can claim to be the owner of a given asset.\textsuperscript{124} Moreover, he

\textsuperscript{122} Ibid text to notes 75, 80 and 96.
\textsuperscript{123} Below 49.
\textsuperscript{124} LD Smith, ‘Property’ text to note 78.
argues that it would be inconsistent to impose strict liability for receiving trust property, but let equitable interests remain subject to destruction by the defence of bona fide purchase of a legal interest.\textsuperscript{125} Finally, he says that to complain about fault-based liability is to complain about the incidents of the institution of the trust.\textsuperscript{126}

The suggested agenda does not exist. No proponent of strict liability has ever claimed favour with such a radical scheme. The argument in favour of strict liability is based on one aspect of the law’s treatment of trust interests, the treatment of such interests in the law of unjust enrichment. Moreover, it is not inconsistent to say that one difference between legal and equitable interests should be abolished, but that other differences should justifiably remain. In this respect Dr Smith refers to the defence of bona fide purchase of a legal interest. The rationale of that defence is greatly different from that underlying the strict liability view. Bona fide purchase exists to promote transactional security. If a person purchases a legal interest under a transaction entered into in good faith, he should be free from any liability which would effectively unwind the benefit of that transaction. The strict liability view is based on the logic of unjust enrichment. In the absence of a change of position or some other defence, the recipient of the wealth of another without the true consent of that other should make restitution. It is quite rational to argue that the treatment of equitable interests should be consistent with both principles, that of transactional security and unjust

\textsuperscript{125} Ibid.
\textsuperscript{126} Ibid.
enrichment.

*A windfall to the innocent recipient*

Dr Smith does not avoid the principled analysis of Lord Nicholls. Indeed, he faces Lord Nicholls’s central example directly. The example, it will be recalled, is this. A trustee gives £1,000 of trust money as a present to the defendant. The defendant spends the money on ordinary living expenses, leaving no traceable substitute. Lord Nicholls says that if the defendant is not liable to make restitution, he will have been unjustly enriched at the expense of the trust’s beneficiaries. If the defendant is required to make restitution, he will simply be put back to the same position he would have been in had the transfer never been made. Dr Smith argues that there are good reasons why the defendant should be immune from liability in unjust enrichment:

‘But of course the fact that someone is only back to where he started does not justify liability. Otherwise all gifts would be recoverable, subject only to a defence of change of position. Presumably Lord Nicholls would say, this is not a gift; the plaintiff never intended the defendant to be enriched. But in another sense, it was a gift; it was a gift from the trustee. Ignoring that amounts to ignoring the fact that there is a trust. This defendant might reasonably ask why he should be required to account in court for what he has done over the preceding several years with money which was legally his own (subject only to the defendant’s undiscoverable equitable interest), failing which he will have to dig into his pocket to repay.’¹²⁷

Separating out these points as far as possible, each can be rejected.

(1) **Absence of change of position does not justify liability.** Dr Smith is of

¹²⁷ Ibid text to notes 84 to 85.
course correct to suggest that before a defendant can be held liable in unjust enrichment, the plaintiff must establish a reason for requiring the defendant to reverse the transfer of wealth in question. Even if the court is satisfied that the defendant was enriched, and that the enrichment was at the expense of the plaintiff, and even that the defendant has not changed his position on the faith of the receipt, the plaintiff will still not win. A crucial element is missing: the establishment of an unjust factor. But in the example there is an unjust factor: the transfer of an asset belonging in equity to another without the consent of that other, and by a person who acted in breach of fiduciary duty owed to that other.

Many claims in unjust enrichment are based on the vitiation of the plaintiff’s consent to the transfer of wealth to the defendant. Mistake is the classic example. A mistaken plaintiff does not truly consent to the subtraction from his wealth. As has been said many times, if mistaken consent justifies restitution, non-existent consent must \textit{a fortiori} do the same.\footnote{See for example P Birks, \textit{An Introduction to the Law of Restitution} (1985) 140-146; \textit{Burrows and McKendrick} 149.} Dr Smith agrees with that very point.\footnote{LD Smith, ‘Property’ n 63.} In our case the trustee’s breach of trust is hidden from the beneficiary until after the transfer. The beneficiary is thus ignorant of the transfer having taken place. Thus there was not a vitiated but an absent consent – no consent at all by the beneficial owner of the money.

The availability of change of position as a defence to claims in unjust
enrichment is in fact a crucial part of the justification for strict liability. Strict liability subject to change of position achieves the most appropriate balance between the interest of the plaintiff in securing restitution, and the interest of the defendant in being able to spend wealth which appears to be his. If there is an enrichment at the expense of the plaintiff, an unjust factor, and no change of position, then in the absence of competing arguments the defendant should be strictly liable to make restitution.

(2) ‘Otherwise all gifts would be recoverable’: The logical conclusion of Lord Nicholls’ reasoning is not that all gifts would be recoverable. A gift is never recoverable unless some additional fact is established. If the gift giver did not make a mistake, or was not acting under undue influence, or did not breach any trust by making the gift in question, then there is no basis for restitution. In other words, there is no unjust factor.

(3) A gift from the trustee: The fact that the trustee made a gift to the defendant does not invest the defendant with any greater moral claim to the enrichment than one who, for example, receives a gift from a person who made the gift because he was mistaken. If the trustee had no right to make the gift, and committed a breach of trust in so doing, why should the recipient be immune from liability in unjust enrichment if he has not changed his position? Why does the fact that the gift was made by the trustee justify that immunity? That fact gives no such justification. Indeed it does the opposite. The trustee gave away someone else’s property.
(4) **Ignoring the trust:** The suggestion that the argument in favour of strict liability is tantamount to saying that trust interests should be abolished was dealt with above.

(5) **Why should the defendant dig into his pocket?:** Dr Smith wisely anticipates the retort that the recipient of a mistaken payment may well be put in the similar position of having to dig into his own pocket to repay money received years before. His answer to the retort is this:

‘[T]here is no direct analogy because such a defendant is aware of circumstances surrounding his acquisition of the money from the plaintiff. If he had received a gift, he would be secure.’

Two suggestions here are false: that the recipient of a mistaken payment always has the opportunity to discover the mistake at the time it was received, and that the recipient of a gift is always secure. The defendant in *Kleinwort Benson Ltd v Lincoln City Council*,\(^\text{131}\) who received a payment made by mistake of law, could not possibly have discovered the mistake. The mistake only materialised in a case which had not yet been decided.\(^\text{132}\) Even mistakes of fact may be impossible to discover. Moreover, it is not true that the recipients of gifts of legal property are always secure from claims for restitution at law. If C gives a gift to D because C mistakenly believes that D has proposed to C’s daughter, C can recover the gift or its value in money as long as he can prove that his mistake caused the gift. That

\(^{130}\) Ibid text to n 85.

\(^{131}\) [1999] 2 AC 349 (HL).

\(^{132}\) *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL).
right to restitution exists even if D had no way of knowing of the mistake. C might, for example, have posted the gift to D from some far off location and remained uncontactable for years. The same is true in equity – a gift giver acting under a mistake can recover a gift.\(^{133}\)

**The lack of authority in favour of strict liability**

One of the stronger points in favour of fault-based liability is the fact that, in the main, the cases to date support it. But it is certainly not the case that there is no authority supporting strict liability for the receipt of misdirected trust funds. Besides *Re Diplock*,\(^{134}\) *G L Baker Ltd v Medway Building and Supplies Ltd*\(^{135}\) undoubtedly supports the strict liability approach. Had certain concessions not been made in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*\(^{136}\) Hansen J would have adopted the strict liability view.\(^{137}\) Dr Smith suggests that in *Twinsectra Ltd v Yardley*\(^{138}\) the Court of Appeal assumed that ‘knowing receipt’ requires a finding of dishonesty on the part of the recipient.\(^{139}\) In fact, the Court only indirectly assumed a requirement of notice of the breach of trust owed to the plaintiff.\(^{140}\) The recipient in that case was clearly

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\(^{133}\) *Gibbon v Mitchell* [1990] 1 WLR 1304 (Millett J).
\(^{134}\) *Re Diplock* [1948] Ch 465 (CA).
\(^{136}\) [1998] 3 VR 16.
\(^{137}\) Ibid 105. In the end, Hansen J did not need to decide the point.
\(^{139}\) LD Smith, ‘Property’ n 4.
\(^{140}\) *Twinsectra Ltd v Yardley* [1999] Lloyd’s Rep Bank 438 (CA) 438, para 114 (Potter LJ).
dishonest. But the Court of Appeal nowhere suggested that that was why he was liable in ‘knowing receipt’. In fact, there is no decision which considers but rejects the argument advanced in Lord Nicholls’ paper.

Moreover, there are two reasons why it is not surprising that there is little authority in favour of strict liability for ‘knowing receipt’. The first is based on the novelty in our law of the defence of change of position. The second is based on the rarity of the case in which the result will be different depending on whether strict or fault-based liability applies. Those two points need exploring.

The general model of unjust enrichment in English law is a claim of strict liability subject to defences.\textsuperscript{141} Exceptionally, fault is required as part of the cause of action, but only where a particular interest is not satisfied by defences such as bona fide purchase or change of position.\textsuperscript{142} Where liability is strict, the legitimate interests of the defendant are protected by those two defences. Change of position is a central link in the chain of reasoning which favours the strict liability approach. Yet that defence was only recently introduced into English law.\textsuperscript{143} Before Lipkin Gorman v Karpnale Ltd, it is understandable why courts would require proof of fault. Strict liability unbalanced by the existence of the defence of change of position is unduly harsh. The importance of the fact that the defence

\textsuperscript{142} See below 60.
\textsuperscript{143} Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 (HL).
now exists as part of our law was rightly noted by Millett LJ in *Boscawen v Bajwa*[^144]. With specific reference to change of position his Lordship said:

> ‘The introduction of this defence not only provides the court with a means of doing justice in the future, but allows a re-examination of many decisions of the past in which the absence of the defence may have led judges to distort basic principles in order to avoid injustice to the defendant.’[^145]

It may then be questioned why no court has clearly adopted the strict liability approach in the last ten years. The answer is that it is only in a rare case that a plaintiff would win on strict liability but lose if he or she were required to prove fault on the part of the defendant. In cases where it does not matter which approach is adopted, it is not surprising to find most judges reluctant to overrule a long line of cases, even though most of those cases were decided before *Lipkin Gorman v Karpnale Ltd*[^146] and change of position.

These matters combine to falsify the assertion that the strict liability campaign ‘implies that the lawyers involved in the cases have simply failed to use a claim which could have been used’.[^147] Many of the old cases can now be viewed as examples of the wrongdoing limb of ‘knowing receipt’, and not as cases where there was any necessity to pursue a claim in unjust enrichment. And even when an unjust enrichment claim would have been beneficial to the plaintiff, it can at the most be said that the lawyers involved failed to attempt to persuade the courts to

[^144]: [1996] 1 WLR 328 (CA).
[^145]: Ibid 334G.
[^147]: LD Smith, ‘Property’ text to notes 73-74.
change the law in a respect which, before *Lipkin Gorman v Karpnale Ltd*,\(^{148}\) would have involved something of a revolution. Change of position is now firmly entrenched in our law. The introduction of strict liability for ‘knowing receipt’ no longer represents an upheaval of the law, but a minor improvement which better reflects the underlying principle.

**Commercial chaos, especially for banks**

Dr Smith suggests\(^{149}\) that the imposition of strict liability in equity would be commercially intolerable, particularly for banks.\(^{150}\) Under strict liability, a bank would be *prima facie* liable when it receives trust money transferred in breach of trust. The fact that *prima facie* liability is more easily established under strict liability than it is under the present fault-based approach is, for Dr Smith, a bad thing in itself:

> ‘Prima facie liability implies potentially extended periods of expense and uncertainty when litigation is pending; and of course it throws on to the defendant the risk that even though the elements of some defence are present, they cannot be proved to the satisfaction of the trier of fact.’\(^{151}\)

Chapter 4 advances several arguments in favour of a much stronger defence of ministerial receipt for banks than has hitherto been recognised. Such a defence would protect the bank in some cases involving the receipt of trust money. And


\(^{149}\) LD Smith, ‘Property’ text to notes 87 to 88.

\(^{150}\) A similar argument is suggested by Lord Shand’s speech in *J R Thomson v Clydesdale Bank Ltd* [1893] AC 282 (HL) 292-293.

\(^{151}\) LD Smith, ‘Property’ text to notes 91 to 92.
Chapter 5 contains, *inter alia*, an argument that a bank should have the defence of bona fide purchase available in more situations than the present law would suggest. That defence would also provide the bank with protection in many cases relevant in this context. But even without these changes in the law, strict liability poses no real danger for banks or any other potential defendant. The only defendant who would be liable under strict liability, but who is at present immune from any liability at all, is the person who:

1. receives misdirected trust property, and
2. disposes of that property without any traceable proceeds, but
3. has not changed his position.

All other defendants are either liable under both the strict liability and fault-based schemes or neither. The only other change concerns the onus of proof. At present, the plaintiff must prove the defendant’s fault. Under strict liability, the defendant must prove his honesty if he wants to rely on change of position. The number of cases in which liability would actually turn on strict or fault-based liability is minute. Banks provide as good an example as any. For the sake of this discussion, assume it to be the law that banks are liable in unjust enrichment whenever a deposit is made of trust funds in breach of trust. There are three possibilities:

1. the deposit is made into an account in credit, and the funds have not been withdrawn;
2. the deposit is made into an account in credit, and the funds have
been withdrawn;

(iii) the deposit is made into an overdrawn account.

There is no real danger for banks from strict liability in any of these situations. In (i), the bank would have to make restitution under strict liability, but it could simply recoup the funds by debiting the account. In (ii), the bank would have the defence of change of position available provided it acted honestly. If it did not act honestly it would be liable regardless of whether strict or fault-based liability applied. The only difference is a shift in the onus of proof. In a strict liability system, the bank would have to prove its bona fides at the time it changed its position. Under a fault-based scheme, the plaintiff has to prove the bank’s mala fides. In (iii) the bank would have the defence of bona fide purchase available in either system, provided it had no notice of the breach of trust. Again, if the bank did have notice of the breach of trust, it would have been liable under the fault-based scheme anyway.

The other factors mentioned by Dr Smith in the passage quoted above are not so much an attack on the principled basis of strict liability, as an exposure of the fact that our system of litigation is not perfect. Sometimes a person with a valid defence cannot prove it. If the reason is that the defence is too hard to prove, then the law should consider relaxing the standard of proof or some element of the defence. But if liability subject to defences is right in principle, the fact that

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152 Assuming that the bank is not a bona fide purchaser, as to which see Chapter 5 below 332.
sometimes deserving defendants lose is not a reason to grant total immunity. And if some banks are exposed to expense and uncertainty because plaintiffs persist in their claims when it is obvious that a relevant defence can be made out, the answer is not to change the principles of liability. The bank who is the victim of frivolous litigation can, as can any such defendant, be compensated with a higher order for costs.

The logic of unjust enrichment demands fault

There is one argument that has been put forward in favour of the fault-based position which is conspicuously absent from Dr Smith’s work. The Supreme Court of Canada recently concluded in *Citadel General Assurance Co v Lloyds Bank Canada*[^154] that ‘knowing receipt’ required proof that the recipient took with notice of the breach of trust. Importantly, that was not because the Court saw the claim as one based upon equitable wrongdoing. Indeed, the Court accepted that the claim was one based upon the principle of unjust enrichment. Surprisingly, however, it was this very principle which the Court said *demanded* an element of fault. La Forest J, speaking for the Court on this point, said:

> ‘It is recalled that a plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly *deprived* but, rather, because the defendant has been unjustly *enriched*, at the plaintiff’s expense. To show that the defendant’s enrichment is unjustified, one must necessarily focus on the defendant’s state of mind not the plaintiff’s knowledge, or lack thereof.’[^155]

That is not so. An enrichment is frequently unjust whatever the defendant’s state of mind. The central example of an event in unjust enrichment is a mistaken payment. Without question the recipient of a mistaken payment is strictly liable to make restitution to the mistaken payer. The enrichment is unjust because of the mistake. For more than 150 years that proposition has stood unchallenged in any common law court. Yet without referring to any cases on mistaken payment, the Supreme Court of Canada suggests that strict liability is illogical for all claims in unjust enrichment. Dr Smith wisely excludes this argument from his armoury. Indeed, he clearly disagrees. When the unjust factor is defective consent, Dr Smith says that strict liability is right in principle. Mr Stevens also rejects *Citadel v Lloyds* explanation for the requirement of fault. As he states, the logic of unjust enrichment goes the other way – a cause of action in unjust enrichment is normally (but not always) one of strict liability.

*No competing interest requires fault*

Apart from cases of policy-motivated restitution, enrichments are unjust because the provider of that enrichment did not really intend the defendant to have it. Either the plaintiff did not truly consent to the defendant’s enrichment, as in mistaken payments; or the person who was beneficially entitled to the property transferred did not consent at all, as in *Lipkin Gorman v Karpnale Ltd*. That is

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156 *Kelly v Solari* (1841) 9 M&W 54.
157 LD Smith, ‘Property’ text to n 93.
normally enough to warrant *prima facie* liability in unjust enrichment. The defendant is liable to make restitution even if he is totally innocent. Sometimes an additional factor comes into play. A general interest competes with the plaintiff’s interest in restitution. That general interest cannot be protected by the defence of change of position.\textsuperscript{160} It necessitates the exceptional introduction of a requirement of fault on the part of the defendant in order to justify *prima facie* liability in unjust enrichment. A common instance is the existence of a contractual relationship between plaintiff and defendant. If a contract covers the transfer of value in question, restitution will not follow from the mere fact that the contract was entered into by mistake. That fact necessarily establishes that the value was transferred by mistake. But it is not enough. The plaintiff’s cause of action is not established without proof of fault. As part of his case the plaintiff must prove either that the defendant was aware of the plaintiff’s mistake, or that the defendant contributed to the making of the mistake in the first place.\textsuperscript{161}

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changing his position? If there is no such interest – and it is submitted that there is not – liability in unjust enrichment should be strict.

A likely change in the law – strict liability in unjust enrichment

For all of these reasons, it is suggested that the argument in favour of strict liability for the recipient of property paid away in breach of trust is likely to win the day. That position is right in principle. In practice it is right too. The best evidence of that is the case for which the availability of strict liability really matters. An innocent donee spends the money given to him in breach of trust without changing his position. In those circumstances, a system of strict liability is the only one that achieves a just result.

Such strict liability will not prove intolerable for banks. In many cases the bank will be fully protected by the defence of change of position. It is true that there will be more cases in which a bank is prima facie liable in unjust enrichment by reason of the deposit of trust money in breach of trust. But if the money has been subsequently withdrawn, the withdrawal will operate as a change of the bank’s position. And will be seen in Chapter 5, there are other defences such as bona fide purchase that will also defeat claims in unjust enrichment brought against a bank. The bank’s position will be further secured if the law develops in the principled manner for which Chapter 4 contends – that is, by allowing banks and other agents to drop out of the law of unjust enrichment.
C. GUARANTEES AND MORTGAGES OFFERED IN BREACH OF TRUST

A number of important cases have resulted from the improper use of trust assets as security for a loan by a bank to the trustee in his personal capacity. In Australia, this was the scenario considered by Hansen J in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*.162 In England, it was the basis of the dispute which came first before Millett J and then the Court of Appeal in *Macmillan v Bishopsgate*.163 And in Canada the situation raised problems which went to, and divided, the Supreme Court in *Gold v Rosenberg*.164 Only *Koorootang v ANZ* and *Gold v Rosenberg* involved claims for ‘knowing receipt’. Consequently, only those two cases were potentially governed by the principles of unjust enrichment. It was noted above that, although the courts in *Macmillan* considered the case to be one ‘lying in restitution’,165 that did not mean that the claim was one for restitution of unjust enrichment. Rather, the case was restitutionary only in the sense that the successful prosecution of the claim actually advanced by the *Macmillan* plaintiffs, a *vindicatio* based on a pre-existing equitable interest, would if successful have led to a restitutionary remedy. The remedy being sought was an order that the defendant give up its security interest in the shares.

Where trust assets are used as security for a personal loan to the trustee

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165 Above 18.
without the consent of the beneficiary, a pre-existing vindicatio will be available to the beneficiaries.\(^{166}\) Such a claim is resolved by the application of the ordinary rules governing proprietary interests competing for priority in the same asset. The beneficiary’s earlier equitable interest will prevail against the lender’s interest unless the lender establishes that he is a bona fide purchaser. The pre-existing vindicatio is not a claim for restitution of unjust enrichment. But at least according to the better view, a claim in unjust enrichment is available alongside the claim to vindicate a pre-existing proprietary interest.\(^{167}\)

One school of thought says that this is not so. Where the plaintiff retains his pre-existing proprietary interest despite the transfer of the relevant asset to the defendant, some commentators believe that a claim in unjust enrichment will not lie. These commentators are then divided. Some say that the claim in unjust enrichment is excluded because it cannot be said that the defendant is enriched at the plaintiff’s expense when the plaintiff has not lost his pre-existing proprietary interest.\(^{168}\) Others say that the defendant is enriched despite the plaintiff’s retention of a proprietary interest, but argue that the claim in unjust enrichment is subsidiary to, and therefore excluded by, the pre-existing vindicatio.\(^{169}\) The better view rejects both of these arguments. A defendant is enriched by possessing an

\(^{166}\) The vindicatio is explained in more detail above 11.

\(^{167}\) Lord Nicholls, *Restitution Past Present and Future* 239.


asset and being free to use it even though he has no title. This is especially so when the asset in question is money. The spending power in money resides with the possessor. It is unrealistic to suggest that the defendant’s wealth is not enhanced until he actually spends the money. As for subsidiarity, there is no proof that the common law takes the view that claims in unjust enrichment, prima facie available on given facts, are subsidiary to other categories of claims available on the same facts. The tradition of the common law is to allow the plaintiff to elect between available causes of action.

In relation to money, the pre-existing proprietary claim will almost always be unavailable. Money quickly loses its identifiability. If trust money is paid away in breach of trust, the pre-existing proprietary claim will only be available where the beneficiaries can identify the very same notes and coins paid away. Far more likely is a claim by the beneficiaries asserting a proprietary right to the traceable proceeds of their trust money. Such a right arises in response to an event of unjust enrichment. But in relation to property other than money, the two claims will frequently be available. So when land is mortgaged in breach of trust,

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172 LD Smith, ‘Property’ text to notes 57-58.
173 United Australia Ltd v Barclays Bank Ltd [1941] AC 1 (HL).
174 Above 22
the beneficiaries may either pursue a claim in unjust enrichment against the lender, or vindicate their pre-existing equitable interest in the land.

That said, it is difficult to imagine a case in which a plaintiff would wisely choose to pursue a claim in unjust enrichment rather than vindicate a pre-existing proprietary interest. The unjust enrichment claim is significantly weaker. Whilst both claims are defeated by bona fide purchase, only the unjust enrichment claim is liable to defeat by the defence of change of position. The degree of knowledge of the plaintiff’s interest sufficient to defeat bona fide purchase is most probably less than that sufficient to defeat change of position, which merely requires the defendant to have acted honestly. If that is so, there will be some cases in which a defendant will win on change of position but lose on bona fide purchase.

However, there are circumstances in which the claim in unjust enrichment will be available but the *vindicatio* of the pre-existing proprietary interest is not. For example, the trust asset in question may be subject to a statutory scheme of land registration. In *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* registration of the bank’s mortgage on a statutory land register was held to cut off the claim to vindicate the beneficiary’s equitable interest.

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175 Bona fide purchase as a defence to claims in unjust enrichment is considered in Chapter 5.
176 Above 18.
interest in registered land. It was expressly assumed by Hansen J that registration did not defeat the claim in unjust enrichment, and that assumption has received academic support.

1. The Beneficiary's Consent

What of the case in which the beneficiary consented to the mortgage in question but later claims that his consent was vitiated by mistake or undue influence? How are the two claims, the pre-existing vindicatio and ‘knowing receipt’, affected by that fact? Such a situation arose in Gold v Rosenberg. The trustee was the beneficiary’s uncle. Both the nephew and the uncle were equal beneficiaries of the residue of a family estate comprising commercial real estate held by two companies. The nephew granted his uncle a general power of attorney which permitted the uncle to manage the two companies and thus control the trust property, though the nephew remained an inactive director of both. The effect of the power of attorney, together with the uncle’s effective possession of and control over all of the trust property, was to impose fiduciary duties upon the uncle to act in the best interests of the nephew.

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178 Ibid 113.20 (Hansen J).
179 Ibid 75.
Some years after the power of attorney was signed, the uncle came under pressure from the Toronto-Dominion Bank to repay loans made to him personally and to a company he wholly owned. At the same time, the uncle wanted fresh loans to expand his business. The bank agreed to a substantial new loan both to repay all of the uncle’s existing indebtedness and to allow him to put his business expansion plans into effect. But the bank would only provide this finance if one of the trust companies guaranteed the new loan and provided a mortgage over all its property. In addition, the other trust company was to postpone a mortgage it held over the property owned by the uncle’s company. The same firm of lawyers acted on behalf of all the parties to the loan transaction – that is, the two trust companies, the uncle’s company, the uncle personally and (for certain aspects) the bank. No lawyer acted on behalf of the nephew. The law firm prepared a resolution of directors of each trust company authorising the guarantee, as well as the necessary mortgage documents. In response to a request from his uncle, the nephew signed each of the necessary documents and the loan was advanced.

Things went badly, and the bank sought to enforce the guarantee against the first trust company. The nephew claimed that the guarantee was unenforceable because, *inter alia*, his uncle had misled him into signing the transaction documents. According to the nephew, his uncle had thereby breached his fiduciary duties to the nephew, and the bank was liable for the benefit it derived from that breach. At trial, and subsequently before the Ontario Court of Appeal,\(^{182}\)

\(^{182}\) *Gold v Rosenberg* (1995) 129 DLR (4th) 152 (Ont CA).
the nephew’s claim was restricted to the bank’s liability as an accessory to the uncle’s dishonest breach of trust. The trial judge found in favour of the nephew. She held that the bank was a constructive trustee for the nephew’s 50% interest in the trust property, and declared that the guarantee, the collateral mortgage and the postponement were enforceable only against the uncle’s interest in the estate. The Court of Appeal reversed the trial judge’s decision, holding that (a) the nephew’s consent was a defence to any claim for breach of trust, and (b) even if there had been a dishonest breach of trust, the evidence did not support a finding that the bank knew of it. The bank was not therefore liable as a dishonest assistant.

In the Supreme Court of Canada attention was switched to ‘knowing receipt’, a claim advanced for the first time in that Court. The question of whether such a claim could be made in relation to a mortgage over trust property divided the Court 4:3, the majority holding that such a claim was maintainable. However, a different majority held that the bank had a defence because it had ‘acted reasonably’. The mortgage was therefore valid and enforceable against the property beneficially owned by the nephew. A number of points need to be considered. The first is the question whether the nephew could, after all, have simply asserted a right to vindicate his pre-existing proprietary interest.

The Supreme Court of Canada treated Gold v Rosenberg as a case in which the uncle held title to the property in question on express trust for the nephew. Could the nephew have bypassed the claim in unjust enrichment (‘knowing receipt’) and instead asserted that he was entitled to vindicate his pre-existing
equitable interest in the trust assets now in the hands of the bank? Some commentators suggest that this *vindicatio* was open to the nephew.\(^{183}\) For example, Dr Bryan says:

> ‘Indeed, it can be argued that *Gold v Rosenberg* should not have been argued as a case about the receipt-based constructive trust at all. The nephew was simply following the assets held on trust for him which, in breach of trust, had been conveyed to the bank as security for the guarantee given by the uncle.’\(^ {184}\)

Dr Bryan goes on to note that even if such a claim had been made, the bank would still have won on the basis that it was a *bona fide* purchaser. He says, however, that the *vindicatio* would have offered Gold a significant advantage over the ‘knowing receipt’ cause of action. In answer to the *vindicatio* the bank would have had to show that it acquired its rights over the trust property ‘without actual or constructive notice of the nephew’s equitable title’. That is not quite right. If the bank really had to show that it lacked notice of Gold’s equitable interest, there is no way the bank could have established the defence of *bona fide* purchase. Gold’s interest as a beneficiary of the estate was patently obvious, and the bank had actual knowledge of it.

What was really in issue was whether the bank had notice of the fact that the nephew’s consent to the guarantee and mortgage over the trust property had been improperly obtained by his uncle. The trial judge had found that Gold’s consent


was irrelevant because he had been ‘subjected to the effects of the dishonest scheme’ of the uncle. The Court of Appeal, however, found that Gold ‘was not misled about the purpose, the effect or the risk of giving his approval’. It is not clear how Gold said he was misled, and what the relevant finding of fact as to that allegation was. But the judgments in the Supreme Court proceed on the assumption that Gold could establish a relevant misrepresentation by his uncle.

How does an allegation of imperfect consent affect the availability of the pre-existing vindicatio? Where the beneficiary’s consent is raised by the trustee himself to defend an allegation that he acted in breach of trust, the law will subject the trustee’s defence of consent to ‘a zealous and scrupulous examination’. Unless the trustee can show that the beneficiary was of full age and capacity, had full knowledge of all relevant facts, and was appraised of all the relevant consequences, the defence of consent will fail. As for third parties, it is clear that a person dealing with a trustee with the fully-informed consent of the beneficiary will be protected. The question is how the third party’s position is different when the beneficiary’s consent was vitiated by (say) a mistake induced by the trustee.

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185 The trial judge’s view is noted in the Ontario Court of Appeal’s judgment: Gold v Rosenberg (1995) 129 DLR (4th) 152, 158.
186 Coles v Trecothick (1804) 9 Ves 234, 247 (Lord Eldon LC).
187 Life Association of Scotland v Siddal (1861) 3 De GF & J 58, 74 (Turner LJ); Farrant v Blanchford (1863) 1 De GJ & S 107, 119; Parker v McKenna (1874) LR 10 Ch 96; Re Pauling’s Settlement Trusts [1961] 3 All ER 713, 729-730 (Wilberforce J), aff’d in part [1964] 1 Ch 303 (CA); Phipps v Boardman [1967] 2 AC 46 (HL); Re Freeston’s Charity [1978] 1 WLR 741 (CA) 754-755 (Goff LJ); Queensland Mines Ltd v Hudson (1978) 52 ALJR 399 (PC); Spellson v George (1992) 26 NSWLR 666 (CA) 60 (Handley JA).
188 Fyler v Fyler (1841) 3 Beav 550, 560 (Lord Langdale MR).
**Bona fide purchase in Gold v Rosenberg**

The correct approach, it is suggested, is that the issue of consent is subsumed within the wider question of whether the bank was a bona fide purchaser. Bona fide purchase was the key to *Gold v Rosenberg*, even though that defence was not expressly mentioned in the judgments. The *vindicatio* was indeed open to the nephew, but had that claim been made it would have been defeated by bona fide purchase. Where a plaintiff seeks to vindicate an interest in property, his claim will fail if the defendant establishes that he purchased that property from a third party without notice of the plaintiff’s rights. When a bank takes a mortgage over trust property, and there are no circumstances raising the suspicion of the bank that the property is held on trust or that any breach of trust is involved, the bank takes as bona fide purchaser of the property for value and in good faith.  

In the circumstances of *Gold v Rosenberg*, the true test of bona fide purchase asks, not whether the defendant knew of the plaintiff’s equitable interest, but whether the defendant knew or ought to have known that the plaintiff’s consent to the relevant transaction was vitiated by a breach of trust.

In principle two extreme positions regarding the impact of the beneficiary’s consent on a potential bona fide purchaser should be rejected. On the one hand, it cannot be right that the defendant automatically wins on bona fide purchase if the beneficiary in fact consented to the transaction in issue, even where it is glaringly...
obvious that the consent was improperly obtained by the trustee. On the other hand, it also cannot be right that the defence of bona fide purchase automatically fails when the beneficiary establishes that his consent was vitiated, even where it would have been impossible for the defendant to discover that fact. A middle ground must be preferred. If the defendant relying on bona fide purchase claims that, as far as he knew, the beneficiary consented to the relevant transfer, the question is whether the defendant ought to have known that the apparent consent was not a true consent. In other words, did the defendant make reasonable inquiries to try to confirm that the consent was valid?

Whether or not the bank made reasonable inquiries was the very issue which divided the Supreme Court of Canada in Gold v Rosenberg. A majority held that, in light of the fact that the bank received legal advice as to the validity of the transaction, it had made reasonable inquiries. Whilst the Court did not speak in terms of bona fide purchase, this defence is the most likely explanation of the bank’s success. The actual words used by the Court were that the nephew lost because ‘the bank, knowing what it knew, acted reasonably in the circumstances’. Acting reasonably is not, in itself, a defence known to the law either to the pre-existing proprietary claim or to a claim in unjust enrichment. But acting reasonably is a determinative element of bona fide purchase. Gold v Rosenberg can therefore be understood as the application of that defence. Whether

\footnote{Gold v Rosenberg [1997] 3 SCR 767, para 73 (Sopinka J). McLachlin and Major JJ concurred with Sopinka J. On whether the bank had acted reasonably, Gonthier J delivered a separate short judgment agreeing with Sopinka J.}
the claim was one lying in unjust enrichment, or an attempted *vindicatio*, would not have changed the result. Each could be defeated by bona fide purchase.\(^{191}\)

The implication for banks is clear. When a mortgage is offered over trust property as security for a loan to the trustee personally, a bank must take reasonable steps to ensure that the beneficiaries under the trust truly consented to the mortgage in question. What is reasonable depends, of course, on the circumstances of the case. It may require the giving of independent legal advice to the beneficiaries.\(^{192}\) The failure to take reasonable steps will mean that the bank cannot plead the defence of bona fide purchase to defeat the beneficiaries’ right to vindicate their pre-existing proprietary interest under the trust. And if the defence of bona fide purchase cannot be established, the bank will lose. It cannot be saved by the defence of change of position, for the claim is not one which arose in response to an event of unjust enrichment.

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\(^{191}\) The defence of affirmation of the breach of trust could also have been raised by the bank, as to which see *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd’s Rep Bank 511 (CA).

\(^{192}\) As to which see below 83.
2. **Mortgages and Guarantees as Enrichment**

Despite the conclusion above, *Gold v Rosenberg* was not contested as a case of a pre-existing *vindicatio* defeated by bona fide purchase. Rather, the claim in issue was one of unjust enrichment. Was the Supreme Court right to conclude that such a claim was open in principle to the beneficiary?

Three of the judges\(^{193}\) held that the answer was no. They considered that a bank which takes a mortgage over trust property does not thereby ‘receive’ trust property for the purposes of recipient liability under *Barnes v Addy*.\(^{194}\) A guarantee transfers no proprietary interest at all, whilst a mortgage gives the mortgagee only a contingent proprietary interest insufficient in itself to form the basis of a ‘knowing receipt’ claim. A majority of the Supreme Court held to the contrary.\(^{195}\) Speaking explicitly in terms of unjust enrichment,\(^{196}\) the Court held that even if a mortgagee does not ‘receive’ trust property, the benefit conferred on the mortgagee and the resulting loss in value suffered by the beneficiary was sufficient to bring the guarantee and collateral mortgage within the ‘knowing receipt’ cause of action. Moreover, if the guarantee and mortgage were successfully enforced, the bank would clearly receive trust property as a direct

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\(^{193}\) Sopinka J, with whom McLachlin and Major JJ concurred.

\(^{194}\) (1870) LR 9 Ch App 244 (CA).

\(^{195}\) Iacobucci J, with whom La Forest and Cory JJ concurred. On this point, Gonthier J delivered a short judgment agreeing with Iacobucci J.

\(^{196}\) *Gold v Rosenberg* [1997] 3 SCR 767, para 41 (Iacobucci J).
result and thereby be enriched at the beneficiaries’ expense.

Having myself been tempted by the view of the minority,\(^\text{197}\) it is the view of the majority in *Gold v Rosenberg* which must be preferred. As a matter of authority that view is supported by *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*.\(^\text{198}\) In that case the recipient of a guarantee offered in breach of fiduciary duty was held liable in ‘knowing receipt’. The majority view in *Gold v Rosenberg* is also correct as a matter of principle. In this context ‘knowing receipt’ is a claim in unjust enrichment.\(^\text{199}\) To be enriched does not require one to have received a proprietary interest. One can be enriched without receiving any property at all. For example, a claim in unjust enrichment will sometimes lie against a person for whom a service is performed.\(^\text{200}\) That is so regardless of whether the service leaves the defendant with any residual wealth. Again, in some circumstances the receipt of a mere contractual right counts as an enrichment. For example, it has been said that a right to rescind a contract for undue influence or misrepresentation, and to thereby ‘recover the claim one has conceded against oneself’,\(^\text{201}\) is a right of recovery generated by unjust enrichment. Lord Millett, agreeing with the argument of Dr Chambers,\(^\text{202}\) says that rescission ‘is another


\(^{198}\) [1986] Ch 246 (CA).

\(^{199}\) See Chapter 1, 36.

\(^{200}\) *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Craven-Ellis v Canons Ltd* [1936] 2 KB 403.


equitable response to unjust enrichment’. A right to rescind does not always involve the recovery of property transferred to the defendant. It is wrong therefore to say that in the absence of an outright proprietary transfer from the plaintiff to the defendant, the latter cannot have been enriched at the latter’s expense.

The minority of the Supreme Court of Canada focused too closely on ascertaining whether the exact words used by Lord Selbourne in *Barnes v Addy* were satisfied. Sopinka J cited the Oxford English Dictionary definition of the word ‘receive’ to determine whether ‘knowing receipt’ was established. This seems to be an example of the phenomenon observed (and rightly criticised) by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*:

‘What has gone wrong? Their Lordships venture to think that the reason is that, ever since the *Selangor case* [1968] 1 WLR 1555 highlighted the potential uses of equitable remedies in connection with misapplied company funds, there has been a tendency to cite and interpret and apply Lord Selborne LC’s formulation in *Barnes v. Addy*, LR 9 Ch App 244, 251-252, as though it were a statute.’

Dr Bryan also believes that the receipt of a guarantee should be considered as a benefit capable of being the subject of a claim in unjust enrichment. He argues that a bank which receives a legally enforceable guarantee of a loan is

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204 (1870) LR 9 Ch App 244 (CA).
205 *Gold v Rosenberg* [1997] 3 SCR 767, para 70.
207 Ibid 386.
enriched because it has received value.\textsuperscript{209} The value is the right to sue the guarantor. The contingent nature of the right ought not deny the fact that the right itself is a benefit and of value to the bank. That is the very reason why banks seek guarantees. For all these reasons, the receipt of either a contract of guarantee or a mortgage or both should render a bank potentially liable in unjust enrichment. The majority of the Court was right to conclude that the plaintiff in \textit{Gold v Rosenberg} could forego the pre-existing \textit{vindicatio} and instead sue the bank in unjust enrichment. But the latter, just as the former, was defeated by the defence of bona fide purchase.\textsuperscript{210}

3. \textbf{DEFENCES IN \textit{Koorootang}}

An analysis which focuses on bona fide purchase partly explains the result in \textit{Koorootang v ANZ}.\textsuperscript{211} The facts of that case were similar to \textit{Gold v Rosenberg}. A company, Koorootang, acted as trustee of a large family settlement. Koorootang provided its assets to ANZ as security for a loan for the personal benefit of one of the directors of the company. The director provided forged documents to the bank which suggested that the beneficiaries under the trust, two of whom were co-directors with the rogue, consented to the transaction. In fact, the beneficiaries were wholly ignorant of the rogue’s plans. The bank’s security interest was registered pursuant to a statutory scheme of registration of title to land. Hansen J

\begin{thebibliography}{9}
\bibitem{209} Ibid 82.
\bibitem{210} See Chapter 5, 324.
\bibitem{211} \textit{Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd} [1998] 3 VR 16.
\end{thebibliography}
held that registration cut off the ability of the beneficiaries to claim that their proprietary interest in the trust assets subsisted and took priority over the bank’s interest. But he held the bank liable to the trust beneficiaries (inter alia) on the basis of ‘knowing receipt’ – a claim which, obiter, Hansen J preferred to view as one of strict liability in unjust enrichment.

An important fact which ultimately led to the bank losing in *Koorootang v ANZ* was that, prior to the execution of the guarantee and mortgage, the bank discovered that Koorootang did not have authority to offer the bank the trust assets as security. Hansen J considered that the failure of the bank to make further inquiries in light of this knowledge was fatal. Once again, the language used in the judgment is not that of bona fide purchase. But as bona fide purchase is a defence to claims in unjust enrichment, the failure of that defence provides a needed reconciliation. ANZ received its interest not directly from the claimants but from a third hand, and the bank gave value at the time of that receipt. In principle, therefore, the defence of bona fide purchase was available to the bank. But the defence would have been defeated by the bank’s notice of the breach of trust, and the consequent vitiation of the beneficiaries’ consent. The bank could not then claim to be a bona fide purchaser.

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212 Ibid 113.20.
213 Ibid 105. In the end, Hansen J did not need to decide the point.
214 Below 324.
In each case the Court characterised the claim as one lying in unjust enrichment. In *Gold v Rosenberg* the bank won on bona fide purchase. In *Koorootang* that defence was defeated by the bank’s failure to make reasonable inquiries. But that left open another defence to ANZ: change of position. The bank clearly had changed its position on the assumption that the receipt of its security interest in the trust assets was valid. It had made the loan to the rogue director of Koorootang, and that loan was irrecoverable. It seems that in principle change of position was open to the bank. But ANZ still lost. Change of position was not pleaded, and therefore formed no part of Hansen J’s analysis. Was the right result reached nonetheless? There are two ways to explain why the bank would have lost even if it had pleaded change of position.

The simplest solution is that ANZ’s dishonesty prevented it from relying on change of position. Hansen J found that the bank had been guilty of fraudulent conduct in proceeding with the transaction knowing what it knew.\(^{215}\) He considered that the bank had deliberately shut its eyes to facts revealing the trustee’s misconduct. That is enough in itself to explain the decision. But it leaves one wondering whether the result would be different in a case in which the court could not say that the bank had behaved dishonestly, but nevertheless knew enough to exclude bona fide purchase.

\(^{215}\) *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16, 123-124.
The second explanation of *Koorootang v ANZ* does not depend on a finding of dishonesty. It may be that the defence of change of position was not open to ANZ at all, even though the claim was one lying in unjust enrichment. Lord Goff *Lipkin Gorman v Karpnale Ltd*\(^\text{216}\) says that change of position may not be available in every case of unjust enrichment.\(^\text{217}\) One such case might be the claim based on the principles in *Barclays Bank Plc v O’Brien*.\(^\text{218}\) It is not clear whether that case is best explained as an example of policy-motivated restitution,\(^\text{219}\) or on some alternative basis such as the participation of the bank in the primary debtor’s equitable wrongdoing.\(^\text{220}\) It is not necessary to explore the true classification of the case here. The important point is that, whatever type of case it is, it is clear that principles of public policy underlie the cause of action. Lord Browne-Wilkinson said:

‘[A] high proportion of privately owned wealth is invested in the matrimonial home…in the joint names of both spouses…. In a substantial proportion of marriages … many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them.

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\(^\text{216}\) *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).
\(^\text{217}\) Ibid 580.
\(^\text{218}\) *Barclays Bank plc v O’Brien* [1994] 1 AC 180 (HL).
On the other hand, it is important to keep a sense of balance in approaching these cases. It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest viz., the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile.\footnote{221}

The courts thus balance competing policies concerning the family home: the need to protect a spouse’s interest in the home, and the need to ensure that the wealth inherent in the home is not rendered inaccessible by that protection. This policy balance would be rendered impotent if the bank could plead change of position in all cases in which it had acted honestly; that defence is therefore not available.

The policy based on the inviolability of the family home is inapplicable to cases such as Gold v Rosenberg and Koorootang v ANZ. In each of those cases the assets in question were not domestic houses in which the surety and principal debtor resided, but commercial investment properties. But there may be a wider version of the Barclays v O’Brien policy which catches Gold v Rosenberg and Koorootang v ANZ. Lord Browne-Wilkinson expressly extended the principles in play beyond relationships between cohabitees:

“In addition to the cases of cohabitees, the decision of the Court of Appeal in Avon Finance Co. Ltd. v. Bridger [1985] 2 All E.R. 281 shows (rightly in my view) that other relationships can give rise to a similar result…. [I]n a case where the creditor is aware that the surety reposes trust and confidence in the principal debtor in relation to his financial affairs, the creditor is put on inquiry in just the same way as it is in relation to husband and wife.’

\footnote{221} Ibid 188.
The crucial fact in this passage is not that a security interest is granted over the family home, but that a guarantee is obtained from a person who ‘reposes trust and confidence in the principal debtor in relation to his financial affairs.’ If that is the pivotal point, then there seems no reason why the same policy ought not to apply to Gold v Rosenberg and Koorootang v ANZ. In those two cases it was clear that the beneficiaries reposed trust and confidence in the trustee in relation to a large part of their financial affairs. The effect would be the same as that which is now observed in the multitude of cases following Barclays v O’Brien. A rule of law is applied, and if the bank fails to meet the requirements of that rule, it loses.\textsuperscript{222} In the context of Barclays Bank plc v O’Brien the effect of the rule is that a bank which is put on inquiry into the possibility that the guarantor does not truly consent to the transaction must ensure that that person obtains independent legal advice. If such advice is not obtained, the guarantee or mortgage will be unenforceable. The application of that rule to Gold v Rosenberg and Koorootang v ANZ would be slightly, but immaterially, different in one respect. Those cases involved a guarantee not from the plaintiff beneficiary, but from a company holding assets on trust for the beneficiary. So in the Barclays v O’Brien rule of law, one replaces ‘guarantor’ with ‘the person whose interest will be detrimentally affected by enforcement of the guarantee’, or, in short, ‘beneficiary’.

The beneficiaries in Koorootang v ANZ and Gold v Rosenberg each reposed trust and confidence in the trustees in relation to their financial affairs. In each

\textsuperscript{222} P Birks, Restitution and Banking Law 197; JP Moore, ‘Equity, Restitution and in personam claims under the Torrens System – Part Two’ (1999) 73 ALJ 712.
case, the bank was put on inquiry by that fact and because the loans were for the personal benefit of the trustee. And in each case, execution of the guarantees and mortgages would have been to the detriment of the beneficiaries. The *Barclays v O’Brien* rule of law was therefore triggered. But at this stage, it is impossible to agree with the majority’s conclusion in *Gold v Rosenberg*. The reason is the very factor which caused the minority judges to dissent. The nephew (beneficiary) did not obtain independent legal advice. The solicitors who told the bank that the transaction was valid acted for a whole host of parties, but not for the nephew personally. If the *Barclays v O’Brien* doctrine was triggered by the facts in *Gold v Rosenberg*, the application of that doctrine cannot be defeated by bona fide purchase. Unless there are exceptional circumstances, the person in whose favour the *Barclays v O’Brien* rule operates must obtain independent legal advice.

In *Koorootang v ANZ* the bank obtained the same sort of inadequate advice as that received by the bank in *Gold v Rosenberg*. ANZ was told by a firm of solicitors that the securities were enforceable, but no-one advised the beneficiaries. Hansen J held that the law firm’s advice was not enough to protect the bank. The fact that the persons who reposed trust and confidence in the principal debtor did not receive independent legal advice is crucial for two reasons. It defeats the bank’s defence of bona fide purchase. And it defeats the attempt by the bank to argue that they had satisfied the requirements of the *Barclays v O’Brien* doctrine.
CHAPTER 2 - MINISTERIAL RECEIPT AT LAW

A. CLAIMS AGAINST AGENTS IN GENERAL

1. BEFORE ANZ v WESTPAC

Long before the recognition of a general defence of change of position, an agent was freed from liability to repay a mistaken payment made to him if:

1. he had received the money in his capacity as an agent; and
2. before acquiring notice of the payer’s claim to recover the money the agent paid over the money received to his principal.

But it was not always so. In the early 18th century case of Jacob v Allen\(^1\) an agent was appointed by an administrator to collect the debts owed to a person who was thought to have died intestate. The agent dutifully performed that task and paid over the money received to the administrator. Later a will was discovered, and the executor sued the agent in money had and received. The agent was held liable despite payment over. Yet just two years after that case precisely the same circumstances led to the opposite result. In Pond v Underwood\(^2\) Holt CJ nonsuited the plaintiff executor’s claim against the administrator’s agent, saying that although a claim would lie against the agent’s principal,

‘… yet it is hard to make the defendant liable, having paid the money over, before he knew of the will, to the administrator.’\(^3\)

\(^1\) (1703) 1 Salkeld 27 (QB), seemingly approved in Att-Gen v Perry (1733) 2 Comyns 481.
\(^2\) (1705) 2 Ld Raym 1210 (QB).
\(^3\) Ibid.
The immunity of agents was apparently taken a step further in *Sadler v Evans*, an important case in the history of ministerial receipt. This appears to be the first reported case in which Lord Mansfield discussed the agent’s defence. Most importantly, *Sadler v Evans* is a rare example of the suggestion that the agent is immune at common law *even before payment over*. In that case a rent collector received money from the plaintiff for the benefit of his principal, Lady Windsor. The plaintiff alleged that the money was not due. He sued the rent collector to recover the money paid, but was non-suited by the trial judge, who said:

‘… nothing could be more absurd than to make the collector or receiver of another person liable to an action for every payment that was voluntarily made to him … And if it was not paid over, yet the payment to her receiver was payment to her; and therefore the action ought to have been brought against her.’

In the course of his reasons the trial judge recalled another instance in which the plaintiff was refused recovery against an agent, and said of this other case:

‘For, whether the money had or had not been paid over to his principal, that could not be the ground of Lord Chief Justice Lee’s opinion … being a matter merely in the knowledge of the principal and receiver; and to make the action maintainable or not, just as that fact should appear on the trial, would make this kind of action a trap for the plaintiff.’

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5 A short note on *Smith v Bromley* (1760) 2 Doug 696 evidences an earlier application of the agent’s defence by Lord Mansfield.
6 *Sadler v Evans* (1766) 4 Burr 1984, 1985 (Perrot B).
7 Though the trial judge is not reported to have referred to any other detail of the case apart from the fact that it was decided by Lord Chief Justice Lee, the reporter notes that it was *Staplefield v Hugh (or Yewed)* cited in *Buller’s Trials at Nisi Prius* (1753) 133.
In a reserved decision, a unanimous appellate court in Sadler v Evans strongly agreed with the reasoning of the trial judge that the action should have been brought against Lady Windsor herself and not her agent. Giving the judgment of the Court Lord Mansfield said:

‘The money was paid to the known agent of Lady W. He is liable to her for it; whether he has actually paid it over to her, or not: he received it for her…. Where ‘tis to a known agent; in which case, the action ought to be brought against the principal, unless in special cases, (as under notice, or mala fides).’

The words in brackets at the end of this passage are open to misconstruction. Lord Mansfield held that unless there were ‘special’ circumstances, the action must be brought against the principal and not the agent. That is so regardless of whether the agent ‘has actually paid it over to her, or not’. With that in mind, the word ‘notice’ must be taken to mean actual knowledge of the underlying facts. The word cannot be interpreted as meaning notice of the plaintiff’s claim. If that was all that was necessary in order for the plaintiff to sue the agent, the plaintiff would always be able to sue the agent. Merely by bringing the action, the plaintiff would give the agent notice of his claim. There would be nothing ‘special’ about such a case at all. The true meaning is that the action must be brought against the principal unless the agent has acted in bad faith, one species of which is knowledge of the underlying facts; that is, knowledge that the plaintiff’s claim is unanswerable.

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8 Ibid.
Two years after *Sadler v Evans*, Lord Mansfield cited it as authority for the existence of a defence where the agent had paid over. It is true that under *Sadler v Evans* the agent does have that defence, in the sense that he cannot be sued after payment over. But as the preceding paragraph makes clear, *Sadler v Evans* is also authority for a wider proposition: that the agent is not liable to the mistaken payer even if the agent has not yet paid over. That is why later cases took *Sadler v Evans* as authority for the proposition that payment over is irrelevant:

‘where money has been received by an agent, you cannot sue him, but must have recourse to the principal’.

Several justifications appear in *Sadler v Evans* for the proposition that the agent is immune from liability even before payment over. First, payment to an agent is regarded as payment to the principal, and the payer should be limited in seeking recovery according to that doctrine. This proposition is discussed further in Chapter 4. Secondly, the trial judge in *Sadler v Evans* thought that if the availability of the action against the agent depended entirely upon whether or not the agent had paid over to the principal, the action would be ‘a trap for the plaintiff’. That particular reason is, at least today, not very persuasive. If payment over is determinative, an agent who waited until trial to let it be known that he had paid over is likely to have costs awarded against him. Thirdly, it seems clear that the Court found that the agent was liable to his principal for all money received on

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9 *Stevenson v Mortimer* (1778) 2 Cowp 805.
10 *Miller v Aris* (1800) 3 Esp 231, 234 (Lord Kenyon). See too *Greenway v Hard* (1792) 4 TR 553, 555 (Lord Kenyon CJ).
11 Below 226.
her behalf, even if it turned out that the money in question was paid by mistake.\textsuperscript{12} The agent ought therefore pay over all money received for the principal, and leave disputes to be resolved amongst the two interested parties. Fourthly, the fact that the receiver was a ‘known agent’ was important to Lord Mansfield. This suggests that a payer who knows that he is effecting a payment to another person via that other’s agent thereby consents to the agent being treated as a mere conduit pipe, and to any claims for recovery being maintainable only against the principal.

It will be noted below that the law quickly abandoned the proposition that the agent is or should be immune from liability even before payment over. But it is first important to note an argument of Mr Swadling. He contends that \textit{Sadler v Evans}\textsuperscript{13} was never authority for that proposition. Mr Swadling explains the case in these terms:

\textit{\textquoteright Sadler v Evans \textquoteright} is consistent with a number of other eighteenth century cases which denied the use of money had and received to plaintiffs who sought to avoid the strictures of the older forms of action available to try their cause. At the time, the action for money had and received was threatening to swallow up most of the other forms of action…. The decision in \textit{Sadler v Evans} is therefore to be explained as one turning on a contest between two competing forms of action. It is not an authority for the proposition that the receipt of the agent is in law the receipt of the principal.\textsuperscript{14}

It is difficult to agree with this argument. Though there is firm ground for the suggestion of an historical tension between the older forms of action and the action in money had and received, the reasons given both at trial and on appeal in \textit{Sadler}

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\textsuperscript{12} See further below 262.\\
\textsuperscript{13} (1766) 4 Burr 1984.\\
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v Evans are clearly directed to a particular principle for agents. It seems clear that Lord Mansfield meant what he said: ‘whether [the agent] has actually paid it over to her, or not … the action ought to be brought against the principal’.\textsuperscript{15} However, one further proposition advanced by Mr Swadling is absolutely correct, and that is the fact that just twelve years after Sadler v Evans Lord Mansfield himself reached the opposite conclusion in Buller v Harrison.\textsuperscript{16}

In Buller v Harrison an insurer mistakenly believed that a payment was due under an insurance policy. He paid out on the policy to the insured’s agent. The agent was owed more than the amount of the insurance money by the insured. Rather than physically paying over the money received to his principal and receiving it back again, the agent recorded the receipt as a reduction of the amount he was owed by his principal. Later the insurer discovered the error, and sued the agent to recover the payment. The claim was resisted by the agent but allowed by the Court. It is instructive to set out at length the relevant part of Lord Mansfield’s reasons:

‘The whole question at the trial was, whether the defendant, who was an agent, had paid the money over. Now, the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal … But on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not. In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood towards each other on the 20\textsuperscript{th} of April.

What then is the case? The defendant has trusted Ludlow and Co [the principals] and given them credit. He trafficks to the country where they live, and has agents there

\textsuperscript{15} Sadler v Evans (1766) 4 Burr 1984.
\textsuperscript{16} (1777) 2 Cowp 565.
who know how to get the money back. The plaintiff is a stranger to them and never heard of their names. Is it conscientious then, that the defendant should keep money which he has got by their misrepresentation, and should say, though there is no alteration in my account with my principal, this is a hit, I have got the money and I will keep it?

If there had been any new credit given, it would have been proper to have left it to the jury to say, whether any prejudice had happened to the defendant by means of this payment: but here no prejudice at all is proved, and none is to be inferred.17

There is no mention here of Sadler v Evans. Nor is any such reference to be found in the entire report. The contrast between the two cases could not have been more striking. Both were cases concerning an allegedly mistaken payment to an agent. In Sadler v Evans Lord Mansfield said that the agent was liable to pay the money over to his principal, and that the plaintiff had no claim against the agent ‘whether he has actually paid it over to her or not’. In Buller v Harrison, on the other hand, Lord Mansfield held that if the plaintiff in such a situation ‘corrects the mistake; the agent cannot afterwards pay it over to his principal, without making himself liable to the real owner’.18

The authority of Buller v Harrison was attacked, unsuccessfultly, early in the 19th century. In Cox v Prentice19 an agent for the sale of a silver bar was mistakenly paid too much. He resisted a claim for restitution of the amount overpaid on the basis that he had sent an account to his principal which included an allowance for the full price received. At trial the plaintiff argued that pursuant

17 Ibid 568.
18 Ibid 566.
19 (1815) 3 M & S 344.
to *Buller v Harrison* the agent had no defence to the claim until he had actually paid over to his principal. The defendant’s counsel retorted that *Buller v Harrison* was not authority for that proposition. Rather, the agent in *Buller v Harrison* was found liable because he had made himself a party to his principal’s fraud. Where there is no fraud by the agent, the claim must be brought against the principal. On the strength of *Sadler v Evans*20 one might have thought that this argument had a reasonable chance of success. It was not to be. The Court was unanimous in rejecting the agent’s submission:

‘I take it to be clear, that an agent who receives money for his principal is liable as a principal so long as he stands in his original situation; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. Here it is admitted that no money has been paid over by the defendant to his principal, nor has there been any other thing done by him to create a change of circumstances. The only question then is, whether the action lies against the defendant, considering it as if it were an action against the principal.’21

Similarly, Le Blanc J said:

‘The circumstances of the account between the defendant and his principal being still open without any new credit given, does, I think according to *Buller v Harrison*, dispose of the objection’.22

All of the above cases considered the agent’s defence in the context of a claim to recover a mistaken payment. But the defence is not so limited. In *D Owen & Co v Cronk*23 a payment to an agent was extracted from the plaintiff by duress. The pressure was applied to the plaintiff by the agent’s principal. The

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20 *Sadler v Evans* (1766) 4 Burr 1984.
21 *Cox v Prentice* (1815) 3 M & S 344, 348 (Lord Ellenborough).
22 Ibid 349.
23 [1895] 1 QB 265.
agent himself was unaware of the duress. He had paid over to his principal by the time the claim was brought to his attention. The Court held that the agent was free from liability. Some earlier cases involving duress applied by a principal refused to allow an agent a defence despite payment over. But those cases must be taken either to have been overruled by *D Owen & Co v Cronk*, or to have found the agent independently guilty of a wrong, a fact which prohibits reliance on the agents’ defence. The true proposition, then, is that later affirmed by the Court of Appeal – payment over gives an innocent agent a defence ‘whenever the circumstances are such that he who has paid the money might have recovered it from the agent’s principal’. In modern language, ministerial receipt gives a defence to all claims in autonomous unjust enrichment.

*Holland v Russell* is an important decision concerning the question as to what counts as payment over. That case is a particularly strong authority for it was appealed twice, first to the Queen’s Bench, and then to seven judges in the Exchequer Chamber. As in *Buller v Harrison* a payment was made in error by an insurer to an agent of the insured. The agent paid over to his principal most of the money received but kept two small amounts. One of the amounts was retained by the agent to satisfy a debt owed to him by the principal. The other amount was

24 *Oates v Hudson* (1851) 6 Ex 346; *Snowden v Davis* (1808) 1 Taunt 359. See too *Parker v The Bristol and Exeter Railway Co* (1851) 6 Ex Rep 703.
25 *Steele v Williams* (1853) 8 Exch 625; *Sharland v Mildon* (1846) 15 LJ Ch 43.
26 *Nizam of Hyderabad v Jung* [1957] Ch 185 (CA) 238 (Lord Evershed MR); rev’d on other grounds *Rahimstoola v Nizam of Hyderabad* [1958] AC 379 (HL).
27 *Holland v Russell* (1861) 1 B & S 14.
28 *Holland v Russell* (1861) 1 B & S 424 (QB).
used by the agent to pay a third party at the principal’s direction. It was held that the agent had a complete defence to the insurer’s claim. The court left open the question whether the agent would have had a defence if his agency had not been disclosed to the plaintiff.

There is some tension between the decision in Buller v Harrison and the finding in Holland v Russell that the sum retained by the agent Russell in satisfaction of a debt owed to him by the principal was effectively a payment over of that amount. Cockburn CJ managed to reconcile the two cases on this basis. In Buller v Harrison the account was still open between principal and agent. In Holland v Russell a balance had been struck between principal and agent, the account had been settled, ‘and the transaction is in effect the same as though the agent had paid over the whole amount to the principal and had received back the amount of his claim.’

In other words, there had been a constructive payment over. That payment over cannot be unilaterally reversed by the agent, because the settling of accounts operates as a novation; that is, a substitution of a fresh contract for former debts. On general principle it would be difficult for a bank to establish a constructive payment over on the basis of a settled account unless the customer in question had closed his account. Ordinary bank statements do not represent the settling of a bank account, unless the bank and the customer have expressly agreed that that is so (nowadays exceedingly rare).

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29 Ibid 435 (Cockburn CJ). Similarly, Erle CJ held that there had been a payment over because ‘all the money has been accounted for in a settlement of account’: (1863) 4 B & S 14, 16.

30 The Kepitgalla Rubber Estates Ltd v National Bank of India Ltd [1909] 2 KB 1010; Paget 162-164.
The conception of constructive payment over in the context of banks was tested before the Privy Council in *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia.*\(^{31}\) The plaintiff (‘Colonial’) received instructions from its client R to pay money into R’s account at a Halifax bank. By mistake the payment was made instead to the defendant bank (‘Exchange Bank’). It happened that R had an account at Exchange Bank as well. At the time R’s account at Exchange Bank was overdrawn. Colonial sued Exchange Bank to recover the payment. Exchange Bank relied on the crediting of R’s overdrawn account as a constructive payment over. The argument was rejected outright by the Privy Council:

‘…nothing was done except by private entries made by the defendants in their own books … it was not true that the sum had been used and could not be recalled. The defendants had only got to run a pen through some private entries in their own books and the matter then would have stood in precisely the same position as it stood in before the mistake was made. They had not in any way altered their position. They would not, if they had cancelled the entries, have been in any way damnedified by the mistaken payment made to them.’\(^{32}\)

This confirmed what was suggested in *Sadler v Evans.*\(^{33}\) The reduction of a debt owed by the customer to the bank is not, without special circumstances, a sufficient payment over by the bank.

*Ellis v Goulton*\(^{34}\) is significant in allowing an agent to plead that he was immune from the payer’s claim for restitution even before payment over. The

\(^{31}\) (1885) 11 App Cas 84 (PC).

\(^{32}\) Ibid 88-89 (Lord Hobhouse).

\(^{33}\) (1766) 4 Burr 1894, above 86.

\(^{34}\) [1893] 1 QB 350 (CA).
circumstances were, however, a little different from the cases just considered. On the sale of premises by auction the purchaser paid a deposit to the vendor’s solicitor as agent for the vendor. The sale fell through owing to the default of the vendor. The purchaser brought an action to recover the deposit from the solicitor. The Court of Appeal held that the payment of the deposit to the solicitor was equivalent to payment to the vendor, and that the action could not be maintained against the solicitor. The plaintiff thus failed to recover, despite the fact that the agent had not paid over to the principal. On one view, the case is not entirely out of line with the cases just discussed. In those cases, the right to restitution arose at the time of the payment. In *Ellis v Goulton*, on the other hand, the right to restitution arose after the payment, when the contract fell through. Chapter 4 discusses whether that is a sufficient point of distinction.

*Bavins Junior & Sims v London & South Western Bank Ltd*[^1] is significant in tackling a question very important in the context of claims against banks. What is the bank’s position when the account holder makes a series of subsequent withdrawals after the payment which the plaintiff seeks to recover has been credited to the account? In *Bavins* a payment order was stolen from the plaintiffs some time after delivery. In many respects the payment order operated like a cheque, though not for the purposes of the Bills of Exchange Act 1882. The payment order was deposited into an account held by one of the defendant’s customers (‘DC’). The defendant collected the proceeds of the payment order.

[^1]: [1900] 1 QB 270 (CA).
from the plaintiffs’ bank, and credited the proceeds to DC’s account. The plaintiff successfully sued the defendant bank in money had and received to recover the proceeds.

_Bavins_ is a case which one might not describe today as a claim in unjust enrichment. The claim was for money had and received. It is not clear whether that cause of action advanced a claim now recognised as an autonomous claim in unjust enrichment by subtraction,\(^\text{36}\) or a claim for restitutionary damages for the wrong of conversion.\(^\text{37}\) The latter seems far more likely, for the court held that the agent’s defence of payment over was _prima facie_ open to the defendant bank. Indeed, the issue which occupied most of the court’s attention was whether the elements of that defence were made out.

The facts relating to payment over are unclear. After the amount of the cheque was credited to DC’s account, she made several withdrawals. At all relevant times the balance of the account was in DC’s favour. Unfortunately, the report of the case does not contain details either of the withdrawals or of subsequent deposits. However, two important facts are clear. First, the balance of DC’s account at the time the defendant bank received notice of the plaintiffs’ claim was greater than the amount of the stolen payment order. Secondly, if DC’s subsequent withdrawals were dealt with according to the ‘first in, first out’ rule in


\(^{37}\) eg _United Australia Ltd v Barclays Bank Ltd_ [1941] AC 1 (HL).
Clayton’s Case, the sum credited to DC’s account as a result of the stolen payment order no longer formed part of the balance of the account. This second fact formed part of the submissions advanced by the bank’s counsel. Neither the plaintiffs’ counsel nor any member of the Court of Appeal indicated that the submission was factually inaccurate.

The defendant therefore seemed on strong ground in suggesting that, the defence of payment over being available, the plaintiff must lose. The money in question had been paid over to the account holder. But each member of the Court of Appeal rejected that submission. Collins LJ did so in these terms:

‘The only answer which they set up appears to be the fact that they have credited their customer with the amount of it. Apart from any other argument, the answer which the plaintiffs’ counsel made to this appears to me conclusive, namely, that a credit so given to a customer by a bank is in its nature provisional only, and depends upon the question whether the cheque or any other document finally results in a right to recover and retain the money. The customer is only credited with the amount subject to the risk of that afterwards turning out not to be so. There does not appear in this case to have been any settlement of account between the defendants and their customer which debarred them from recovering from their customer the amount with which they had credited her.’

Similarly, AL Smith LJ said that there was no reason why the defendant bank:

‘… could not have debited the customer with the amount upon it being shewn that she had not title to the document, and that it belonged to the plaintiffs.’

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38 Devaynes v Noble (Clayton’s Case) (1816) 1 Mer 568.
39 Bavins Junior & Sims v London & South Western Bank Ltd [1900] 1 QB 270, 277 (Collins LJ).
40 Ibid 275-276.
Again, Vaughan Williams LJ said:

‘… there had been no such settlement of accounts between them as disentitled the defendants as against their customer to strike out the credit.’

According to Bavins, then, as long as the balance in the account is sufficient to reverse the relevant entry and repay the plaintiff, and as long as there has been no settlement of the account with the account holder, a bank which continues to operate the account in question will not be free from the possibility of having to make restitution.

Soon after this case dicta apparently inconsistent with the notion of a ‘settled account’ fell from Collins LJ himself (by then, Collins MR). In Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co the plaintiff owed its supplier a sum of money. The supplier was financed by two banks, the defendant bank and one other. The supplier had assigned to each bank various debts owed to it by its customers. The debt owed by the plaintiff was assigned by the supplier to the other bank. By mistake the plaintiff sent the money to the wrong bank, the defendant. The other bank, as assignee of the relevant debt, sued the plaintiff and recovered the amount of the debt. The consequence was that the plaintiff had paid twice in respect of the one purchase. The plaintiff therefore wanted to recover the mistaken payment. But by this time, the supplier had gone out of business. The plaintiff sued the defendant bank instead, and the defendant pleaded payment over. That plea failed, and the plaintiff recovered.

41 (1904) 90 LTR 474 (CA).
42 William Brandt’s Sons and Co v Dunlop Rubber Company [1905] AC 454 (HL).
The Court of Appeal held that the agent’s defence was not relevant on the facts. That was because in the Court’s view the defendant bank received as principal. The bank did not receive payment as agent on behalf of its customer but in its own right as assignee. It may be doubted whether that conclusion was correct. The defendant bank was not an assignee of the payment made by plaintiff, for the relevant debt was not owed to the defendant bank at all. Consequently, the actual payment simply represented a deposit made by mistake into an account by someone other than the account holder. The bank therefore received as agent, and the defence of payment over should have been considered. In any event Collins MR went on to discuss the situation which would have applied had the defendant bank received as agent. Noting that the supplier’s account with the bank was overdrawn at the time of the mistaken payment, Collins MR said this:

‘A case rather more difficult arises when the mode by which he [the agent] passes it on is by settlement in account with a third party for whom he has received it, involving the application of the money to the discharge of a debt due from the third party to himself. He has thus no doubt benefited by getting his debt paid, but he has done so in discharging his primary duty of passing the money on to his principal. He has constructively sent it on and received it back, and has done nothing incompatible with his position as a conduit-pipe or intermediary. He was entitled to be paid, and has been paid by his debtor, who was no doubt put in funds to do so by the receipt of the money, and who therefore, and not the intermediary, has had the benefit of the windfall. Hence the care with which the courts have considered whether the sum has in fact been effectively passed out of the hands of the agent into those of the principal, no entry by the agent in his books sufficient until the assent of the principal has completed the transaction (see Buller v Harrison, 2 Cowp. 365).^43

^43 Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co (1904) 90 LTR 474, 476.
These important remarks appear to represent a slight move away from the notion that an agent who has not physically paid over money to his principal will only be entitled to a defence where there has been a formal settlement of account. Instead, Collins MR suggests that the agent will have a defence where the amount in question is credited by him in reduction of the debt owed to the agent by the principal and ‘the assent of the principal has completed the transaction’. If a constructive payment over were made out in that case, it must be wondered whether some separate assent of the account holder was really necessary to ‘complete the transaction’. As Professors Ellinger and Lomnicka point out, a customer gives his consent to this sort of appropriation when the overdraft account is opened.\(^{44}\) Once a payment over has been established (whether by actual or constructive payment over), the defence should be complete. On the other hand, it may be that Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co\(^ {45}\) should be seen as authority for the proposition that there is no payment over where the act relied on by the plaintiff to establish that fact can be unilaterally reversed. That proposition is explored further below.\(^ {46}\)

*Kleinwort, Sons & Co v Dunlop Rubber Co*\(^ {47}\) is the first of two House of Lords cases to have considered the operation of the defence of ministerial receipt in the context of payments to a bank.\(^ {48}\) The facts here were identical to those in


\(^{45}\) (1904) 90 LTR 474 (CA).

\(^{46}\) Below 117.

\(^{47}\) (1907) 97 LT 263; 23 TLR 696 (HL).

\(^{48}\) The other is *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJB 465 (HL), discussed below 104.
Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co.\(^{49}\) A payment intended to be made into the account of a merchant at one bank was deposited by mistake to the same merchant’s overdrawn account at the defendant bank. As in Continental Caoutchouc the account holder made several withdrawals after the mistaken payment.\(^{50}\) The jury found that the bank had received the money as principal and not agent. The bank was therefore ineligible to plead ministerial receipt. But like Collins MR, the House of Lords considered what the position would have been had the bank received as agent. Lord Loreburn LC, with whom Lord James agreed, said that it made no difference. Even if the bank had received as agent it had no defence. Crucially, the relevant test was not put in terms of whether or not the money in question had been paid over by agent to principal. Rather, it was suggested that the defence requires the agent to prove specific detriment. The payer can recover from the agent if the payment:

‘… is redemanded from the person who received it before his position has been altered to his disadvantage.… Now that is this case…. Channell J put the question’\(^{51}\) very plainly to the jury, and explained to them the contention of the appellants … that they would not have continued, as they did continue, to make advances to [the account holder] if it had not been for this payment …. This contention the jury refused to accept…. [I]t seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion. They thought that the appellants would have acted in exactly the same way if no payment had been made by the Dunlop Co at all.’\(^{52}\)

\(^{49}\) Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co (1904) 90 LTR 474; 9 Com Cas 240 (CA), discussed Above 99.

\(^{50}\) Again, the report does not contain details of the account transactions subsequent to the mistaken payment.

\(^{51}\) The question put to the jury to which Lord Loreburn referred was: ‘Were the defendants led by the plaintiffs’ mistake to alter their position to [the account holder] to their own disadvantage?’ The jury answered ‘No’.

\(^{52}\) Kleinwort, Sons & Co v Dunlop Rubber Co (1907) 97 LT 263 (HL) 264.
The notion of payment over appears nowhere in this passage or the remainder of Lord Loreburn LC’s judgment. Most of the cases above applied a definite test to determine the agent’s liability: has the money in question be paid over to the principal? Lord Loreburn LC’s test seemed to involved a degree of speculation: how would the defendants have acted if the payment had not been made? These tests are not the same. The first asks whether the money in question remains in the account. The second asks whether the bank would be left worse off than before the mistake was made if the bank had to repay the plaintiff. There was some historical support for a test which focuses on the question whether the defendant would be disadvantaged if found liable to repay the plaintiff. In *Buller v Harrison*, it will be recalled, Lord Mansfield considered it relevant to ask ‘whether any prejudice had happened to the defendant by means of this payment’. But he also said that ‘The whole question at the trial was, whether the defendant, who was an agent, had paid the money over.’ It is reasonable to assume that in Lord Mansfield’s view the defendant would of necessity be prejudiced by having to repay the plaintiff after payment over. But in *Kleinwort, Sons & Co v Dunlop Rubber Co* Lord Loreburn LC seemed to be saying that even if there has been actual payment over, there must *in addition* be some detriment proved by the defendant bank. Lord Atkinson’s remarks were more orthodox. On the supposition that the defendant received as agent, he said that the bank would not have been liable if there had been actual payment over, or constructive payment.

53 *Buller v Harrison* (1777) 2 Cowp 565.
54 Ibid.
55 *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263 (HL).
over by way of a settled account, or the agent had done ‘something which so prejudiced his position that it would be inequitable to require him to refund.’

Just four years passed before the issue of ministerial receipt in the context of a mistaken payment to a bank returned to the House of Lords. In *Kerrison v Glyn, Mills, Currie & Co* the plaintiff had entered into an arrangement with Kessler & Co, a firm of bankers in New York. Pursuant to that arrangement cheques drawn in Mexico by an associate of the plaintiff were met by a correspondent bank of Kessler and Co. For his part, the plaintiff agreed to pay the amount of such cheques, together with a fee, into an account held by Kessler & Co at the defendant bank in England. In anticipation of Kessler and Co arranging for certain cheques to be met, the plaintiff deposited £500 into Kessler and Co’s account with the defendants. At that time the account was overdrawn. Unknown to the plaintiff, Kessler & Co had already become insolvent, and there was no possibility of the cheques of the plaintiff’s associate being met. The day after he deposited the £500 into Kessler & Co’s account, the plaintiff demanded the return of the money from the defendant bank. The defendant refused and proceedings followed. The House of Lords held that the plaintiff was entitled to recover. The central focus of the case was whether the plaintiff had as a matter of fact been mistaken at the time of payment, and if so, whether that mistake was of a type which warranted recovery. But the defence of ministerial receipt was touched upon, both by the

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56 Ibid 265.
57 *(1911) 81 LJKB 465 (HL).*
At trial, Hamilton J dealt with the payment over defence in these terms:

‘It appears to me to be clear that as all that Messrs. Glyn, Mills, Currie, & Co. had done was to write 500l. on the credit side of the account in their books when Mr. Kerrison made his request for the return of the money, they are in the position of having received a windfall at a moment when it was not due, and desired – as much as I sympathise with them – to retain it; but unfortunately the cases are against them’.

When the case reached the House of Lords, Lord Atkinson took a slightly different approach. He drew an analogy between the facts before him and this situation:

‘It was admitted, as I understood, that if money be sent direct from one person to another in payment in advance for some service to be rendered by that other, in the belief that he is alive, when in fact he is dead, it could be recovered by the sender from the person, whether agent or legal personal representative of the deceased, into whose hands it came. The fact that the deceased was largely indebted to such agent, and that the latter would as between himself and the legal personal representative of the deceased be entitled to set off pro tanto the money received as against the debt due to him, could not possibly prejudice the rights of the person transmitting the money. He would obviously have the same rights against an agent of the deceased to whom nothing was owing; and this would be so even though the deceased had authorised the agent to apply the money when received to the discharge pro tanto of the sum due to him.’

Dr Bryan has pointed out that the example is not well chosen. The principal’s death usually terminates an agency relationship. The relevant rule of agency is stated in Bowstead and Reynolds as follows:

‘The actual authority of an agent is also terminated, unless it is irrevocable in
accordance with the provisions of Article 120 – (a) by the death, mental incapacity or (in some situations) insolvency of the principal or the agent; or where the principal or agent is a body corporate, by its winding up or dissolution."  

The agency having been terminated by the principal’s death, the recipient cannot have received as agent. But actual death is not the same as near death, and a company being wound up in insolvency is not in the same position as a company about to be wound up in insolvency. If the company in *Kerrison v Glyn, Mills, Currie & Co* was legally, though not factually, capable of continuing normal operations, the bank received as agent, and the analogy between that case and the situation where the principal dies is erroneous. It seems from the report of the trial that at the time of the relevant payment the company was not legally incapable of carrying out the acts required of it. Consequently, the bank received as agent.

But was there payment over? In the closing paragraph of Lord Atkinson’s speech he speaks of the bank not being permitted to ‘hold’ money which, if the relevant payment had been made to the customer directly, the law would require the customer to repay. By inference, it seems that Lord Atkinson rejected the notion of a constructive payment over based on a reduction of the customer’s overdraft defined by Collins MR in *Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co*. Similarly, Lord Shaw’s reference to a bank not being permitted ‘to impound money which his principal could not have honestly or

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61 Ibid 656.
62 (1911) 81 LJKB 465 (HL).
63 *Kerrison v Glyn, Mills, Currie & Co* (1909) 101 LT 675, 677 (Hamilton J).
64 *Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co* (1904) 90 LTR 474; 9 Com Cas 240 (CA), above 100.
legally retained\textsuperscript{65} carries with it the same inference. The notion of a bank ‘holding’ or ‘impounding’ money is unfortunate for reasons explained in Chapter 4.\textsuperscript{66} Lord Mersey was more direct. He acknowledged that if the bank

‘has paid over the money to his customer, or has altered his position in relation to his customer to his own detriment, on the faith of the payment, the banker may refuse to repay the amount and may leave the person who has paid him to enforce his remedy against the customer.’\textsuperscript{67}

But his Lordship said that in the present case, the bank ‘had in no way altered their position when they were asked to refund the money.’\textsuperscript{68} The notion of constructive payment over seemed dead and buried.

\textit{Steam Saw Mills Co Ltd v Baring Brothers & Co Ltd}\textsuperscript{69} is a rare case in which the bank successfully defended the plaintiff’s claim for the recovery of a mistaken payment by arguing, in part, that the account holder was the proper party to be sued, if not alone, then at least jointly with the bank. But the circumstances of that case were so unusual that it probably cannot be relied upon for any general proposition of that kind. The plaintiff exporters had a contract with the Russian Government. In exchange for a licence to export wood from Russia to England, the exporters agreed to pay the proceeds of sale into the Russian Government’s bank account in England, and in turn the Russian Government would pay the rouble equivalent to the exporters in Russia. In 1917 the plaintiff made several

\begin{itemize}
\item \textsuperscript{65} (1911) 81 LJKB 465 (HL), 771.
\item \textsuperscript{66} See the discussion of \textit{Foley v Hill} (1848) 2 HLC 28 (HL) below 254.
\item \textsuperscript{67} (1911) 81 LJKB 465 (HL), 472.
\item \textsuperscript{68} Ibid.
\item \textsuperscript{69} [1922] 1 Ch 244 (CA).
\end{itemize}
deposits into the account of the Russian Government held at Barings Bank in anticipation of the Russian Government performing its end of the bargain. But later that year the Russian Government was overthrown, twice, in consecutive revolutions and the exporters were never paid.

The plaintiffs claimed that they were entitled to recover from Barings the amount of the deposits still standing to the credit of the Russian Government. That claim was based, *inter alia*, on an allegation that the plaintiffs had paid the money for a consideration which had failed. The Court of Appeal rejected the claim. The Court’s reasons for so doing are doubtful. It was said there was no *total* failure. The requirement of a total failure is, at least today, probably incorrect.  

Despite the rejection of the claim based on failure of consideration, the Court of Appeal could not dismiss the possibility that some other claim might be maintainable against the Russian Government. In particular, it was possible that the plaintiffs might be able to establish that at the time they made the payments in question the Russian Government did not exist, and the plaintiffs had therefore been discharged from their contractual obligation to make the payments. Importantly for present purposes, the Court of Appeal was adamant that such a claim could not be made in the absence of the Russian Government. It was therefore held that the bank could keep the money but must undertake not to part with it without notice to the plaintiffs and without an order of the court. It is not entirely clear whether the presence of the Russian Government was crucial because (a) it was a sovereign

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entity; (b) questions of fact would arise which necessitated the presence of the Russian Government; or (c) regardless of those two matters, the account holder was the proper party to be sued in any event, at least jointly with the bank. If the answer was (c), the case seems inconsistent with the orthodox understanding of ministerial receipt. The authorities discussed above hold that when the bank receives as agent, the bank is itself liable to return the mistaken payment. However, there are dicta in parts of Steam Saw Mills Co Ltd v Baring Brothers & Co Ltd\textsuperscript{71} which strongly suggest that (c) was not the relevant reason. In particular, the Court intimated that, had a claim definitely been maintainable against the Russian Government, the bank would be liable to repay the plaintiffs even in the absence of the Russian Government as a party to the proceeding.

An argument that the account holder was the proper party to be sued, if not alone, then at least jointly with the bank was advanced again a few months after Steam Saw Mills Co Ltd v Baring Brothers & Co Ltd in Admiralty Commissioners v National Provincial and Union Bank.\textsuperscript{72} T was serving as an officer in the British armed forces and the plaintiffs were responsible for his pay. T directed the plaintiffs to pay his salary into his account at the defendant bank. By mistake, payments of T’s salary continued after his death. T’s father took out letters of administration in Canada but such letters had not been sealed in England. The plaintiffs sought recovery of the amount still standing in T’s account that had been paid after T’s death. Sargant J held that the plaintiffs were entitled to recover. It

\begin{itemize}
  \item \textsuperscript{71} Steam Saw Mills Co Ltd v Baring Brothers & Co Ltd [1922] 1 Ch 244 (CA).
  \item \textsuperscript{72} (1922) 127 LT 452.
\end{itemize}
appears that *Steam Saw Mills* was not cited to Sargant J, having been decided by the Court of Appeal just two months before. Before turning to see how Sargant J dealt with the proper-party argument, one point needs to be noted. It flows from the impact of the death of the bank’s principal, the account holder. It was seen above during the discussion discussing *Kerrison v Glyn, Mills, Currie & Co*\(^73\) that the death of the principal determines the agent’s authority to act as such. No argument was advanced, however, in *Admiralty Commissioners v National Provincial and Union Bank*\(^74\) that the account holder’s death meant that the bank could not plead the defence of payment over. The likelihood is that, for the reasons discussed above, a bank will not be able to rely on the defence after the account holder’s death. However, if the relevant sums are withdrawn, the bank can successfully plead change of position.

As to the proper party to a suit for the recovery of a mistaken payment, the bank submitted that no action at all could be maintained against it unless the account holder or his personal representative was not joined a party. The bank conceded that a non-bank agent was liable to repay a mistaken payment without the principal being joined to the plaintiff’s action. But banks were said to be in a special position. The bank’s counsel argued that once the money was credited to the customer’s account, the bank become liable to pay it to the customer.\(^75\) Consequently, if an order was made requiring the bank to repay the plaintiff in a

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\(^73\) (1911) 81 LJKB 465 (HL), above 105.
\(^74\) (1922) 127 LT 452.
\(^75\) Ibid 453.
proceeding to which the customer was a party, the bank was at risk of being sued twice: once by the payer, and once by the customer. Sargant J dismissed the argument in these terms:

‘In my opinion, any contract by which a bank agrees to honour cheques of the customer on his current account does not extend to amounts standing to the credit of that account in so far as they are swollen by inadvertent payments made in mistake of fact. As a result of an order for repayment of the amount claimed, the customer’s current account will be deflated by that amount. Any subsequent action by the customer’s legal representative to recover that amount from the bank would have no reasonable chance of success.’

The assertion that a bank is never bound to honour its customer’s directions in relation to funds in his account deposited by a third party by mistake is doubtful. The reasons for that doubt are explored in Chapter 4.77 For now the error can be encapsulated by asking two questions. What if the mistaken payer never actually makes a claim against the bank? More importantly, what happens if a claim is made against the bank by the mistaken payer, but the account holder (had he been sued directly by the plaintiff) would have had a defence to the same claim? In either of these situations, it would be astonishing if the bank could always claim against its customer that it was permitted to retain the mistaken deposit because the banking contract ‘did not extend to … inadvertent payments made in mistake of fact’.

76 Admiralty Commissioners v National Provincial and Union Bank (1922) 127 LT 452, 453.
77 Below 263.
It is another 60 years before the defence of ministerial receipt is subject to further detailed consideration by a Commonwealth court. In the space of twelve months, two decisions came down which are amongst the most important ministerial receipt cases to date. The first was the High Court of Australia’s unanimous judgment in *ANZ v Westpac*, and the second was *Agip (Africa) Ltd v Jackson*, a decision of Millett J. The High Court’s decision, not reported when *Agip* was decided, warrants a section all to itself, so *Agip* is taken first. An employee of Agip helped embezzle millions of pounds of the company’s money. The employee caused Agip to make payments on fictitious invoices to various companies set up and controlled by the defendant accountants, partners in a firm called Jackson Co. One such company was Baker Oil. Money paid to Baker Oil was immediately transferred from Baker Oil’s bank account to Jackson Co’s bank account and from there to various rogues overseas. The accountants were sued on a variety of fronts, one of which was money had and received. They escaped liability for this claim in relation to all the money which had left their possession on the instructions of their clients (the overseas rogues). Millett J held that Jackson Co had, to that extent, a defence to the claim in money had and received, for they had received the money as agents and paid it over on the instructions of their principals.

For present purposes, the crucial aspect of this case is that the defence of ministerial receipt was, for the first time, extended to subsequent recipients. A

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subsequent recipient is a person who receives the plaintiff’s money not directly from the plaintiff but indirectly via a third person. Here, the accountants were subsequent recipients. The plaintiff’s money was paid first to Baker Oil and then to Jackson Co. This aspect was discussed by Millett J in the following terms:

‘Jackson Co. must be treated as being in the same position as an agent who has accounted to his principal. Money paid by mistake to such an agent cannot afterwards be recovered from the agent but only from the principal. In every previously decided case the agent has received the money directly from the plaintiff, and it is well established that to obtain the benefit of the defence the recipient must have been known to the plaintiff to have been acting for a disclosed principal. In such a case the agent is treated as a mere conduit pipe and the money is taken as having been paid to the principal rather than the agent.

This defence would not have been available to Baker Oil. So far as the Banque du Sud [the plaintiff’s bank] was concerned, Baker Oil received the money as principal. If, however, the action for money had and received is extended to a subsequent transferee, the defence must be adapted to meet the extension, for it is unlikely that there will have been any dealings between the plaintiff or his agent and the subsequent transferee. In such a case the transferee's liability must depend on the character in which he received the money from the person from whom he received it. Baker Oil and Jackson Co. were both acting as agents and trustees for the same clients and the payment by Baker Oil to Jackson Co. was a transfer from one agent to another for onward transmission to their common principals. Save as regards the sum in court, the money has been accounted for to those principals and, in my judgment, any claim to recover it must now be made against them and not against Jackson Co.’

It is not strictly true to say that the agent’s defence has only ever been applied to an agent who received directly from the plaintiff. In Sadler v Evans, for example, the defendant agent received from a third party, not from the plaintiff. That quibble aside, two points of substance flow from the passage above. First, Baker Oil, the immediate recipient of the plaintiff’s money, would not have had

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81 Sadler v Evans (1766) 4 Burr 1984.
the defence of payment over open to it. That was so despite the fact that when Baker Oil received the plaintiff’s money it was acting as agent. Millett J held that the defence only applies to a person paid by the plaintiff when the plaintiff knows that the recipient is acting as an agent. In this case, Agip did not know that Baker Oil was acting as agent for the simple reason that Agip did not really know that its money was being paid to Baker Oil at all. The second point follows from the first. It is clear that when the claim is against a subsequent recipient it cannot be relevant to enquire whether the plaintiff knew of the defendant’s agency, for the plaintiff never dealt with the defendant. Instead, whether or not the defence is open to a subsequent recipient is said to depend on ‘the character in which he received the money’. That suggests that it is enough if the defendant in fact received as agent, even if the person who paid the defendant did not know he was paying an agent. Millett J did not say whether a subsequent recipient must make his agency status known to the person from whom the subsequent recipient received. But there would seem little point in such a requirement. The question in issue is whether, as against the plaintiff, the subsequent recipient can rely on his status as agent. Given that the plaintiff has had no dealings with the defendant, and may not even know of the defendant’s existence at the time of payment, the case should not turn on whether or not the defendant made his agency status known to someone else.
2. **ANZ v Westpac**

On the surface *ANZ v Westpac* was a fairly simple case. A debtor maintained an account with ANZ. He owed $14,000 to the creditor, who maintained an account with Westpac. The debtor instructed ANZ to transfer by electronic means $14,000 to Westpac to the account of the creditor. An ANZ clerk accidentally transferred $114,000 rather than $14,000 to Westpac. Westpac credited $114,000 to the creditor’s account. Three days later ANZ discovered its mistake and notified Westpac of the error. At this stage, ANZ did not request that the excess moneys be returned to it by Westpac. Westpac told ANZ to communicate directly with the creditor. ANZ did so and reached an agreement with the creditor that he would repay $100,000 to ANZ by instalments. Forthwith, the creditor paid $2,500 to ANZ. Before any further payment was made, the creditor went into liquidation. ANZ then requested Westpac to remit the balance of the excess payment, namely $97,500. Westpac refused. ANZ commenced proceedings against Westpac. Westpac advanced a number of arguments to the effect that it was not liable to pay ANZ anything. Those reasons included the overdrawn state of the creditor’s account at the time the mistaken payment was received, and the presentation to and payment by Westpac of a series of cheques drawn on the creditor’s account after the ANZ overpayment. How much, if anything, was Westpac liable to repay?

In the Supreme Court of New South Wales the trial judge entered judgment for ANZ in the amount of $97,500, the sum claimed. Westpac appealed. The

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83 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (SC NSW,
New South Wales Court of Appeal allowed the appeal in part, and reduced the judgment sum to $32,032.19.\textsuperscript{84} Subsequently, ANZ persuaded a differently constituted Court of Appeal to rehear its appeal on the basis that the Court of Appeal had misconceived the significance of a concession made by Westpac. On the rehearing, the Court of Appeal once more allowed the appeal in part, but this time reduced the sum awarded to the ANZ by the trial judge to $39,320.72.\textsuperscript{85} The High Court of Australia granted ANZ special leave to appeal, and Westpac cross-appealed. On the hearing of the appeal, the High Court held that Westpac was liable to pay ANZ $17,021.68.

It will be submitted in Chapter 4 that a fundamentally different approach should have been adopted. ANZ should have been confined to its claim against the account holder. Westpac should never have been even \textit{prima facie} liable to repay ANZ at all. But that is certainly not the law at present. It is therefore instructive to analyse the way the case was dealt with by each court. That analysis is important for two reasons. First, if the approach advocated in Chapter 4 is wrong, a future court will no doubt be faced with the same question as that which arose in \textit{ANZ v Westpac} – how is the bank’s liability to return a misdirected third party deposit determined in the light of subsequent transactions to the account? In answering that question, a rare unanimous judgment of the High Court of Australia

\begin{itemize}
\item \textsuperscript{84}Westpac Banking Corporation \textit{v} Australia and New Zealand Banking Group Ltd (CA NSW, 23 August 1985).
\item \textsuperscript{85}Westpac Banking Corporation \textit{v} Australia and New Zealand Banking Group Ltd (CA NSW, 20 June 1986).
\end{itemize}
will prove highly persuasive, even though the case was deeply affected by crucial concessions. Secondly, the analysis of the varying approaches adopted in the four courts highlights the difficulties which flow from the imposition of *prima facie* liability in unjust enrichment upon agents, particularly banks.

**Detriment**

The most important point to emerge from the entire course of the proceedings in *ANZ v Westpac* 86 relates to the issue of detriment. It was in respect of this issue that the Court of Appeal changed its mind between the first and second appeals. The trial judge, the first Court of Appeal and McHugh JA dissenting in the second Court of Appeal all felt that it was necessary for a defendant to establish some specific detriment before he could rely on the defence of payment over. This point has been noted already. Some cases, such as *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* 87 and *Kerrison v Glyn, Mills, Currie & Co* 88 suggest that it is not enough for an agent to establish payment over of the money in question. In addition, the agent must show that he will suffer some detriment if he makes restitution to the plaintiff. Normally, payment over and detriment go hand in hand. If an agent pays over to his principal but is then required to make restitution to the plaintiff, the agent will usually be left worse off than before the mistake was made. The money used to make restitution will have to come out of the agent’s own pocket. But what if the agent can repay the plaintiff without that repayment

87 (1885) 11 App Cas 84 (PC), considered above 95.
88 (1911) 81 LJKB 465 (HL), considered above 104.
leaving the agent in a worse position than he would have been in had no mistake
been made? In the context of banks, restitution will not usually leave the bank
worse off if it can reverse the credit entry to the customer’s account.\(^89\) This is the
basis of the ‘reversibility model’ of payment over discussed by Dr Bryan.\(^90\) When
the credit entry can be unilaterally reversed by the bank without adversely
affecting the bank’s position, there is no detriment and hence no payment over.

A simple example illustrates the point. A bank account has a balance of £0
on Day 1. The following transactions then take place.

<table>
<thead>
<tr>
<th>Day</th>
<th>Opening</th>
<th>Transaction</th>
<th>Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>£0</td>
<td>Mistaken credit of £100,000 by M</td>
<td>£100,000</td>
</tr>
<tr>
<td>2.</td>
<td>£100,000</td>
<td>Deposit of £200,000 by a/c holder</td>
<td>£300,000</td>
</tr>
<tr>
<td>3.</td>
<td>£300,000</td>
<td>Bank meets cheque for £200,000</td>
<td>£100,000</td>
</tr>
</tbody>
</table>

A claim is made by the mistaken payer M against the bank on Day 4. Does the
bank have the defence of payment over? That depends on two points. First, is it
necessary for the bank to prove specific detriment before gaining the benefit of the
payment over defence? Secondly, if no detriment is required, only an actual
payment over of the money in question, has the money actually been paid over?
The detriment point is considered first.

\(^89\) It may do so in an insolvency context, as to which see below 126.
\(^90\) M Bryan, *Restitution and Banking Law* 171-176.
In the example above there is only one way in which the bank could, upon making restitution to the plaintiff, be left worse off than had no mistake been made. That result will follow if the bank is prevented from debiting the account to reflect the fact that the bank has repaid M. If the bank cannot debit the account then it will be left with £100,000 less of its own money than had no mistake been made. The bank will only be prevented from debiting the account if, vis-à-vis its customer, the bank is estopped from reversing the previous credit entry.  

No court has ever suggested that an agent, bank or otherwise, should be placed in the position where, if restitution is made to the payer, the agent will definitely be worse off financially than it would have been otherwise. But the crucial question is whether it is necessary for the bank to establish that fact before it can defeat the plaintiff’s claim. That is the very question on which the Court of Appeal changed its mind. The trial judge found that Westpac could establish no such detriment. ANZ therefore recovered in full. McHugh JA in the second appeal favoured the same conclusion. The first Court of Appeal also considered that the case involved ‘the primary defence of detriment’. It is not necessary to pursue here the precise reasons why the first Court of Appeal arrived at a different ‘detriment’ calculation than the trial judge. What is important is that the Court considered detriment to be the key to the agent’s defence at common law.

92 Westpac Banking Corporation v Australia and New Zealand Banking Group Ltd (CA NSW, 23 August 1985) per Samuels JA.
Priestley JA, with whom Samuels JA agreed, rejected the ‘detriment’ (or reversibility) model of payment over in the Court of Appeal’s second judgment:

‘What the respondent asserted would have happened thereafter (no mistake having been made), seems to me a matter of speculation rather than an assessment of probabilities.’\(^93\)

As a matter of principle, it is not clear that this is a good reason for rejecting the reversibility model of payment over. If an agent is *prima facie* liable to make restitution, then requiring detriment before the agent is allowed to escape that liability is not illogical. To establish detriment the bank would have to show what its position would have been had no mistake been made. If detriment in this sense was required, the defence of payment over would operate on the same principle as that which underlies the defence of change of position.

The general rationale of change of position is well-known:

‘the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.’\(^94\)

Recent cases have made it clear that, generally speaking, it will be inequitable to require the defendant to make restitution after he has disenriched himself on the faith of the receipt in question.\(^95\) But the defence can be further refined. If the defendant’s plea of change of position is based on an act of disenrichment, the plea

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94 Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 (HL) 580 (Lord Goff).
will fail unless restitution would leave the defendant financially worse off than he would have been had the mistaken payment never been made. That is clear, for example, from *Scottish Equitable plc v Derby*.96 Professor Birks is reluctant to use the word ‘detriment’ in relation to the defence of change of position.97 But in the present context the word reminds us that change of position is essentially about the defendant not being left worse off by having to make restitution. That is why, as Professor Birks himself concludes:

‘It must be correct that there will be no disenriching change of position, so long as the relevant entry in the customer’s account can be unilaterally reversed.’98

So there can be no change of position by the bank if it can unilaterally reverse the credit entry. What, though, of payment over? Crucially, a majority of the second Court of Appeal and the unanimous High Court allowed the defence of payment over without asking whether the credit entry could be reversed without detriment to the bank. The defence was not thus about detriment, but about actual payment over. As Priestley JA said:

‘The extent of an agent’s responsibility … to repay moneys paid under a mistake of fact should depend upon how much, if any, of the fund remains in his hands.’99

The only question which had to be asked was whether the money in question had left the account. This is referred to below as the pure model of payment over. The

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96 [1999] All ER (D) 1042 (Harrison J).
98 Ibid 211.
word ‘pure’ indicates that payment over is all that is required. In the Court of Appeal Priestley JA used the following example to express the point clearly. Assume that at the commencement of day 1, an account holder is overdrawn to the extent of £90,000. The following transactions then take place:

<table>
<thead>
<tr>
<th>Day</th>
<th>Opening</th>
<th>Transaction</th>
<th>Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>($90,000)</td>
<td>Mistaken credit of $100,000 by M</td>
<td>$10,000</td>
</tr>
<tr>
<td>2.</td>
<td>$10,000</td>
<td>Bank meets cheque 1 for $100,000</td>
<td>($90,000)</td>
</tr>
<tr>
<td>3.</td>
<td>($90,000)</td>
<td>Customer makes $100,000 deposit</td>
<td>$10,000</td>
</tr>
</tbody>
</table>

Priestley JA said that on these facts there had been payment over:

‘If the banker gets notice of the mistake on day 1, then he personally owes that sum to the person (M) from whom it mistakenly came…. If he gets notice on day 2 after irrevocably meeting that day's cheque, then he owes nothing to M, the banker's customer being the only person from whom M would be entitled to recover….If the banker gets notice on day 3 after the deposit of $100,000, then … the position is that he no longer in any sense has M's money. That has been replaced by money from another source. As against M, the banker has never been more than his customer's agent. There is no reason that I can see, in principle or fairness why the banker should have any personal liability to M and every reason why the customer should alone be liable to M.’

If payment over is all that is required, then this analysis is unimpeachable. The plaintiff’s money has clearly been paid over. The fact that the bank might be able to reverse the credit entry made on day 1 without suffering detriment is neither here nor there. There has been payment over, and the plaintiff is restricted to a claim against the bank’s customer. The High Court adopted exactly the same

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100 Westpac Banking Corporation v Australia and New Zealand Banking Group Ltd (NSW CA, 20 June 1986).
The Court expressly held that there is no ‘separate requirement of overall prejudice in a case where the money received has been paid over.’ The only reason the High Court reached a different conclusion to that reached by the second Court of Appeal was the fact that a concession made before the latter Court was not repeated before the High Court. The concession related to the use of the rule in *Clayton’s Case*, a point discussed below.

On the High Court’s approach, which has here been labelled the pure model of payment over, the bank in Priestley JA’s example has a complete defence to the plaintiff’s claim for restitution. But on the detriment / reversibility model of the payment over defence the bank would remain liable. If one ignores the mistaken payment, then the account has an opening balance of $(90,000), followed by a withdrawal of $100,000 and a deposit of $100,000. That leaves the closing balance of the account the same as the opening balance. Now the mistaken payment is taken into account, as well as the bank’s repayment to the plaintiff. As long as the bank is not estopped from debiting the account to reflect the fact that restitution has been made, the closing balance will be the same. There is an opening balance of $(90,000), 2 credits of $100,000 and two debits of $100,000, leaving the closing balance at $(90,000). The bank is put back in exactly the same position that it would have been in had no mistaken payment been made. No detriment means no defence, and restitution follows. This exposes a fundamental

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102 Ibid 683.
103 Devaynes v Noble (*Clayton’s Case*) (1816) 1 Mer 568.
104 Below 124.
difference between the payment over defence, as understood by the High Court, and the defence of change of position. A comparison between the two defences is furthered below.\textsuperscript{105}

**Pure model of payment over and the rule in Clayton’s Case\textsuperscript{106}**

The preceding section began with a factual example that has not yet been dispensed with. For convenience it is set out again.

<table>
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<tr>
<th>Day</th>
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<th>Transaction</th>
<th>Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>£0</td>
<td>Mistaken credit of £100,000 by M</td>
<td>£100,000</td>
</tr>
<tr>
<td>2.</td>
<td>£100,000</td>
<td>Deposit of £200,000 by a/c holder</td>
<td>£300,000</td>
</tr>
<tr>
<td>3.</td>
<td>£300,000</td>
<td>Bank meets cheque for £100,000</td>
<td>£100,000</td>
</tr>
</tbody>
</table>

It was concluded above that on the ‘reversibility’ or ‘detriment’ model of the payment over defence, the bank will be liable to make restitution if a claim is made against it by M on Day 3. The pure model of payment over, however, raises an evidential impossibility. Has the £100,000 paid to the bank by M left the account or not? Without the application of a presumption, it is impossible to tell. In *ANZ v Westpac*\textsuperscript{107} the High Court of Australia held that in this situation the ‘first in, first out’ rule in *Clayton’s Case* was to be applied.\textsuperscript{108} This rule presumes that

\textsuperscript{105} Below 134.
\textsuperscript{106} *Devaynes v Noble (Clayton’s Case)* (1816) 1 Mer 568.
\textsuperscript{107} (1988) 164 CLR 662.
\textsuperscript{108} Ibid 679.
the money first paid into a bank account is the first to be withdrawn. Applying that presumption, M’s money has been paid over by the bank to the account holder. The bank is therefore not liable to make restitution. There is one situation, however, where the rule in *Clayton’s Case* cannot help a court determine whether, on the pure model of payment over, a mistaken payment remains in the account. That situation is discussed next.

**Difficulties created by the pure model of payment over**

The pure model of payment over runs into seemingly insoluble difficulties when a mistaken payment is swallowed by an overdrawn account. The following example highlights the problem.

<table>
<thead>
<tr>
<th>Day</th>
<th>Opening</th>
<th>Transaction</th>
<th>Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>(£100,000)</td>
<td>Mistaken credit of £60,000 by M</td>
<td>(£40,000)</td>
</tr>
<tr>
<td>2.</td>
<td>(£40,000)</td>
<td>Bank meets cheque for $60,000</td>
<td>(£100,000)</td>
</tr>
</tbody>
</table>

If a claim were made against the bank on Day 1 then it is clear that there has been no actual payment over for the simple reason that no payments have been made out of the account. Unless the bank can argue that there has been a constructive payment over, a proposition discussed further below, it must repay M the full amount of his mistaken payment. But what if the claim is made on day 2? Has M’s payment been paid over on the pure model? That is a difficult question. Two additional facts, which will not always be present, will render the dispute easily capable of resolution. Suppose that the account holder had an overdraft limit of
£100,000. Suppose further that the account holder is wound up in insolvency at the end of Day 2 with no assets available to satisfy the claims of unsecured creditors. In that situation there is no point discussing whether the bank has the defence of payment over available because it will definitely be able to establish the defence of change of position. Given the overdraft limit, the only reason the bank met the cheque on Day 2 was the fact that the overdrawn balance in the account had been reduced by M’s payment. Had that payment not been made, the cheque would have been dishonoured by the bank. Moreover, if the bank has to repay £60,000 to M, the balance in the account will be pushed beyond the overdraft limit with no hope of the bank recouping the funds from M. That is most certainly a detrimental disenrichment on the faith of the mistaken payment. The defence of change of position is therefore established.

The easier situation out of the way, the more difficult question reappears. If the two facts just discussed (relevant overdraft limit, and supervening insolvency of the account holder) are not present, has the mistaken payment been paid over on the pure model? It is impossible to answer that question as a matter of logic. No presumption will help. One cannot apply the ‘first in, first out’ presumption if there is no money ‘in’ the account at all. It might be said that in this situation the bank has to fall back on the detriment / reversibility model of payment over. But it seems absurd to suggest that the bank’s position is less secure, and the plaintiff’s stronger, by reason of the fact that the account was overdrawn. As Dr Bryan says,
a plaintiff’s right to restitution from the bank should not turn on the fortuitous fact that the account happened to have a debit or a credit balance.\textsuperscript{109}

\section*{Difficulties created by the reversibility model}

The pure model of payment gets itself into difficulty in the situation just discussed. The reversibility or ‘detriment’ model of payment over, on the other hand, fares no better in some situations. That model requires the defendant bank to show that making restitution to the plaintiff will cause the bank to suffer some specific detriment which cannot be overcome merely be reversing the relevant credit to the customer’s account. McHugh JA, in the second appeal, thought that this was the right approach. As stated above, this is not an irrational test of payment over if one assumes that the bank must make out some defence to its \textit{prima facie} liability to make restitution. But in circumstances such as those present in \textit{ANZ v Westpac},\textsuperscript{110} where there were multiple debits and credits to the account after the mistaken payment, as well as the supervening insolvency of the customer, it is almost impossible to determine whether the bank will suffer a relevant detriment if required to make restitution. That is evidenced by the difficulty experienced by McHugh JA in applying the reversibility or detriment model of payment over. McHugh JA considered that unless Westpac repaid ANZ in full, Westpac would be left better off than it would otherwise have been. His Honour said that this could be demonstrated in three ways. But each of McHugh JA’s demonstrations led to a

\textsuperscript{109} M Bryan, \textit{Restitution and Banking Law} 179.

\textsuperscript{110} \textit{ANZ v Westpac} (1988) 164 CLR 662.
different conclusion. It is not necessary to delve into the intricacies of the three calculations. It is sufficient to stand back and observe that a test which requires a defendant to show specific detriment must be unworkable if a judge as well respected as McHugh JA applies it three times with three different results.

A series of important concessions

It is important to briefly note several other points before leaving the analysis of \textit{ANZ v Westpac}. The first is the fact that several important concessions were made by Westpac at each stage of the proceeding. Westpac conceded that at the time it received notice of the mistaken payment it should have realised that without the overpayment Jakes’ account would have been in excess of its overdraft limit. ANZ said, and Westpac accepted, that for this reason Westpac should have dishonoured all Jakes cheques which:

(a) were presented to Westpac for payment after notice of the mistake had been given to Westpac; or

(b) were presented to Westpac for payment before it received notice of ANZ’s mistake, but which could still have been dishonoured by Westpac.

The correctness of this concession was seriously doubted by the High Court:

‘It is … far from self-evident that Westpac was, when it received notice of the mistaken overpayment, obliged to … reverse the provisional inter-bank credits to collecting banks for cheques which had been presented at the clearing house and already debited against the drawer’s current account with it. Indeed, one is led to speculate about what Westpac’s position vis-à-vis Jakes would have been if it had, of its own initiative, dishonoured those cheques and reversed those entries and provisional
credits. Certainly, its position would have been a somewhat difficult one if it had subsequently turned out that ANZ’s claim for repayment could be met by a good defence on the part of Jakes.\footnote{Ibid 677-678.}

But the concession having been made the High Court was bound to apply it. More importantly, Westpac conceded that it was \textit{prima facie} liable to repay ANZ the mistaken payment, and that the onus fell on Westpac to establish the defence of payment over. Both these concessions are discussed further in Chapter 4.

\textbf{Constructive payment over}

Another concession made by Westpac was that the existence of an overdrawn account did not give a bank an automatic defence by way of constructive payment over. That concession accords with several cases discussed above. But the High Court considered that it was at least arguable that constructive payment over should be recognised:

\begin{quote}
‘The concession that, notwithstanding subsequent transactions, no part of the overpayment (or, for that matter, of the telegraphic transfer) should be seen as effectively and irrecoverably applied to eliminating the pre-existing indebtedness forecloses any argument that such appropriation would fall within the comments of Collins M.R. in \textit{Continental Caoutchouc}:

“He has thus no doubt benefited by getting his debt paid, but he has done so in discharging his primary duty of passing the money on to his principal. He has done nothing incompatible with his position as a conduit-pipe or intermediary. He was entitled to be paid, and has been paid by his debtor, who was no doubt put in funds to do so by the receipt of the money, and who therefore, and not the intermediary, has had the benefit of the windfall.”\footnote{Ibid 680.}'
\end{quote}
It is also interesting to note that during the first appeal, Mahoney JA was prepared to consider whether a third party deposit to an account *in credit* constituted a constructive payment over:

“In the case of a banker receiving money as agent for his customer, the banker, in theory, effects a transaction which, spelled out, will constitute a vesting of the money in the customer, a deposit by the customer in his account with the bank, and a consequent creation of a debt by the banker to the customer in respect of the money. But it is accepted by the parties, for the purposes of this appeal, that the bank, after crediting the $100,000 excess to the account of Jakes, could, ‘by a private book entry’, effectively reverse the position and the bank has been assumed therefore to be in the position of the parties considered in *The Colonial Bank case*113,114.

Despite Mahoney JA’s remarks, the notion of constructive payment over was not pursued by Westpac in the later appeals. It remains arguable that a constructive payment over should be treated in law as the same as an actual payment over to the principal and a payment back again from the principal to the agent, in much the same way that the law regards a set off of mutual debts.115

**Who gets the benefit of the part-repayment by the account holder?**

Having determined how much of the overpayment still remained in Westpac’s hands, the majority of the Court of Appeal held that this was the amount that Westpac must repay ANZ. With regard to the repayment of $2,500 made to ANZ by Jakes itself, Priestley JA said that:

113 *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84 (PC), considered above 95

114 *Westpac Banking Corporation v Australia and New Zealand Banking Group Ltd* (CA NSW, 23 August 1985) 2-3.

115 *Livingstone v Whiting* (1850) 15 QB 722, 723 (Lord Campbell CJ).
‘there is no reason why the appellant [Westpac] should have the benefit of Jakes’ small reduction of the balance which will still be owing to ANZ after recovery of the $39,320.72 still in its agent’s hands.’\textsuperscript{116}

Once it is accepted that both principal and agent are liable to repay a misdirected payment still in the hands of the agent, it seems appropriate that a plaintiff in the position of ANZ is entitled to combine its recoveries from the two sources, as long as double recovery is avoided. In insolvency law, the same principle applies to recoveries from both a principal debtor and a surety.\textsuperscript{117} This aspect of the Court of Appeal’s decision was not challenged in the High Court.

\textit{A special rule for banks / burden of proof?}

Apart from the ruling by the High Court that payment over does not require the establish of detriment, the most important facet of \textit{ANZ v Westpac} is the \textit{dicta} concerning the application of the agent’s defence when the agent in question is a bank. At first sight, the \textit{dicta} seem directed only to the proper allocation of the onus of proof. But it may be that the Court intended to go further. It is therefore important to set the relevant passage out in full:

\begin{quote}
Westpac’s concession to the effect that it bears the onus of displacing a prima facie liability to repay the amount of the overpayment makes it unnecessary to examine a question of some general importance which would otherwise arise. That question is whether the nature and scope of the business of a modern commercial bank in which both the lending and borrowing of money are activities to be pursued for profit and the fact that the receipt by a bank of a payment to the credit of a customer’s account is ordinarily accompanied by the immediate application of the money on behalf of the
\end{quote}

\textsuperscript{116} \textit{Westpac Banking Corporation v Australia and New Zealand Banking Group Ltd} (CA NSW, 20 June 1986).

\textsuperscript{117} RM Goode, \textit{Legal Problems of Credit and Security} (2nd edn, 1988) 196-197.
customer (ie, by way of repayment of existing indebtedness or by way of loan to the bank) have the effect of qualifying the applicability to such a payment of any general rule that a person who receives a payment made under fundamental mistake of fact as an intermediary on behalf of another is under a prima facie liability to himself repay it. There is strong authority supporting the view, implicit in the concession, that a bank is, in such circumstances, in the same position as other agents: see, eg, *Kerrison v Glyn, Mills, Currie & Co* \(^{118}\) and *Admiralty Commissioners v National Provincial and Union Bank of England Ltd*. \(^{119}\) None the less, as Samuels JA pointed out in the Court of Appeal, it may be arguable that where a banker “is subject to the anomalous responsibility exemplified in this case, it is for the party seeking repayment to establish the precise extent of its recovery”. That being so, we adopt Samuels JA’s comment that “the instant case should not be regarded as an authority for the contrary proposition”. \(^{120}\)

Two different interpretations of this passage seem to be open. The first is that the High Court was suggesting that agents, particularly banks, should be immune from liability in unjust enrichment. That proposition is advanced in Chapter 4. Indeed, an earlier part of the High Court’s judgment indicated that it did not consider the orthodox version of the agent’s defence to be unquestionable:

> ‘The prima facie liability to make restitution is imposed by the law on the person who has been unjustly enriched. In the ordinary case of a payment of money, that person will be the payee. However, when the person to whom the payment is directly made receives it as an intermediary (eg as agent for a designated principal), there may be uncertainty about the identity of the actual recipient of the benefit at the moment of payment.’ \(^{121}\)

As discussed in Chapter 4, there is much to be said for the view that the person who benefits by a mistaken deposit to a bank account is always the account holder. Consequently, he is the only person who should be liable in unjust enrichment to

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\(^{118}\) (1911) 81 LJKB 465 (HL).

\(^{119}\) (1922) 127 LT 452.

\(^{120}\) ANZ v Westpac (1988) 164 CLR 662, 675.

\(^{121}\) Ibid 673-674.
repay the mistaken payment. But that proposition is radically different from the current orthodoxy, as Chapter 2 showed.

The second possible interpretation is that the difficulties experienced in the banking context should, where insoluble, be borne by the party seeking repayment. Thus it is for that party to establish, not that he is entitled to recover, but the *extent* to which he is entitled to recover. Far less radical as that interpretation may be, it is curious none the less. In a context which accepts that an agent is *prima facie* liable to the plaintiff, any alteration of that liability because of circumstances subsequent to the agent’s receipt must surely be a matter for the agent to establish. That is, it seems entirely anomalous that once a cause of action is established at the moment of receipt, the person asserting the cause should have to prove anything more. The fact that the defendant finds it difficult to establish the extent to which he is entitled to a defence is neither here nor there. Particularly is this so in light of the long-standing fact that even the most careless plaintiff is entitled to recover a mistaken payment. But there is certainly other authority for the proposition that the onus lies on the plaintiff to exclude the agent’s defence. In *Agip (Africa) Ltd v Jackson* Millett J said:

‘This defence does not avail an agent who has accounted to his principal after notice of the plaintiff’s claim; but that was not the position in the present case. The evidence cannot be described as satisfactory, *but the burden of proof rests on the plaintiffs*, and they have failed to show that the defendants had such notice before 15 January 1985.’

122 *Kelly v Solari* (1841) 9 M&W 54.
Moreover, the Divisional Court in *Taylor v Metropolitan Railway*\(^ {125}\) held that the onus was on the plaintiff to prove either that the agent had not paid over the money or that the agent had notice at the time of any payment over.\(^ {126}\) Yet in each case the allocation of the burden of proof is made by assertion. No authority is cited. In fact, there is also authority for the contrary position – that payment over is a matter for the agent to prove.\(^ {127}\) But as a matter of principle it must be for the agent to satisfy the elements of the defence.

3. **Comparison with Change of Position**

In rejecting the idea that the agents’ defence required proof of specific detriment beyond payment over, the High Court of Australia said:

> ‘If the matter needs to be expressed in terms of detriment or change of position, the payment by the agent to the principal of the money which he has received on the principal’s behalf, of itself constitutes the relevant detriment or change of position.’\(^ {128}\)

This passage twice uses the phrase ‘change of position’ in describing the operation of the agent’s defence. A question immediately springs to mind. Is there any difference between the orthodox view of the defence of payment over described above, and the now-established defence of change of position? It has already been concluded that there is at least one difference.\(^ {129}\) On the model of payment over adopted by the High Court no detriment need be proved by the agent. This means

\(^{125}\) *Taylor v Metropolitan Railway* [1906] 2 KB 55 (Kennedy and AT Lawrence JJ).

\(^{126}\) Ibid 64.

\(^{127}\) *Re Bourne, ex p Bird* (1851) 4 De G & Sm 273, 276 (Sir JL Knight VC).

\(^{128}\) *ANZ v Westpac* (1988) 164 CLR 662, 682.

\(^{129}\) Above 120.
that the agent will have that defence on some occasions when no change of position can be established. In particular, change of position will not lie for the agent (commonly a bank) that can unilaterally recover a disenrichment by reversing the entry in its principal’s account.

The English cases revisited

The pure model of the payment over defence as defined by the High Court’s decision in *ANZ v Westpac*\(^\text{130}\) represents a departure from English law. The English cases considered earlier in this chapter held that a reversible credit entry to an account is not a sufficient act of disenrichment to establish the agent’s defence of payment over even where there have been subsequent transactions between agent and principal. For example, in a number of cases such as *Holland v Russell*\(^\text{131}\) the only reason why the defence was allowed was that the account between the principal and agent was settled. Although there had been no physical payment over of the money by the agent, the plaintiff was held not entitled to restitution from the agent. Implicit in this is the notion that the settling of the account prohibited the agent from re-opening past transactions on the basis that he had repaid a sum of money to the plaintiff. Hence, if the agent was required to make restitution to the plaintiff he would be left worse off than before the mistake had happened. That is the very harm avoided by the defence of change of position. But where there is no reason why the bank cannot reverse the credit entry to the

\(^{130}\) *ANZ v Westpac* (1988) 164 CLR 662.

\(^{131}\) (1863) 4 B & S 14, discussed above 94.
customer’s account, then on the English approach the bank should be required to
do so. Hence in Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia\textsuperscript{132} one
finds Lord Hobhouse saying that the defendant bank:

‘had only got to run a pen through some private entries in their own books and the
matter then would have stood in precisely the same position as it stood in before the
mistake was made’.\textsuperscript{133}

This sort of reasoning no doubt explains the position which the common law has
reached in relation to payment over. There is no payment over without detrimental
disenrichment. But as will be seen in Chapter 4, this reasoning does not justify the
requirement of payment over. In particular, the passage wrongly suggests that if
the bank can simply reverse the credit entry, the matter will always stand ‘in
precisely the same position as it stood in before the mistake was made’. In fact, as
Chapter 4 shows, the common law has reached a false sense of security in this
respect.

\textit{Other differences}

There may be other differences between payment over and change of position.
Professor Birks has analysed what he views as two illusory distinctions between
the two defences.\textsuperscript{134} The first is the requirement that the agent, at the time he pays
over, does not have notice of the plaintiff’s entitlement to restitution. The law has
not yet firmly adopted a stance as to the precise degree of notice or knowledge

\textsuperscript{132} (1885) 11 App Cas 84 (PC).
\textsuperscript{133} Ibid 88-89.
\textsuperscript{134} P Birks, \textit{Restitution and Banking Law} 208-214.
required to disentitle a defendant from pleading change of position. Most commentators think that it would be wrong for the law to say that a careless defendant is disqualified from the change of position defence; the test should be one of dishonesty.\textsuperscript{135} Professor Birks suggests that the same test should apply to determine whether an agent is prohibited from relying on a payment over.\textsuperscript{136} The difficulty with this view is that the cases in relation to the agent’s defence repeatedly include the requirement that there be an absence of notice of the plaintiff’s entitlement to restitution on the part of the agent. In \textit{Holland v Russell}, for example, it was held that when the agent paid over he had to have had a ‘full belief in the validity of the transaction’.\textsuperscript{137} And in \textit{Edwards v Hodding}\textsuperscript{138} an agent who paid over before receiving answers to inquiries he had initiated was found liable not because he had express notice of the plaintiff’s rights, but because he had what was ‘equivalent to express notice.’\textsuperscript{139} It would be strange if the law suddenly abandoned the absence of notice requirement for the agent’s defence in favour of an absence of dishonesty. That is not to say that the honest agent who pays over with notice should not have a defence. Rather, such an agent should be able to plead change of position.

Professor Birks also sees no difference in relation to the requirement of payment over. For change of position the relevant question is not whether the very

\textsuperscript{135} Above 18 n25.
\textsuperscript{136} P Birks, \textit{Restitution and Banking Law} 212.
\textsuperscript{137} \textit{Holland v Russell} (1863) 4 B & S 14, 17 (Erle CJ).
\textsuperscript{138} (1814) 5 Taunt 815.
\textsuperscript{139} Ibid 820 (Heath J).
money received has been paid out on the faith of the receipt. Rather, the test of change of position asks whether, by an act causally related to the enrichment received, the defendant has lost the benefit of that enrichment. Consequently, the mere fact that the money in question has been spent does not establish the defence of change of position. Conversely, the defence may exist even where the money in question has not been spent. Can the same be said of the agent’s defence of payment over? Professor Birks suggests that it can. That may not be right. The example he uses is the agent who is not required to keep money received for his principal separate from his own, and pays the money in question into his own general account, later withdrawing an equivalent sum to pay his principal. Professor Birks says that in relation to both the agent’s defence and change of position the rule in *Clayton’s Case* – first in, first out – is used in the same way:

‘*Clayton’s Case* merely provides the solution to a sub-issue which arises when the reliance in question first takes the form of an entry in an account.’

The sub-issue referred to is whether the defendant has been disenriched. Professor Birks sees that as the crucial question for both change of position and the agent’s defence.

That seems doubtful. Say an agent’s general account is in credit in the amount of £1,000. The agent then receives by mistake £200 for his principal. The

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141 P Birks, *Restitution and Banking Law* 213.
142 *Devaynes v Noble (Clayton’s Case)* (1816) 1 Mer 568.
143 P Birks, *Restitution and Banking Law* 213.
agent pays the £200 into his account, does not touch it for a week, then withdraws £200 and gives it to his principal. Has he paid over, thereby satisfying the agent’s defence? Probably not. If the rule in *Clayton’s Case* is used to determine whether a particular sum deposited into account still remains ‘in’ that account, as it was in *ANZ v Westpac*, then the answer is that the plaintiff’s £200 is still in the account. The agent may subjectively have intended to withdraw the last £200 paid in. But, at least in the first instance, the right to elect which debt is satisfied by which repayment is not the account holder’s. In the first instance the right of election is the debtor’s (here, the bank). A communication of the debtor’s election is required. If the debtor (bank) does not elect, the creditor (account holder) can do so, but again the election must be communicated. There is persuasive authority for the view that the mere fact that a payment exactly equals a particular debt does not establish an objective intention to appropriate. No appropriation having been made, the rule in *Clayton’s Case* applies. In our example, the result of applying that rule is that the agent still has the claimant’s money, and is not entitled to plead payment over. But it is inconceivable that he would fail if he pleaded change of position. The agent’s overall wealth has declined precisely because of the payment received from the mistaken payer.

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145 *Cory Brothers & Co v The Owners Of The Turkish Steamship ‘Mecca’* (1897) AC 286 (HL).
146 *Leeson v Leeson* (1936) 2 KB 156 (CA) 161 (Greer LJ); *Re Walsh, Ex parte Deputy Commissioner of Taxation* (NSW) (1982) 42 ALR 727 (Fed C of Aust) 728-9 (Lockhart J); *Knysh v Corrales Pty Ltd* (1989) 15 ACLR 629 (Full Fed C of Aust) 633.
In this respect the distinction between the agent’s defence and change of position may be more clearly illustrated. Suppose the agent pays the money received on behalf of his principal into his account at one bank. He then pays the same amount to his principal by withdrawing cash from his account at a different bank. It seems impossible for the agent to establish payment over. The answer to the basic question ‘what happened to the plaintiff’s money?’ is that as far as the plaintiff is concerned the agent still has it. Again however, it is inconceivable that the agent would be denied the defence of change of position. The same conclusion arises here as in relation to the first point: payment over is rendered irrelevant by the availability of change of position.

As discussed, the most important difference between the defence of payment over and change of position is one that is particularly important to banks. Where a bank can without detriment reverse a credit entry to reflect the fact that it has made restitution to the plaintiff, the defence of change of position will not be established. However, on the Australian approach to the defence of payment over, the fact that the relevant credit entry in the customer’s account can be reversed is irrelevant. The Australian test of payment over simply asks whether there has been ‘payment by the agent to the principal’,\(^\text{148}\) using if necessary ‘the ordinary rule of appropriation of debits against credits (and vice versa) in a single running account between banker and customer’.\(^\text{149}\) That is not the English approach. There is inconsistency then within the common law. Furthermore, Chapter 3 shows that

\(^{148}\) *ANZ v Westpac* (1988) 164 CLR 662, 682.

\(^{149}\) Ibid 676.
both common law approaches are inconsistent with the treatment in equity of an agent’s liability to make restitution.

B. WHEN DOES A BANK RECEIVE MONEY AS AGENT?

Is it correct to say that a bank receives money as agent on behalf of the relevant account holder when a deposit is made by a third party? A perusal of the cases considered above suggests that the answer is clear. The agent’s defence of payment over has been applied in a number of cases where the defendant was a bank. All those courts must therefore have treated the bank as an agent. But as noted below, one passage recently inserted into the leading authority on the law of agency, *Bowstead and Reynolds*, might be taken as suggesting that the agent’s defence has no role to play when money is received by a bank, because a bank does not really receive as agent at all. Moreover, some commentators are avowedly hostile to the notion that a bank ever acts as agent in receiving money. Professor Geva, for instance, thinks that the notion is ‘quite contrary to principle’.* Chitty on Contracts*, on the other hand, regards it as ‘indisputable’ that the recipient banker receives as agent. Who is right? The answer lies in the distinction between two situations: (1) where the deposit is made by the account holder himself, and (2) where the deposit is made by someone other than the

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150 *Bowstead and Reynolds* 624.


account holder.

1. **MONEY DEPOSITED BY ACCOUNT HOLDER**

There is no agency relationship at play when a customer deposits money into his own account. The deposit of funds is purely a loan of money from the customer to the bank. In no sense does the bank take the money in question as the agent of the customer.\(^{153}\) There is merely a contract of loan, an exchange between debtor and creditor.\(^{154}\) Most importantly, when a bank accepts money from a customer to be credited to his own account, the bank is not accepting the money on behalf of someone else. It is not a three party situation (depositor, bank, account holder). Instead, the transaction involves, and affects the legal rights of, only two parties.

2. **MONEY DEPOSITED BY THIRD PARTY\(^{155}\)**

If someone other than account holder makes a deposit into a bank account, the bank acts as agent when it takes possession of that money. Some doubts have been expressed whether that is so. Professor Goode says that it is ‘somewhat loose’ to say that a collecting bank receives money as the agent of the relevant account holder.\(^{156}\) And there is a passage in *Bowstead and Reynolds* which might

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\(^{153}\) *Foley v Hill* (1848) 2 HLC 28 (HL). *Foley v Hill* is considered in more detail in Chapter 4, 254.

\(^{154}\) *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 (CA) 127 (Atkin LJ).

\(^{155}\) On occasion throughout this work, a deposit to an account by someone other than the account holder is referred to as a ‘third party deposit’. The third party depositor will often be the plaintiff seeking restitution from the account holder’s bank in relation to the sum deposited.

be taken as suggesting that it is wrong to regard a bank in receipt of a misdirected third party deposit as an agent. Introduced for the first time in the latest edition of that leading work, Professor Reynolds includes this observation:

‘Some of the cases in which the agent is held liable do not really refer to agents but rather to persons only at best describable as intermediaries. In many cases they have been banks. Thus in Kleinwort, Sons & Co. v Dunlop Rubber Co. the price of goods sold was assigned to a bank and notice given to the debtor, who by mistake paid another bank which was itself assignee in respect of the price of other goods of the same seller. That bank was held liable to refund the money; but the finding of the jury that the second bank received the money as agent for the original seller does not really accord with the facts. Such cases have little relevance to agency law.’

As discussed below, the law does treat a bank that receives a third party deposit as an agent. Nevertheless, it may be true to say, as the passage from Bowstead and Reynolds suggests, that banks in this situation are not really agents in the full sense of the word but intermediaries. This word helps us to note that banks act as agents for some purposes but not others. Some cases, examined below, have decided exactly that. But in this context the question should be turned around, to be whether the principles which apply to ministerial recipients should apply to banks even if they are not agents for all purposes or in the full sense of that word. The answer, clear from the cases already, is that the defence of payment over does apply to banks. That conclusion is underlined by the cases examined next.

**Cash**

When a debtor hands over a bundle of notes and coins to a teller at the creditor’s bank, the bank takes the money from the debtor as the creditor’s agent. In two

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157  Bowstead and Reynolds 624.
House of Lords decisions that proposition was accepted without question. As discussed shortly, the notion that the bank as acting as agent required refinement in the circumstances of one of those cases, The Laconia. For present purposes only the essential facts of that case need be noted. The plaintiff company owed instalments of hire charges to the owners of a ship. The plaintiff was instructed by the owner to make payments into a certain bank account. Lord Wilberforce expressly noted that in accepting the company’s payments, the bank to which the money was paid was acting as ‘agents of the owners’. So too did Lord Salmon and Lord Fraser. In the other House of Lords decision, Kerrison v Glyn, Mills, Currie & Co, Lord Atkinson said that ‘undoubtedly, the defendants were the agents designated by [the account holder] to receive the money from [the plaintiff]’.

Many cases have affirmed that payment of an amount owed to an account holder is complete at the moment the payment is made to the bank; notification to the account holder is not necessary. That assumes, of course, that the contract

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160 Ibid 873.
161 Ibid 880.
162 Ibid 886.
163 (1911) 81 LKB 465 (HL).
164 Ibid 470.
165 eg Chambers v Miller (1862) 13 CB (NS) 125; 32 LJ (CP) 30; Momm v Barclays Bank International Ltd [1977] QB 790, 802 (Kerr J).
creating the debt to the account holder does not require payment to be made by way of cash (ie currency). The important point here is that the only way that the law could decide that payment to the account holder is complete at the moment the payment is made to the bank is by applying a fundamental tenet of agency law: payment to the agent is payment to the principal.  

There is nothing new in this. In *Eyles v Ellis* the plaintiff’s tenant was in the habit of paying his rent into the plaintiff’s bank account. Best CJ said that ‘the plaintiff had made the Maidstone bankers his agents, and had authorised them to receive the money due from the defendant.’ Lord Shaw noted in *Kerrison v Glyn, Mills, Currie & Co* that the case was:

‘… only of importance on account of an able attempt by the respondents’ counsel to distinguish the position of a banker from the position of any other recipient of money acting as factor or agent’.  

The House of Lords held that that attempt failed.

There is earlier English authority which, at first glance, appears to be contrary to the proposition that a bank accepts as agent for its customer a deposit of money from a third party. In *Midland Bank Ltd v Conway Corporation* a customer of the defendant bank owned a house in England. For some time the

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166 Below 226.
167 (1827) 4 Bing 112.
168 (1911) 81 LJKB 465 (HL).
169 Ibid 471.
170 [1965] 1 WLR 1165.
customer had been a resident in Peru. Whilst there she let her house to a tenant. The local council became aware that the house was causing a nuisance. Under the Public Health Act 1936 a nuisance abatement notice could be served on the ‘owner’ of the house. ‘Owner’ was defined in the Act as including a person who received the rent of the property ‘whether on his own account or as agent’. For some time the tenant had been paying his rent by way of deposit into the owner’s account at Midland Bank. The council served an abatement notice on the bank. Was the bank liable to abate the nuisance? On one view the bank was so liable. It was in receipt of rent as an agent of the owner. The bank therefore seemed to fall within the definition of ‘owner’ under the Act. But the Court of Appeal held that the bank was not liable. Lord Parker CJ said:

‘… the bank did not in my judgment receive such sums as agent in the sense in which that word is used in the Act.’\(^{171}\)

The important point was that the bank did not receive the deposits of rent as agent \textit{in the sense in which that word is used in the Act}. The definition in the Act was, said Lord Parker CJ, meant to apply only to:

‘… someone who does more than act as a mere conduit pipe … It denotes in my view someone specially appointed, such for instance … as rent collectors or managers.’\(^{172}\)

It is clear from Lord Parker CJ’s judgment that he considered that the bank was acting as an agent (‘a mere conduit pipe’), but not in the sense in which the word agent was used in the Act. The judgment of Sachs J, despite agreeing with that of

\(^{171}\) Ibid 1170.
\(^{172}\) Ibid 1169.
Lord Parker CJ, appears to be to the contrary. He said:

‘Here the money was received by virtue of the relationship of banker and customer; and that is quite a different character from that of an agent.’\(^{173}\)

Browne J left the question open:

‘Even assuming without deciding for a moment that a banker is an agent to receive money which is paid into his customer’s account….’\(^{174}\)

The view of Lord Parker CJ is preferable to that of Sachs J. Only the former is consistent with the later House of Lords decision in *The Laconia*.\(^{175}\) Indeed, *The Laconia* almost certainly solves the very problem which arose in *Midland Bank Ltd v Conway*. In *The Laconia* the owner of a chartered ship had the contractual right to withdraw the vessel for late payment. The hirer was required to pay instalments to the owner’s bank. A payment was made late. The vessel was subsequently withdrawn and the late payment returned to the hirer. The hirer argued that the right to withdraw the vessel had been lost by the bank’s acceptance of the late payment, the bank acting in this respect as the owner’s agent. The House of Lords rejected the hirer’s argument. But it was not on the basis that the bank was not the owner’s agent to receive third party payments. Rather, as seen above, the House of Lords held that the bank was acting as agent, but – and this is the crucial point – the bank was an agent with limited authority. In particular, the bank had no authority to waive the owner’s rights. Similarly, it was open to the

\(^{173}\) Ibid 1171.
\(^{174}\) Ibid 1173.
Court in *Midland Bank Ltd v Conway* to construe the legislation’s use of the word agent as excluding an agent who had no authority other than to accept payments. That is exactly what Lord Parker CJ did in that case. For this reason, his view must be preferred to that of Sachs J.

**The passing of property**

The reason why some commentators refuse to accept that a bank receives as agent relates to the passing of property. Title to notes and coins deposited by a third party with a bank become the bank’s property.\(^\text{176}\) The bank merely becomes indebted to the account holder for an equivalent sum. That fact, it is said, is incompatible with the bank having collected the money as agent of the account holder.\(^\text{177}\) But the passing of title is not the determinative fact. Often, of course, an agent is under a duty to keep property received for his principal separate,\(^\text{178}\) and such an agent is treated in equity as a trustee of that property.\(^\text{179}\) But a person may collect money as agent on behalf of another even though he is only personally accountable to his principal for the sums received.\(^\text{180}\) An agent may be required to collect money on behalf of his principal, but not be required to either (a) pay the very notes and coins received to his principal, or (b) hold that money or its

\(^{176}\) *Foley v Hill* (1848) 2 HLC 28, 36 (Lord Cottenham LC); *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA, The Brimnes* [1975] QB 929 (CA), 969 (Cairns LJ).


\(^{178}\) *Gray v Haig* (1855) 20 Beav 219; *Bowstead and Reynolds* 253-254.

\(^{179}\) *Foley v Hill* (1848) 2 HLC 28, 35-36 (Lord Cottenham LC).

\(^{180}\) *Westpac Banking v Savin* [1985] 2 NZLR 41 (CA) 69 (Richardson J).
substitute (such as the balance of a bank account into which the money is deposited) on trust for his principal. But he is still an agent. There are many examples in the reports of principals and agents making arrangements pursuant to which the agent is entitled to treat receipts on behalf of his principal as the agent’s own funds, whilst remaining under an obligation to pay the principal an equivalent sum.\(^{181}\) That is the very reason why the courts have rejected attempts ‘to distinguish the position of a banker from the position of any other recipient of money as factor or agent’.\(^{182}\)

**Electronic funds transfers**

The position concerning payment by electronic funds transfer is a little more difficult to analyse in legal terms, though it would be surprising if the result were different from the case of cash payments. Some things are clear. Despite its name, nothing is actually transferred from debtor to creditor, or from the debtor’s bank to the creditor’s bank. No property or claim passes from one to the other.\(^{183}\) The transaction is carried out by means of a series of accounting entries by the debtor’s bank, the creditor’s bank, and any intermediary banks.\(^{184}\) A funds transfer is in fact merely a process pursuant to which an instruction given by the debtor to his bank results in a credit being made to the creditor’s account by his bank.\(^{185}\)

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\(^{181}\) *King v Hutton* [1900] 2 QB 504 (CA); *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374, 382 (Bramwell J); *Henry v Hammond* [1913] 2 KB 515; *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd’s Rep 658. See generally *Bowstead and Reynolds* 253-254.

\(^{182}\) *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465 (HL) 471 (Lord Shaw).

\(^{183}\) *R v Preddy* [1996] AC 815 (HL).


\(^{185}\) Ibid 504-505 n75.
There is, however, no doubt that the law treats an electronic transfer made through the banking system as involving a ministerial receipt by the payee’s bank. That was clearly the view of the High Court of Australia in its unanimous judgment in *ANZ v Westpac*. That case concerned an electronic transfer of funds from one bank to another for the credit of the latter’s customer. The High Court had no difficulty accepting that ‘in accordance with ordinary banking practice’ an electronic funds transfer is ‘the equivalent of a payment of cash’ and that the agent’s defence of payment over applied. That defence applied because:

‘The funds were received by Westpac solely in the capacity of intermediary for Jakes…. not on [Westpac’s] own behalf as principal but as an intermediary; they were paid to it and received by it as Jake’s banker on the express basis that they were to be credited to Jake’s account and there were in fact so credited.’

When the same case was before the NSW Court of Appeal, McHugh JA observed:

‘There is, of course, much authority which supports the view that, in the absence of a finding that a bank has received money as principal … it is to be treated on the same basis as an ordinary agent…. But the relationship between a bank and its customer is different from the ordinary agency relationship. When a bank collects the proceeds of cheques or, as in this case, a telegraphic transfer, and credits it to the customer’s account, the relationship between the parties is that of principal and agent. However, once the bank has collected the money and placed it to the account of the customer, the relationship of the parties in respect of that money becomes that of debtor and creditor’.

Whilst the relationship between banker and account holder may be ‘different from

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187 Ibid 668.
188 Ibid 674-675.
189 Westpac Banking Corporation v Australia and New Zealand Banking Group Ltd (CA NSW, 20 June 1986).
the ordinary agency relationship’, the clear fact is that the bank, at the moment of receipt, receives the funds paid by a third party as agent for the purposes of the agent’s defence at common law.

**Cheques**

The next situation which falls for consideration concerns the collection and payment of cheques. What is the position regarding the collection by a bank of a cheque drawn by A in favour of C and deposited into C’s bank account? The cases and the literature are replete with references to the fact that in the ordinary course of events the bank acts as C’s agent in collecting cheques.\(^{190}\) When the collecting bank is paid the value of the cheque by the drawer’s bank, the collecting bank receives those proceeds as the agent of C. That is so even though no cash actually changes hands. It is true that immediately the cheque is paid, the collecting bank borrows that sum from C. The proceeds thereafter form part of the bank’s assets, and the bank owes, as debtor, an equivalent sum to C. But that fact does not alter the agency status of the bank at the moment of receipt. That is clearly borne out by the cases.\(^{191}\) The proceeds are collected by the bank on behalf of C, the bank acts as agent, and there are three parties involved in the receipt.

\(^{190}\) eg *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 160 CLR 251, 263 (Gibbs CJ); *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, 671 (Kerr J). There are some situations, not relevant here, where the bank takes the cheque from its customer as a holder for value in its own right: see *Capital and Counties Bank Ltd v Gordon* [1903] AC 240; *Westminster Bank Ltd v Zang* [1966] AC 182; *Barclays Bank v Astley Industrial Trust* [1970] 2 QB 527.

\(^{191}\) *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 160 CLR 251, 263-4 (Gibbs CJ) 273 (Brennan J); *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 292 (Millett J), aff’d [1991] Ch 547 (CA).
That means that payment made by cheque is a payment to the account holder. That is why in cases concerned with restitutionary liability the courts refer to a payment by cheque from A to B as being equivalent to a payment in cash from A to B.\textsuperscript{192}

\textit{Collecting bank also paying bank}

Is there any difference in analysis where the collecting bank also acts as the paying bank? The answer is no. The collecting bank still receives the relevant funds as agent. Take the converse situation first, where the collecting bank is not the paying bank. In that situation, the paying bank can be regarded as making a third party payment to the collecting bank for the credit of the latter’s customer. But in truth the paying bank is acting as agent on behalf of its customer. Consequently, the third party payer is really the drawer of the cheque, acting through the agency of his own bank. Thus the three parties involved, so far as the agency status of the collecting bank is concerned, are: Payer (drawer of cheque), Agent (collecting bank) and Principal (drawee of cheque / customer of collecting bank). Now take the situation where the collecting bank is also the paying bank. The same three parties are present. In effect, the bank receives money as agent paid by one account holder to another, and then immediately borrows the sum paid from the latter.

\textsuperscript{192} RE Jones Ltd v Waring and Gillow Ltd [1926] AC 670 (HL) 687 (Lord Shaw).
**Drawer of cheque also payee**

There is one situation relating to cheques which does not involve the collecting bank receiving as agent – when the drawer of the cheque is also the payee. In that situation, there are only two parties: the drawer of the cheque (who is both payer and payee) and the collecting bank. The bank does not receive from a third hand as agent for the account holder. So if a person has two bank accounts, and he draws a cheque on one bank account and deposits it into his other bank account, the bank does not collect the proceeds of the cheque as agent. In this situation, the bank receives the money credited to the second account from the holder of that account. When a bank receives money for the credit of an account, and the person paying the bank is the holder of that account, the bank does not receive as agent.

This point can be seen more clearly if one supposes that there was no cheque involved. If instead of writing a cheque, the account holder had withdrawn cash from one account and deposited it in the other, it would be clear that the bank does not receive the cash as agent. The cash deposit would merely represent a loan of money from the account holder to the bank. A bank does not act as agent in accepting such a loan. There should be no difference when the same transaction is effected by means of a cheque. The holder of the two accounts simply short circuits the process. When he draws a cheque on one account and deposits it into his other account, two transactions are collapsed into one. First, there is a payment from the holder of the first account to the holder of the second account. As the holder of the two accounts is the same person, the payment simply represents a withdrawal by the account holder. Secondly, there is a loan of the money so paid.
by the holder of the second account to the bank at which that account is held. That loan, like any deposit by an account holder, does not involve the receipt by the bank as agent.

This illustrates that the same proposition must be true where the cheque is drawn on one bank and deposited into an account held by the drawer at another bank. There is merely a transfer of funds by the one person between two of his accounts. No agency relationship is involved in the second bank’s receipt. The situation must be treated as equivalent to a withdrawal of cash from the first bank, and a payment of that cash into the account at the second bank by the account holder. The second bank does not receive as agent.

**Trustees, company directors and cheques**

This has an important implication for the analysis of some ‘knowing receipt’ cases. It is convenient to canvass that implication now. Say a trustee (T) has two accounts at a bank. One of those accounts is held on trust, the other is T’s personal account. T draws a cheque on the trust account payable to himself, and deposits the cheque into his personal account. In that case the bank receives the amount of the cheque on its own behalf, not as agent on behalf of T. Again, it is the same as if T had withdrawn cash from the trust account and given the cash back to the bank as a deposit to T’s personal account. The bank receives the cash on its own behalf. The two party analysis should apply even where the accounts are held in different capacities – one as trustee, the other personally. There are still only 2 parties
involved: account holder and bank. That is because of the well-established principle that, even when an account is held on trust, the debt is owed by the bank to the trustee.  

An example of this sort of case exists in *Imperial Bank of Canada v Begley*. B executed a power of attorney giving A authority to operate her bank account at Imperial. A also had a bank account at Imperial which at all times was overdrawn. A drew a cheque on B’s account in favour of himself and deposited the cheque into his overdrawn account. The Privy Council held that Imperial was liable to make restitution to B. The actual ground of the decision was that the bank ‘for their own benefit concurred in the transaction without any inquiry…’. On the analysis adopted here that is the right approach. The bank received for its own benefit in the sense that it did not receive as agent. The benefit derived from the bank’s status as principal. As discussed in the next section, the fact that B’s account was overdrawn at the time the bank received the money is incidental.

This analysis is supported by Blackburn J’s approach in *Bailey v Finch*. In that case F became the executor of Mrs A’s estate. At the time of her death Mrs A held a bank account in credit in the amount of £654l. F caused the bank to transfer that sum to a new account in F’s name. Blackburn J analysed the transfer in this way:

193 *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107.
194 [1936] 2 All ER 367 (PC).
195 Ibid 371 (Lord Maugham).
196 (1871) LR 7 QB 34.
‘That was to all intents and purposes a payment of the debt which they owed to the testatrix, and would amount to a loan of that sum of 654l by Mr Finch to the bank…. It was a personal contract between him and the bank.’

A transfer effected by an account holder to his own account is the same as a loan of money from account holder to bank; in other words, a deposit. A deposit involves the bank receiving as principal and not as agent.

The same analysis should also apply to cheques drawn by company directors. Directors of a company are, for the purposes of claims in ‘knowing receipt’, regarded as trustees of the company’s property. Consequently, if a director draws a cheque on the company’s bank account and deposits that cheque into his personal account, the bank which holds his personal account does not receive as agent. It is the same as the trustee example above. There are only 2 parties involved in the transfer of funds: director and bank. The bank does not receive as agent.

**Collected money credited to overdrawn account**

It has been established so far that in relation to the three main payment mechanisms (cash, cheque and electronic funds transfers) a third party payment is received by the payee’s bank as agent. This conclusion is recognised in *Paget*, but with a twist:

‘A bank does not normally receive funds for its own benefit, but rather as agent for the

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197 Ibid 41.
198 *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 1 WLR 1555; *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (CA).
underlying account holder: the main exception is when funds are used to discharge a customer’s overdraft, whether directly or by way of set-off. ¹⁹⁹

The point of immediate concern flowing from this passage relates to the use of money to discharge a customer’s overdraft. Is it correct to say that a bank receives funds as principal and not agent when the account to which a third party payment is credited is overdrawn? The quoted passage suggests that it is. Even if the funds are given to the bank by a third party the bank will not be acting as agent when the account is overdrawn. That view also appears in Jacobs’ Law of Trusts in Australia:

‘It is hard, for example, to see how a banker acts as agent for a customer when it collects proceeds of a cheque deposited by the customer, for credit of an overdrawn account of that customer.’ ²⁰⁰

The better view is to the contrary. A bank does receive funds collected on behalf of its customer as agent even where the account to which the money is credited is overdrawn. ANZ v Westpac ²⁰¹ makes this clear. In that case, the relevant account was overdrawn at the time the mistaken payment was made. This did not deter the court from holding that the payment was received by the bank as an agent for the purposes of the defence of payment over:

‘The funds were received by Westpac solely in the capacity of intermediary for Jakes…. not on [Westpac’s] own behalf as principal but as an intermediary; they were paid to it and received by it as Jake’s banker on the express basis that they were to be

¹⁹⁹ Paget 432.
credited to Jake’s account and they were in fact so credited.\(^{202}\)

One sees here the very point made in *Bowstead and Reynolds* noted above\(^{203}\) – that it is perhaps better to refer to banks as intermediaries rather than agents. But this makes no difference to the application of the principles of ministerial receipt. Those principles apply even where the relevant account is overdrawn. There is just as much a collection by an agent (or an intermediary) for a principal followed by an adjustment of the balance owing between them when the account is overdrawn as there is when the account is in credit. The state of the customer’s account is irrelevant to the question whether, at the instant the bank first comes into possession of the money, it is acting as the customer’s agent for the purposes of the principles of ministerial receipt. If the receipt is from a third party, the bank receives not on its own behalf but on behalf of another.

**C. CONCLUSION**

An agent who has received money on behalf of a principal will have a complete defence to a claim in unjust enrichment if, before acquiring notice of the facts underlying that claim, the agent pays over the money to or at the direction of his principal. The agent does not need to establish any specific detriment beyond the fact of payment over. According to some of the English authorities the agent will not be entitled to the benefit of that defence if the payment over takes the form of a reversible book entry. In Australia the position is different, at least where the

\(^{202}\) Ibid 674-675.

\(^{203}\) Above 143.
recipient agent is a bank and there have been subsequent transactions to the relevant account. In that situation the bank need only establish payment over. No further detriment need be established by the bank to defeat the plaintiff’s claim to recover the money paid. Apart from a dictum in ANZ v Westpac,\(^{204}\) and Lord Mansfield’s decision in Sadler v Evans\(^{205}\) the Australian and English authorities speak with one voice on the most fundamental issue. In the absence of payment over, a bank is liable to the plaintiff in unjust enrichment even when the bank received as agent.

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\(^{204}\) ANZ v Westpac (1988) 164 CLR 662.

\(^{205}\) (1766) 4 Burr 184.
CHAPTER 3 - BENEFICIAL RECEIPT IN EQUITY

This chapter explores the equitable treatment of agents in respect of claims in unjust enrichment, in particular the claim for ‘knowing receipt’.\(^1\) In this context the greatest controversy concerns the position of banks. Money is often transferred to a bank by one person for the credit of another person’s account. It sometimes transpires that the first person was acting in breach of trust or fiduciary duty when he transferred the money in question. Can the bank be liable for ‘knowing receipt’? It is necessary to start with the position of agents in general. Two types of agents are distinguished: agents of the trustee, and agents of persons other than the trustee.

A. CLAIMS AGAINST AGENTS IN GENERAL

1. THE TRUSTEE’S AGENT

Say a trustee appoints an agent to assist in some transaction concerning the trust. As part of that transaction, the trustee transfers trust property to the agent. So far as the agent can tell there is nothing improper about the transfer. He has merely been engaged by a trustee to perform an ordinary business transaction. In fact, however, the trustee is using the agent to commit a fraud for the trustee’s own personal benefit. Can the agent be made liable to beneficiaries, and if so, on what basis? The answer is that the agent may be liable, but not for ‘knowing receipt’.

\(^1\) See Chapter 1, 36.
Agents of trustees are not liable for receiving trust property on behalf of the trustee. They can only be liable in two other respects. The first is as an accessory to the fraud of the trustee. Liability as an accessory to a breach of trust requires proof of the accessory’s dishonesty.\(^2\) The second is as trustee \textit{de son tort}. Such liability arises where the agent takes it upon himself to deal with the trust funds outside the scope of his agency.\(^3\)

\textit{Mara v Browne}\(^4\) is a good example of the immunisation of a trustee’s agent from liability for the mere receipt of misdirected trust property. Beneficiaries of a trust sought to make two solicitors liable as constructive trustees. The primary breach of trust was committed by an express trustee. He had invested trust money in eight mortgages. It was held that those mortgages were improper investments for the trustee to make. In order to facilitate the mortgage investments, the trustee paid the trust money to the two solicitors for the trust, who passed the funds on to the borrowers. AJ Smith LJ said:

\begin{quote}
‘North J found, and I agree with him, that eight of the mortgages taken for the trust funds were speculative and risky, and not such as could be justified by a trustee - in fact, these investments constituted breaches of trust. Although this might well render the trustees liable for a breach of trust, it certainly does not per se render their solicitor so liable.’\(^5\)
\end{quote}

The Court of Appeal exonerated the solicitors on the basis that an agent in possession of money which he knows to be trust money, so long as he acts

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\item\(^2\) \textit{Royal Brunei Airlines Sdn Bhd v Tan} [1995] 2 AC 378 (PC).
\item\(^3\) \textit{Blyth v Fladgate} [1891] 1 Ch 337.
\item\(^4\) [1896] 1 Ch 199 (CA).
\item\(^5\) Ibid 251.
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honestly, is not accountable to the beneficiaries unless he intermeddles in the trust by doing acts characteristic of a trustee and outside the duties of an agent.

There are two reasons why the law restricts the liability of an agent of a trustee to those situations in which the agent has himself acted dishonestly or outside the scope of his agency. First, in acting on behalf of the trustee the agent does not receive the trust property for his own benefit. He was merely a conduit pipe through which possession of the property passed from the trustee to a third party. The agent did not at any stage assert his own title to the trust property adversely to the trust. The same rationale applies in reverse. An agent of a trustee who receives money from a third party to be paid over to the trustee is not personally liable to anyone other than his principal. This rationale is evident, for example, in *Nickolson v Knowles*. In that case N was employed as G’s agent to receive money owing under an insurance policy. After N was paid the insurance money he was notified of K’s claim to be G’s secret partner. K told N not to pay the money over to G. Faced with competing claims, N interpled. Leach VC held that the agent was bound to pay his principal G:

‘… a mere agent to receive for the use of another could not, by notice, be converted into an implied trustee. That his possession was the possession of the principal.’

Thus when an agent of a trustee holds money on the latter’s behalf, the agent is entitled to deflect third party claims by saying ‘Take that up with my principal!’

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7 (1820) 5 Madd 47.
8 Ibid.
The second consideration is a more practical one. If an agent of a trustee were to be made liable in circumstances where, though he had not acted dishonestly, there was a suspicion that the trustee might be acting in breach of trust, no agent could ever feel safe in carrying out the instructions of a trustee. The celebrated case of *Barnes v Addy*\(^9\) highlighted equity’s willingness to protect agents of trustees in this respect. Lord Selbourne said:

‘strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees… If those principles were disregarded, I know not how any one could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees.’\(^{10}\)

Many other cases both before\(^11\) and after\(^12\) *Barnes v Addy* have held that agents of trustees should not be at risk of liability for acts within the scope of their agency. Even where the agent received trust property as a result of a breach of trust, the agent will be free from liability to the trust’s beneficiaries as long as the scope of the agency is not exceeded and as long as the agent does not act dishonestly.\(^{13}\) The agent will be held to have acted dishonestly where he knows

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\(^9\) *Barnes v Addy* (1870) LR 9 Ch App 244 (CA)

\(^{10}\) Ibid 252.

\(^11\) *Lockwood v Abdy* (1845) 14 Sim 437; *Maw v Pearson* (1860) 28 Beav 196; *Morgan v Stephens* (1861) 3 Grff 226, 236 (Stuart VC); *Williams-Ashman v Price & Williams* [1942] Ch 219.

\(^12\) *Lee v Sankey* (1872) LR 15 Eq 204, 211 (Bacon VC); *Adams v Bank of New South Wales* [1984] 1 NSWLR 285 (CA); *Air Canada v M & L Travel Ltd* [1993] 3 SCR 787, 825.

\(^13\) *Hardy v Caley* (1864) 33 Beav 365.
both of the existence of the trust, and that the trustee was committing a breach of trust.\textsuperscript{14} As Lindley LJ said in \textit{Spencer v Hart}:\textsuperscript{15}

‘\textit{Prima facie} the only persons to sue an agent are his principals; although, no doubt, it might be shewn that an agent was so involved in a breach of trust committed by his principal as to stand in the position of a \textit{quasi}-trustee, and in that case an action might be supported against him.’\textsuperscript{16}

Consequently an agent of a trustee will not be liable for ‘knowing receipt’ where he knows only of a doubtful claim made against his principal by a third party.\textsuperscript{17}

A bank can act as an agent of the trustee, but not by merely accepting deposits of money from the trustee himself and permitting withdrawals by the same. A bank only acts as an agent for a trustee in respect of a bank account held on trust when the bank deals with a third party at the direction of the trustee. Thus the bank acts as agent when it collects money from a third party for the credit of the trustee’s account,\textsuperscript{18} or makes a payment out of that account to a third party. If the trustee himself deposits money into the account the banker is not acting as the trustee’s agent. There is merely a transaction between the bank as debtor and the trustee as account holder and creditor, assuming the account is in credit. In that case the bank acts as a principal on its own behalf. The bank does not receive the money as agent.

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\item \textsuperscript{14} \textit{Morgan v Stephens} (1861) 3 Grff 226, 236 (Stuart VC).
\item \textsuperscript{15} (1881) 51 LJ Ch 271 (CA).
\item \textsuperscript{16} Ibid 273.
\item \textsuperscript{17} \textit{La Roche v Armstrong} [1922] 1 KB 485, 491 (Lush J); \textit{Carl Zeiss Stiftung v Herbert Smith \& Co} [1969] 2 Ch 276 (CA).
\item \textsuperscript{18} As in \textit{Keane v Robarts} (1819) 4 Madd 332, 357 (Leach VC).
\end{itemize}
2. **A Third Party’s Agent**

So there can be agents of trustees, and sometimes the bank fits that category. The second category is the agent of a third party. Take the case of a trustee who intends to transfer trust money in breach of trust to X. X is not able to receive the money directly. The trustee pays the money to X’s agent who forwards the money on to X. Is the agent liable in this situation for ‘knowing receipt’? The most recent authorities unambiguously tell us that the answer is no. The agent of a third party who does not act dishonestly is not liable in equity for ‘knowing receipt’. This answer is not derived from any defence of change of position or payment over. Instead, the agent is not even *prima facie* liable unless he receives the trust property for his own benefit.

The authorities are considered in a moment. Moving directly to the reasons for such an approach, it is clear that the rationale could incorporate only the first justification of the position with respect to agents appointed by the trustee. As in that situation there is no beneficial receipt by the agent. The agent received on behalf of and for the benefit of his principal. It is the principal who is enriched by the agent’s receipt, not the agent. Liability should fall upon the principal alone.\(^{19}\) On the other hand, the second justification encountered above does not apply. There is no warrant here for offering agents a principle of protection in order to allow professionals to be engaged safely by trustees to act on behalf of the trust.

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\(^{19}\) See Chapter 4.
In the present context the agent does not act for the trust. He is the agent of the person whom the trustee intended to benefit by the payment in question.

In this context recent cases are clear. An agent in this situation is immune from liability for having received trust property transferred in breach of trust. That is because liability for ‘knowing receipt’ requires a receipt by the defendant for his own benefit. Millett J’s dictum to this effect in *Agip (Africa) Ltd v Jackson*\(^{20}\) is unequivocal, and his decision was approved on appeal.\(^{21}\) Under the heading of ‘knowing receipt’, Millett J said this:

‘[I]t is necessary to distinguish between two main classes of case under this heading. The first is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without such notice but subsequently discovered the facts....

The second and, in my judgment, distinct class of case is that of the person, usually an agent of the trustees, who receives the trust property lawfully and not for his own benefit but who then either misappropriates it or otherwise deals with it in a manner which is inconsistent with the trust. He is liable to account as a constructive trustee if he received the property knowing it to be such, though he will not necessarily be required in all circumstances to have known the exact terms of the trust...

The essential feature of the first class is that the recipient must have received the property for his own use and benefit. This is why neither the paying nor the collecting bank can normally be brought within it.... This is not a technical or fanciful requirement. It is essential if receipt-based liability is to be properly confined to those cases where the receipt is relevant to the loss.’\(^{22}\)

\(^{20}\) *Agip (Africa) Ltd v Jackson* [1990] Ch 265,

\(^{21}\) [1991] Ch 547 (CA).

A requirement of beneficial receipt for claims of ‘knowing receipt’ is seen by Millett J as essential. Agip has been consistently followed on this point. Hoffman LJ applied the distinction between beneficial and non-beneficial receipt in equity in El Ajou v Dollar Land Holdings Plc\(^23\) So too did Vinelott J in Eagle Trust v SBC Securities.\(^24\) The distinction between receiving for one’s own benefit and receiving on behalf of another has also been applied in New Zealand\(^25\) and Canada,\(^26\) and continues to be applied in England to the present day,\(^27\) including recently by the Court of Appeal.\(^28\) Taking just one example from this series, the Supreme Court of Canada in Gold v Rosenberg\(^29\) recently held:

‘To be “chargeable” with trust property, a defendant must have received it in his or her own right, must have enjoyed the property beneficially. There is, thus, no cause of action in knowing receipt against a person who holds trust property merely as an agent for a third party. This was the rationale for dismissing the plaintiff’s knowing receipt claim in Air Canada.\(^30\)

Authority before Agip is scarce, but it is certainly not non-existent. In any event the scarcity is to be expected.

\(^{23}\) El Ajou v Dollar Land Holdings Plc [1994] 2 All ER 685 (CA) 700.
\(^{24}\) [1993] 1 WLR 484, 490, 501.
\(^{25}\) Nimmo v Westpac Banking Corp [1993] 3 NZLR 218, 224-225 (Blanchard J).
\(^{27}\) Box v Barclays Bank plc [1998] Lloyd’s Rep Bank 185; BCCI (Overseas) Ltd v Akindale (Chancery Division, Carnwarth J, 18 December 1998).
\(^{28}\) Twinsectra Ltd v Yardley [1999] Lloyd’s Rep Bank 438 (CA) para 44 (Potter LJ).
\(^{29}\) Gold v Rosenberg [1997] 3 SCR 767.
\(^{30}\) Ibid para 40 (Iacobucci J), referring to Air Canada v M & L Travel Ltd [1993] 3 SCR 787.
**Pre-Agip authority**

One of the strongest pre-*Agip* authorities in favour of the beneficial receipt requirement is *International Sales and Agencies Ltd v Marcus*.\(^{31}\) In that case Lawson J said:

> ‘It is important to bear in mind that there are two categories of persons, recipients of [a] company’s money who are treated as constructive trustees or may be treated as constructive trustees. The first category is the person who receives moneys held by a constructive trustee and receives those moneys for his own benefit; that is the present case. The second category is the constructive trustee who acts as a channel through which funds are disposed of in breach of constructive trust reach [sic] other quarters, and it is clear … that different considerations relate to the state of mind of the persons in the two categories.’\(^ {32}\)

Much earlier, in *Foxton v Manchester and Liverpool District Banking Co*,\(^ {33}\) Fry J said that ‘those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit’.\(^ {34}\) *Nickolson v Knowles*\(^ {35}\) might also be taken as supporting the immunity of agents who do not act dishonestly from claims for ‘knowing receipt’. In that case Sir John Leech VC said that ‘a mere agent to receive for the use of another could not, by notice, be converted into an implied trustee’.\(^ {36}\) Similarly, in *Bodenham v Hoskyns*\(^ {37}\) Kindersley VC found a bank liable for the receipt of trust funds under the principle:

> ‘… according to which a person who knows another to have in his hands or under his control monies belonging to a third party cannot deal with those monies for his own

\(^{31}\) [1982] 3 All ER 551.

\(^{32}\) Ibid 557.

\(^{33}\) (1881) 44 LT 406.

\(^{34}\) Ibid 408.

\(^{35}\) (1820) 5 Madd 47.

\(^{36}\) Ibid.

\(^{37}\) (1852) 2 De G M & G 903.
private benefit...".  

Other earlier English cases concerning the receipt of misdirected trust property also emphasise the fact that the defendant received for his own benefit.  

The beneficial receipt requirement is also supported by pre-*Agip* authority in Australia and New Zealand. In a dissenting judgment implicitly approved when the decision was reversed by the High Court of Australia, Jacobs P in *Consul Development Pty Ltd v DPC Estates Pty Ltd* discussed the liability of ‘a person who receives trust property for his own benefit, as a volunteer or otherwise’. Jacobs P’s judgment in *Consul Development* was adopted by Sir Clifford Richmond in *Westpac Banking Corporation v Savin* who said:

‘an agent who receives trust funds from the trustee will be within the first category only if he is setting up a title of his own to the funds which he has received and is not acting as a mere depository or, as Lawson J put it … merely as a channel through which money is passed to other persons’.  

Two points must be made about this state of authority. First, in all of the above cases the question of an agent’s liability was not directly in issue. Secondly, as will be seen below there are other early cases involving banks in which the

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38 Ibid 905.  
39 *Rolfe v Gregory* (1865) 4 De GJ & Sm 576; *La Roche v Armstrong* [1922] 1 KB 485, 491 (Lush J); *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 2 Ch 276 (CA) 303-304 (Edmund Davies LJ).  
40 [1974] 1 NSWLR 443 (CA); rev’d (1975) 132 CLR 373.  
41 [1974] 1 NSWLR 443 (CA) 457.  
42 [1985] 2 NZLR 41 (CA).  
43 Ibid 69.
reasoning is devoid of any reference to the special positions of agents so far as ‘knowing receipt’ is concerned. But again in those cases the point was not argued or considered by the court.

Strong academic authority supporting the stance adopted in Agip had emerged well before that case. Ever since the first edition of the Trusts and Trustees volume of *Halsbury’s Laws of England*, that work has contained this statement of the law:

> ‘In order to constitute a person who takes trust property or trust money for his own purposes a constructive trustee of it he must have notice that it is being misapplied by being transferred to him…’.

In two articles, both of which remain leading discussions on the liability of constructive trustees, agents are said to be immune from recipient liability. Many other commentators have, since Agip, accepted the beneficial receipt requirement in equity.

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Some commentators have, however, taken the contrary view. Mr Tan\(^{47}\) and Dr Bryan\(^{48}\) are two who suggest that an agent who acts merely as a conduit through which trust funds pass can be liable for ‘knowing receipt’. The argument of Mr Tan is, with respect, unconvincing for a number of reasons. First, he conflates the position of agents of trustees and agents of third parties. In so doing Mr Tan says that ‘the prevailing view’ that an agent who acts merely as a conduit through which trust funds pass can never be liable for ‘knowing receipt’ is one of ‘recent and novel introduction’.\(^{49}\) But in light of the authority discussed above\(^{50}\) that view is untenable. *Barnes v Addy*\(^{51}\) itself is in favour of according special protection to agents of a trustee. Secondly, Mr Tan’s argument is partly based on the now discarded view that an agent who acts dishonestly cannot be liable as an accessory to a breach of trust unless the trustee himself also acted dishonestly.\(^{52}\) Thirdly, and perhaps most importantly, Mr Tan himself acknowledges that ‘creating an exception for an agent makes good sense where liability is strict’.\(^{53}\) As was suggested in Chapter 1, the equitable liability of a recipient of misapplied trust property is indeed likely to be recognised as a strict claim in unjust


\(^{48}\) M Bryan, *Restitution and Banking Law* 184-186.


\(^{50}\) Above 160.

\(^{51}\) *Barnes v Addy* (1870) LR 9 Ch App 244 (CA).


\(^{53}\) YL Tan, ‘Agent’s Liability for Knowing Receipt’ [1991] LMCLQ 357, 373. Dr Bryan also recognises that the policy justification for a beneficial receipt requirement is strong: M Bryan, *Restitution and Banking Law* 186.
enrichment, subject to the defence of change of position and other appropriate defences. That the immunity of agents makes sense in this environment is explored in detail in Chapter 4.

Dr Bryan’s argument is stronger. He relies upon an important series of banking cases involving recipient liability the result and reasoning of which, he suggests, is inconsistent with a special principle for agents. Those cases are examined in some detail shortly.54

**What does ‘beneficial receipt’ mean?**

For the moment, let us take it that ‘knowing receipt’ in equity requires a ‘beneficial receipt’. The defendant sought to be made liable in unjust enrichment for having received trust money paid to him in breach of trust must have received that money for his own benefit. If he did not so receive, he will be immune from liability for ‘knowing receipt’. What is meant by ‘for his own benefit’? In order to gain the benefit of the immunity, is it sufficient that the defendant was acting in the interests of another person, and not for his own benefit? Or is something more is required? Take the case of a receipt by a trustee. A trustee clearly does not act for his or her own personal benefit. Indeed to do so would be an equitable wrong. The trustee acts for the benefit of the beneficiaries. If one trustee misdirects trust funds to another trustee, does the latter fall within the beneficial receipt immunity? What about a liquidator? A liquidator of an insolvent company acts in the interests

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54 Below 192.
of the creditors as a whole and not for his own personal benefit. Is a liquidator also free from liability for ‘knowing receipt’ if he receives property misdirected by a trustee?

The answer is that the recipient trustee and the liquidator are not within the scope of the beneficial receipt immunity. The true principle is that a person will be immune from liability for the receipt of misdirected trust funds only where he received on behalf of another and that other could himself be sued to recover the money in question. In effect, the immunity is only available to an agent – a person who receives property on behalf of a principal who himself is liable to a suit to recover the property in question. A trustee or liquidator deals with another person as a principal in this respect, and not as agent. To use a common law example, a person who makes a mistaken payment to a trustee does not expect, and is not required by the law, to have to sue the trust’s beneficiaries to recover the mistaken payment. *King v Stewart* says exactly that. The position is the same in equity. In *Springfield Acres Ltd v Abacus (Hong Kong) Ltd* Henry J regarded this as self-evident. In that case a director of a company disposed of the company’s assets in breach of trust. The disposal was made to a trustee of a family trust. Abacus, the trustee recipient, sought to defeat the claim in ‘knowing receipt’ by submitting that it had not received for its own benefit. That submission was rejected outright:

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55 The authorities which establish that a principal may be sued in unjust enrichment from the moment of the agent’s receipt are discussed in Chapter 4, 234.

56 (1802) 66 LT 339.

‘Mr Browne submitted that there could be no liability under this head because Abacus did not take the property for its own benefit, but only in its capacity as a trustee for the Jayne Allen trust…. I do not think that the principle expressed and adopted in Nimmo\textsuperscript{58} has any application to the present situation. [When] Abacus received the funds … it was acting as the owner of the funds and exercised the right of control over them. It was not merely an agent in the sense referred to in Nimmo, and the fact that it had fiduciary obligations itself to others in accounting for its use of the funds is beside the point.’\textsuperscript{59}

One might quibble with the emphasis placed by Henry J on Abacus acting as owner of the funds. As discussed above, an agent can be the full beneficial owner of funds the moment they are paid to him but still receive as agent.\textsuperscript{60} That point aside, the remainder of the reasoning is correct and very important to a true understanding of beneficial receipt in equity. The beneficial receipt requirement should be taken to confer immunity to personal claims based on the receipt of misdirected trust funds only upon agents. An agent in this context means a person who is appointed to receive property or funds by another, in circumstances in which that other person can himself be sued in respect of any such receipt.

The Supreme Court of Canada came very close to this position in \textit{Air Canada v M & L Travel Ltd}.\textsuperscript{61} The Court said that ‘knowing receipt’ liability ‘requires the stranger to the trust to have received trust property in his or her personal capacity, rather than as agent’.\textsuperscript{62} If the Court had stopped there, it would have been perfectly in line with what is said above: to receive beneficially means

\textsuperscript{58} Nimmo v Westpac Banking Corp [1993] 3 NZLR 218 (Blanchard J), discussed below 182.
\textsuperscript{59} Springfield Acres Ltd v Abacus (Hong Kong) Ltd [1994] 3 NZLR 502, 510-511.
\textsuperscript{60} Above 148.
\textsuperscript{61} [1993] 3 SCR 787.
\textsuperscript{62} Ibid 811.
to receive other than as agent. However, the Court actually said:

‘The former category of “knowing receipt” of trust property is inapplicable to the present case because it requires the stranger to the trust to have received trust property in his or her personal capacity, rather than as an agent of the trustees.’

Adding the emphasised words at the end of this sentence certainly does not make it incorrect. But the qualification is unnecessary. The immunity of agents from liability for the non-wrongful version of ‘knowing receipt’ applies where the recipient is an agent of anyone.

Of course an agent can also receive as a trustee. Money may be transferred to an agent in circumstances which require the agent to hold that money on trust for his principal. But it is not the fact that the agent holds on trust which gives him immunity from claims for ‘knowing receipt’. Rather, it is the very fact that he received as agent. Only agents receive non-beneficially in this context.

Whether or not the defendant received beneficial title to the money transferred is not the issue. The issue is whether the money was paid to and received by him as agent on behalf of a principal. Consequently, it does not make sense to say that persons can receive beneficially, even if they are acting as agent. The very fact that the defendant received as agent means, in this context, that he did not receive beneficially. A commonly held view thus appears to be a

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63 Ibid.
misconception. ‘Banks always receive beneficially, even if they are acting as agents’ is wrong. A bank which receives as agent *ipso facto* receives non-beneficially.

### B. CLAIMS AGAINST BANKS

It is necessary to start again with the same two basic banking transactions encountered above when considering banks as agents in the common law. The first transaction is where an account holder deposits money into his own account. The second is where someone else deposits money into that account.

#### 1. MONEY DEPOSITED BY ACCOUNT HOLDER

It was shown in Chapter 2 that where an account holder deposits money into his own account the bank does not receive as agent. Instead, there is simply loan of money from the account holder to the bank, constituting the bank as debtor and the account holder as creditor. That assumes of course that the account is not already overdrawn. If the bank is not acting as agent, then it cannot take advantage of any special immunity limiting the liability in unjust enrichment of those so acting. That is indeed the position adopted here. But contrary murmurs may be heard from a few of the cases in equity, and it should be seen if they can quietened before moving on.

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65 LD Smith, ‘Property’ text to n 88.
66 Above 142.
**Polly Peck International v Nadir (No 2)**

*Polly Peck International v Nadir (No 2)* is a confusing and difficult case. The administrators of PPI claimed that the company had been defrauded of a massive amount of money. Part of the fraud related to a payment of £45m. A rogue employee caused PPI to pay £45m into an account at Midland Bank held by another company called IBK. IBK transferred £45m of that sum into an account also held at Midland Bank by the Central Bank of Northern Cyprus ('Central Bank'). In exchange Central Bank credited two IBK accounts in Northern Cyprus. The transaction was not a straight swap of English pounds for English pounds. Instead, IBK’s two accounts in Northern Cyprus were credited by Central Bank partly in Turkish lira and partly in sterling respectively. The administrators of PPI claimed that Central Bank was liable as a recipient in equity for the whole £45m.

This case has generated a huge amount of confusion represented in the language of the past by this question: Was the claim one for ‘knowing receipt’ or ‘knowing assistance’? At an interlocutory stage of the trial Millett J was inclined to think that the case was one of knowing assistance. But the question was not tested, for although the administrators’ claim was pleaded in terms of ‘knowing receipt’, counsel for the administrators put the case primarily on the basis of what used to be called knowing assistance. On appeal, however, characterisation of the case was split between the credits in lira and the credits in sterling:

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‘Millett J, in the judgment below, treated the present case as one of “knowing assistance” rather than “knowing receipt”. In respect of the nine sterling transfers I think that is right. The Central Bank received the funds transferred not in its own right but as banker, and, as banker, credited the funds to IBK in Northern Cyprus. But in respect of the bulk of the transfers the case is, in my opinion, one of “receipt” rather than “assistance”. The Central Bank was exchanging Turkish lira for sterling and became entitled to the sterling not as banker for IBK but in its own right. IBK became entitled to the Turkish lira.’

The analysis of the case, at both levels, has been criticised by Dr Bryan, and in particular the distinction drawn by the Court of Appeal between the lira transfers and the sterling transfers. That distinction has also been doubted in two cases in New Zealand, in both of which the court was inclined to the view that Polly Peck was a knowing assistance case. Dr Bryan thinks that the whole case should have been dealt with on the basis of ‘knowing receipt’. It is submitted that Dr Bryan is correct though not for the reasons upon which he relies.

A proper analysis of the case requires close consideration of the facts in light of the rights which PPI asserted it had by reason of those facts. For this purpose the fraud can be presented thus:

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69 [1992] 4 All ER 769 (CA) 777 (Scott LJ).
70 M Bryan, Restitution and Banking Law 183.
71 Cigna Life Insurance New Zealand Ltd v Westpac Securities Ltd [1996] 1 NZLR 80, 86 (HC, Greig J); Nimmo v Westpac Banking Corp [1993] 3 NZLR 218, 225 (HC, Blanchard J)
PPI was claiming restitution of $45m of its money paid to Central Bank. It is important to realise that the payment giving rise to this alleged right to restitution was the payment to Central Bank’s account at the Midland Bank. That is why there is a question mark leading to the credits to IBK’s accounts with Central Bank in Northern Cyprus. That was not the receipt in issue. This is clear from PPI’s statement of claim:

‘In the premises the Central Bank received the said sums to the Central Bank’s Midland Account with actual knowledge that the transfer of the same had been procured by Mr Nadir in breach of his fiduciary duty …’.  

Of course what Central Bank did in reliance on that receipt cannot be ignored. The credits to IBK’s accounts in Northern Cyprus could give rise to the defences of bona fide purchase or change of position. But the important point is that the credit in pounds and Turkish lira to IBK’s accounts in Northern Cyprus ought not affect the nature of the cause of action. The cause of action related only to the

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72 Polly Peck International v Nadir (No 2) [1992] 4 All ER 769 (CA) 774 (Scott LJ).
receipt of £45m in Central Bank’s account in London. If that is right, the Court of Appeal’s reference to the Turkish lira credits in characterising the claim in question was erroneous.

If the claim itself was only concerned with the receipt of £45m in London, how should that receipt have been analysed? That question should be answered by applying the true meaning of ‘beneficial receipt’ in equity. It was suggested above that all this requirement means is that, in receiving the money in question, the recipient must have been acting for himself and not on behalf of another which other person can and should be sued instead. In short, the recipient must not be acting as an agent. The receipt in issue was a payment from one account holder (IBK) to another (Central Bank). Central Bank received on behalf of itself, not as agent but as principal. ‘Knowing receipt’ was therefore the correct cause of action in relation to the whole of the £45m.

Dr Bryan’s explanation of the same conclusion is different. He says this:

‘The distinction drawn by the Court of Appeal is, however, a false one. The Central Bank received all money from IBK for its own commercial purposes. It was liable, as debtor, to pay IBK an equivalent sum upon demand. Whether the payment is made in sterling or Turkish lira was a simple matter of customer preference.’

Dr Bryan says that all money received by a bank can be the subject of a ‘knowing receipt’ claim. But in Polly Peck International v Nadir (No 2) the fact that the

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73 M Bryan, Restitution and Banking Law 183.
74 Dr Bryan’s view is explored further below 194.
75 Polly Peck International v Nadir (No 2) [1992] 4 All ER 769 (CA).
defendant was a bank was irrelevant. Central Bank was in the same position as any other account holder who receives credit to their account in breach of trust. A credit to one’s own account is an enrichment. Consequently the Central Bank was the recipient of an unjust enrichment and thus *prima facie* liable for that receipt.

*Box v Barclays Bank plc*\(^{76}\) suggests that a bank does not always receive beneficially when money is deposited into an account by the account holder. Box was one of a group of plaintiffs who invested their savings with a company called Sylcon Finance Ltd. Sylcon deposited the money it received from the plaintiffs into its account at Barclays Bank. The plaintiffs alleged that they had a right to restitution from Barclays. The statement of claim included various causes of action, including money had and received and ‘knowing receipt’. Ferris J rejected all of the claims. No right against Barclays was established even if the facts alleged by the plaintiffs were true. Importantly for present purposes Ferris J considered that in relation to money had and received the plaintiffs had to establish that the bank received the money deposited by Sylcon beneficially. Although that proposition was asserted without discussion of any of the authorities in Chapter 2, it is consistent with the argument in Chapter 4 that all claims in unjust enrichment require a beneficial receipt. But in considering whether or not Barclays’ receipt was beneficial, Ferris J suggested that a bank does not necessarily receive beneficially when money is deposited to an account by the account holder. His Honour only found that the bank had received beneficially because the account

into which the money was deposited was overdrawn. Ferris J reached the right result for the wrong reason. A person receives money beneficially when he does not receive as agent. A bank does not receive money deposited into an account by the account holder himself as the account holder’s agent. The bank receives on its own behalf from the account holder. A bank that receives on its own behalf and not as agent receives beneficially.

A ‘net benefit’ approach to enrichment?

A different view as to ‘beneficial receipt’ by banks was taken by Blanchard J in *Nimmo v Westpac Banking Corporation.* Mr Nimmo received a superannuation payment on his retirement. The payment was made to Mr Nimmo by way of cheque drawn by his employer. Mr Nimmo indorsed the cheque over to an investment company called Kinetic. Kinetic deposited the cheque into its account with Westpac and the proceeds were credited to the company’s account. The sum then passed through several other Kinetic accounts before one of the Kinetic directors fraudulently withdrew all of Mr Nimmo’s money. This rogue director presented to Westpac a Kinetic cheque drawn on the account in which Mr Nimmo’s money then stood. The cheque was made payable to Westpac. In exchange for that cheque, the rogue received a Westpac bank cheque, some traveller’s cheques and cash.

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77 [1993] 3 NZLR 218.
The case is a little difficult to analyse. But one aspect of the case can be disposed of immediately. Westpac could not be liable for the initial receipt of Mr Nimmo’s money achieved through the deposit by Kinetic of the superannuation cheque indorsed over to Kinetic by Mr Nimmo. That receipt was entirely proper and consented to by Mr Nimmo. In essence, it was the circumstances surrounding the withdrawal of Mr Nimmo’s money for which Westpac was sought to be held accountable. Could those circumstances be analysed so as to make Westpac at least *prima facie* liable in ‘knowing receipt’?

There are three ways to analyse Westpac’s role in the fraudulent transactions: (1) as merely assisting the withdrawal of funds, and thus not beneficially receiving any funds itself; (2) as initially assisting the withdrawal of funds, but then beneficially receiving part of the funds back again when the rogue purchased traveller’s cheques and a bank cheque; (3) as involving the receipt of funds, but not beneficially because there was no net benefit to the bank. The first method of analysis says that the only receipt of funds by Westpac was the initial consensual receipt for which the bank could not be liable. No breach of trust had taken place at that stage, for the person beneficially entitled to the money (Mr Nimmo) had consented to that very deposit. Everything that took place at the time of the withdrawal by the rogue director was simply that, a withdrawal. Westpac as debtor repaid its creditor Kinetic. A repayment of a debt involves no receipt by the debtor. It is true that during the process of the withdrawal Westpac received a Kinetic cheque payable to the bank. But this was just a written authorisation for the withdrawal. That is, the cheque simply operated as a withdrawal slip. And the
different forms in which the money was received by the rogue director (bank cheque, traveller’s cheques and cash) could be said to make no difference either, any more than a withdrawal in various denominations of notes and coins. On this analysis, the bank could only be liable as an accessory to the director’s fraud.

The second mode of analysis adopts most of the first, but says that a bank can be liable for the receipt of misdirected trust money when that money is used to purchase something from the bank. In other words, when a withdrawal is made in some form other than cash, the bank can be liable as a recipient. If that is right, one should say that the case is to be analysed just as if the rogue director had withdrawn all of Mr Nimmo’s money in cash, and then handed some of the cash back to the bank to purchase a bank cheque and traveller’s cheques. These instruments should not, on this analysis, be viewed differently from the purchase of any other asset made with trust funds. If cash held on trust is used improperly by a trustee to buy a car for his wife the car dealer receives trust money, and is therefore prima facie liable in equity as a recipient. It does not matter if the value of what was given to the trustee (the car) precisely matches the value of what was received by the car dealer (the cash). A different view appears in the judgment of Lord Templeman in Lipkin Gorman v Karpnale Ltd, but that view, discussed below\(^\text{78}\) should be rejected. Assuming the correctness of that rejection, the relevant question is whether the bank, just as much as the car dealer, can establish a defence of bona fide purchase.

\(^{78}\) Below 189.
The third mode of analysis is the one adopted by Blanchard J:

‘... Westpac undoubtedly received the moneys which were withdrawn from Kinetic’s trust account, for the Kinetic cheque was made payable to Westpac and was credited to Westpac in the books of the bank. That credit existed only for a short time because Westpac immediately put Mr Eaton in possession of bank cheques and travellers cheques and debited its books accordingly. The net result, disregarding the [bank] fees, was that Westpac was in no better position as a result of the transaction. It had not been enriched and therefore could not be said to be unjustly enriched. I make mention of this because it is probable that unjust enrichment is the basis of a constructive trust in a case of knowing receipt: *Powell v Thompson* [1991] 1 NZLR 597.79

The last sentence is entirely in accordance with the preferable view of ‘knowing receipt’ supported in Chapter 1. When ‘knowing receipt’ is not a claim for the wrong of dishonest receipt, it is properly regarded as a claim in unjust enrichment.80 But the rest of this passage is not correct. If a transaction gives rise to *prima facie* liability for the receipt of misdirected money, that *prima facie* liability is not displaced by the fact that the recipient was enriched only for a short time. The High Court of Australia put the principle perfectly in *David Securities Pty Ltd v Commonwealth Bank of Australia* 81

> ‘From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched.’82

The same principle applies to all claims in unjust enrichment. In the end,

79 *Nimmo v Westpac Banking Corporation* [1993] 3 NZLR 218, 224-225.
80 Above 36.
82 Ibid 385.
therefore, of all three possible ways to view Nimmo, Blanchard J’s approach seems the most unsatisfactory. The error in Nimmo was caused by the failure to focus upon the true principle enshrined within the phrase ‘beneficial receipt’. A receipt is beneficial when the recipient received for himself and not as agent for another. Once the relevant receipt in Nimmo was identified, the only question was whether Westpac received the money in question as principal or agent.

It is submitted that the correct approach to Nimmo is the second mode of analysis discussed above. If a person goes to his bank, writes out a cheque payable to cash, gives the cheque to the teller and receives £100 in return, then that is just a simple withdrawal of cash. The bank has not received anything. It has merely repaid part of the money it owes the account holder. There is no difference, it is suggested, if instead of making out the cheque to cash it is made payable to Barclays Bank. It is still just a withdrawal from the account, and there is still no receipt by the bank. The situation is different if instead of receiving cash the account holder receives traveller’s cheques. There is then the merger of two separate transactions: a withdrawal of money, and a purchase of a particular product, the traveller’s cheques. The fact that the two transactions are not separated by the bank should not hide the fact that there is a true purchase. A purchase necessarily involves a receipt of money by the seller. The same analysis applies to the bank cheque. A purchase of a bank cheque is still a purchase. So the bank should have been prima facie liable as the recipient of misdirected money to the extent that the rogue director had purchased the bank cheque and the traveller’s cheques. Depending on the bank’s knowledge, it would have been able
to plead bona fide purchase or change of position.

Blanchard J’s net benefit approach was adopted by Greig J in *Cigna Life Insurance New Zealand Ltd v Westpac Securities Ltd.* An employee of Cigna misdirected the company’s money to Westpac Securities, a subsidiary of Westpac Bank but a separate legal entity in its own right. Westpac Securities conducted business as a money market operator. Before the fraud in question, Cigna’s employee had properly conducted a series of transactions on behalf of Cigna with Westpac Securities. For each such transaction Cigna money was transferred into Westpac Securities’ general account at Westpac Bank. The fraudulent transfers in question were effected by Cigna drawing a cheque in favour of Westpac and depositing that cheque in Westpac Securities’ account at Westpac Bank. To conduct the frauds, the employee opened a new ‘account’ with Westpac Securities in his own name, and transferred funds by the usual method. Westpac Securities repaid the employee personally, who absconded with most of the money. Greig J asked the usual question: ‘whether this is what is described as a knowing receipt case or a knowing assistance case.’ After referring to *Nimmo*, and in particular Blanchard J’s approach to the question of enrichment, Greig J said:

‘[A]s between a plaintiff claiming a constructive trust, I think it is right to treat a trading bank defendant as merely a depository or channel through which the moneys are transferred to achieve the fraudulent purpose. The money is then gone and is not retained or held by the bank. It claims no entitlement to it and cannot be said to be chargeable as receiver. It is, of course, different if the bank retains the money as creditor to reduce [an] overdraft or in some other way for its own benefit.

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84 Ibid 86.
In this case it is accepted that this [scil Westpac Securities] is not a trading bank but it is a bank in the sense that it takes the customer’s money, offers interest and then makes use of the money for its own benefit in anticipation of making a profit out of that use. It was, however, merely a channel by which the thief transferred the money. In the circumstances, then, I consider that this is a case of knowing assistance and is not a knowing receipt case at all.  

Again, it is submitted that this is not correct in principle. In determining the question of *prima facie* liability, it is not relevant to ask if the money in question has ‘gone’. Whether or not a bank has retained an overall benefit or enrichment is a question which goes not to *prima facie* liability but to the availability of a defence. If misdirected trust money has been received beneficially, in the sense of having been received by a person acting as a principal and not an agent, then *prima facie* liability in unjust enrichment arises. Liability in unjust enrichment, at least where the unjust factor is the vitiation or absence of intention, arises at the moment of receipt. If it is later discovered that the money is ‘gone’, the question becomes ‘do the circumstances in which the defendant parted with the money free it from liability?’ In other words, is there a defence? To conflate those two issues is, with respect, erroneous. For one thing, it reverses the onus of proof with respect to relevant defences. The New Zealand approach suggests that the plaintiff must prove that the defendant was materially better off at the time the claim is made or at least shortly after the transactions in issue. That is not correct.

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85 Ibid 87.

86 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 386 (Lord Goff).
The proper analysis of *Cigna v Westpac Securities* appears to be this. Westpac Securities was simply the holder of an ordinary bank account. Money was paid into that account. Westpac Securities must therefore be regarded as receiving that money beneficially; that is, in its own right, and not as agent. Money paid into a person’s bank account enriches that person. A claim in unjust enrichment should have been regarded as lying against Westpac Securities for ‘knowing receipt’.

It seems that the net benefit approach is not peculiar to New Zealand. The same view has surfaced in England. In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*, 87 shares were given to a bank in breach of trust as security for a loan. Auld LJ said he found it ‘difficult to see what enrichment the banks have had, since they gave full value’ for the shares in the form of the loan. 88 And in *Lipkin Gorman v Karpnale Ltd* 89 Lord Templeman said:

> ‘An innocent recipient of stolen money may not be enriched at all; if Cass had paid £20,000 derived from the solicitors to a car dealer for a motor car priced at £20,000, the car dealer would not have been enriched. The car dealer would have received £20,000 for a car worth £20,000.’ 90

The car dealer may indeed be free from liability, but not because he was not enriched. The receipt of money for one’s own benefit is always enriching. Where a person receives from a third party, any outflow of wealth caused by that receipt

88 Ibid 409A.
90 Ibid 560.
is relevant only to defences, either bona fide purchase or change of position. The mere fact that the outflow of wealth takes place at the same time as the receipt of the enrichment does not change the approach. Whether the disenrichment takes place before, at the same time as, or after the receipt of the enrichment, the disenrichment is a matter of defence. If this were not so, there would be no such defence of bona fide purchase in the law of unjust enrichment. A purchase would give the defendant not a defence, but the right to say that he was never enriched at all. Yet bona fide purchase is clearly a defence to claims in unjust enrichment.92

There is one situation where what the defendant spent to acquire the enrichment in question is relevant to prima facie liability. Where there is an exchange of value between the plaintiff and the defendant giving rise to a claim in unjust enrichment, it may be that the enrichment action lies only for the balance between the value of what each party gave. A banking example comes from the swaps cases. At trial in both Westdeutsche Landesbank Girozentrale v Islington London BC93 and Kleinwort Benson Ltd v South Tyneside BC94 Hobhouse J applied this approach to the question of limitation periods. Both cases involved a series of payments from a bank to a local council and vice versa under an interest rate swap contract which turned out to be ultra vires the local council. If each payment gave rise to a separate claim in unjust enrichment, some payments would have been caught by the applicable six year limitation period. Hobhouse J rejected that

93 [1994] 4 All ER 890.
94 [1994] 4 All ER 972.
approach. He held that where a void swaps contract between A and B required payments on each side, then the claim in unjust enrichment lay only for the rolling balance between what A had paid B and what B had paid A. The limitation period would only apply if some part of the final balance was made up of payments more than six years old. For present purposes the important point to note is that this rolling balance approach can only apply to a transaction between the plaintiff and the defendant. The claims with which this chapter is concerned involve the receipt of an enrichment by the defendant from a third party; that is, someone other than the plaintiff. What the defendant gave the third party in that context is a matter of defence.

One Canadian commentator has recently argued that the net benefit approach was logically correct, but for a slightly different reason to that explored above:

‘Courts and writers sometimes do not seem aware that it is logically necessary to argue retention in an unjust enrichment action. I suggest that the better view is that retention is required’.

This logic is flawed. The flaw is exposed in Mr Stevens’ earlier reasoning:

‘… the defendant must still retain the enrichment, since if the defendant has done nothing wrong, the defendant’s responsibility arises not because he received, since there is nothing wrong in merely receiving, but because he still has … The liability is to give back what you have. The essence of the unjust enrichment argument is that you have without juristic reason.’

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97 Ibid 421 (emphasis in original).
That argument is wrong. If it were right, there would be no defence of change of position. Were the plaintiff required to prove that the defendant is still enriched, then disenrichment would not operate as a defence. The absence of disenrichment would be an element of the cause of action. But English law clearly views the defence of change of position, a defence of disenrichment, as a defence. The flaw in the above quotations goes deeper than this. An unjust enrichment is recoverable because (a) the defendant was enriched at the plaintiff’s expense by the receipt of the property in question, and (b) that enrichment was unjust. Nothing more is needed to establish a cause of action. The moment those two things occur, the defendant falls under a liability to give back the property received at the plaintiff’s expense or its value in money.\footnote{Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 (HL) 386 (Lord Goff).} The liability arises not because the defendant has done something ‘wrong in merely receiving’. The liability arises because, however innocent the defendant may be, he was enriched at the expense of the plaintiff in circumstances which warrant restitution. If the defendant says that this liability is extinguished or reduced by events subsequent to the moment of receipt, the defendant may be able to establish a defence. But it is for the defendant to prove the elements of that defence. A \textit{prima facie} cause of action already exists.

2. \textbf{Money Deposited by Third Party}

As established in Chapter 3, when money is paid into a bank account by someone other than the account holder the law treats the bank as receiving those funds as
Almost at the same instant, the bank borrows from its customer the money it received and credits that amount in its books as a debt owed to the account holder. The bank then becomes the customer’s debtor. But that does not affect the bank’s initial status as agent. Nor is the fact that the bank received as agent affected by the fact that title to the money in question passes directly from the depositor to the bank.

With the bank’s agency status secured, together with the proposition confirmed above that in equity recipient liability does not fall upon one who receives as agent of another, the conclusion that a bank which receives as agent cannot be liable for ‘knowing receipt’ ought to follow. At least where the relevant account is in credit, that is certainly the view expressed by Millett J in *Agip (Africa) Ltd v Jackson*:

‘The essential feature of the first class [‘knowing receipt’] is that the recipient must have received the property for his own use and benefit. This is why neither the paying nor the collecting bank can normally be brought within it’.101

But some cases and commentators have suggested that banks can be liable for ‘knowing receipt’, at least in some circumstances. The most common view is that the bank is liable for ‘knowing receipt’ when trust money is improperly used by the trustee to reduce his overdraft. That situation is considered shortly.

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99 Above 142.
100 *Agip (Africa) Ltd v Jackson* [1990] Ch 265.
101 Ibid 292.
Other commentators have gone further. They regard the state of the account as irrelevant. The bank is always *prima facie* liable when it receives trust money, regardless of the state of the account. Moreover, the bank can be so liable even if the money is deposited by a third party. Dr Bryan is a proponent of this view. He argues that there is, in fact, no ‘beneficial receipt’ requirement in equity, and that this is shown by early banking cases.

*The early bank cases*

A series of cases in the 19th and early 20th centuries involved the deposit of trust funds into a trustee’s personal account. Those cases must be examined to see what light they shed on the proposition that a bank, when it receives as agent, is immune from liability for ‘knowing receipt’ in equity. At the outset, though, one point must be anticipated. Many of the older cases involving the potential liability of a third party following a breach of trust failed to distinguish between liability for ‘knowing receipt’ and accessory liability (what used to be called ‘knowing assistance’). That failure is notorious. It is only in modern times that the courts have seen the need to distinguish between the two forms of liability on the basis that ‘knowing receipt’ is ‘restitutionary’ whilst knowing assistance is not. In this context, the analysis of older cases may well not be fruitful. One cannot expect to find direct support for the distinction recognised in the modern cases

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103 The failure is patent in, for example, *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, and *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 2 Ch 276 (CA).

104 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) 386 (Lord Nicholls).
between receiving for oneself and receiving as agent on behalf of another. Moreover, most courts considering a third party’s liability consequent upon a breach of trust perceived the liability in issue as a form of wrongdoing. There was therefore no need for those courts to consider whether the defendant received trust property as agent on behalf of another. Agency or no agency, beneficial receipt or no beneficial receipt, a wrongdoer must compensate the person wronged. That caveat must be borne in mind when the early bank cases are analysed.

The first case is *Gray v Johnston*, a decision of the House of Lords. A bank operated an account in the name of J. J used the account for the purposes of a business which he operated in partnership with his son-in-law M. The account was often overdrawn. The overdraft was secured by the deposit of insurance policies on J’s life. When J died his debt to the bank was satisfied from the proceeds of those policies. The remaining proceeds were paid by the bank into the account still held in the name of J. This balance was part of the estate of J and it should have been dealt with according to his will. Pursuant to J’s will the residual property was bequeathed to Mrs J for life with a power of appointment in favour of J’s children and grandchildren. The misapplication of the money occurred in this way. Mrs J continued to run the business previously conducted by J and M, Mrs J and M forming a new partnership for this purpose. A new account was opened at the bank in the name of Mrs J and M’s new firm. That account also became

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106 (1868) LR 3 HL 1.
overdrawn. Mrs J then drew a cheque signed by her as executrix of J’s estate upon her late husband’s bank account and paid the cheque into the new firm’s account. One of J’s children sued the bank alleging that they were liable for the misapplication of trust money by Mrs J.

The House of Lords decided that the claim must fail. Lord Cairns LC said the main question for consideration concerned the description of the bank’s duty upon the presentation of the cheque by Mrs J. Was the bank bound to honour the cheque, or should it have refused to do so? In the circumstances it was held that the bank was bound to honour the cheque:

‘[I]n order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place ... be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.’

Lord Cairns LC was not persuaded that even the first element was satisfied in the circumstances then present, namely, that the trustee intended a breach of trust. It must be doubted now whether it is necessary for the trustee to have intended a breach of trust, as opposed to having committed a breach of trust in fact, in order for liability in ‘knowing receipt’ or as an accessory to a breach of trust to be established. In any event the deciding factor for Lord Cairns LC was that there

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107 Ibid 11.
was no evidence in *Gray* that the bank was ‘privy to the intent to make this misapplication of the trust funds’.\(^\text{109}\) As to any ‘personal benefit to the bankers designed or stipulated for’, Lord Cairns LC held that the mere fact that the account into which the funds were paid was overdrawn on the particular day on which the cheque was presented was not a sufficient benefit. On this point Lord Cairns LC said:

‘it appears to me wholly impossible to imagine that the bankers can have been influenced, in any degree, in their conduct by the indirect and incidental benefit which they thus derived.’\(^\text{110}\)

How would the case be analysed today if, as *Agip (Africa) Ltd v Jackson*\(^\text{111}\) affirms, equitable recipient liability does not fall upon a bank that has received as agent? It is suggested that the same result would follow. The bank would not have been liable for ‘knowing receipt’ in unjust enrichment, for the bank received as agent. It was seen in Chapter 2 that the presentation of a cheque almost always results in the collecting bank acting as agent, even where the collecting bank is also the paying bank.\(^\text{112}\) An exception to this general rule exists, however, where the drawer of the cheque is also the payee. The relevant cheque here related to J’s account. It was drawn by Mrs J in her capacity as executrix of J’s will, and was payable to Mrs J and M. These facts come close to invoking the exception; a transfer from one account operated by the trustee (here Mrs J) to another such

\(^{109}\) *Gray v Johnston* (1868) LR 3 HL 1, 11.  
\(^{110}\) Ibid 13.  
\(^{112}\) Above 152.
account. However, in fact the exception was not brought into play. The cheque was payable to M as well as Mrs J. That meant that there was not simply a transfer by a person from one of his accounts to another. Rather, the transfer was effectively to another person’s account. Three parties were therefore involved: payer, bank and payee, and the bank thus received payment as agent.

The bank’s status as agent did not feature in the judgments. Nevertheless, if the bank did receive as agent and not as principal, that would explain why one of the two judgments in the House of Lords seemed to view the case as one of accessory liability and not as a case of ‘knowing receipt’. Lord Cairns spoke of bankers becoming ‘parties or privies to a breach of trust committed with regard to trust property’. And before holding the bank liable his Lordship required ‘proof that the bankers are privy to the intent to make this misapplication of the trust funds.’ This is clearly the language of accessory liability. Lord Westbury, on the other hand, spoke in terms closer to the restitutionary liability of a recipient:

‘Nothing can be better settled than that if an executor commits any dishonesty by misappropriating part of the assets of a trust estate for the benefit of A, to whom he is indebted, A knowing it and receiving the money, may be required, in equity, to make restitution of that money of the benefit of the estate.’

If this means that ‘knowing receipt’ in its unjust enrichment sense was in issue, it is not at all clear why the claim against the bank failed. The bank was aware of the equitable interests affecting the money. Lord Westbury spoke of the decisive test

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113 Gray v Johnston (1868) LR 3 HL 1, 11.
114 Ibid.
115 Ibid 14.
Restitution From Banks

as being this:

‘Was the payment of the £853, under the cheque of Mrs Johnston, made by the bankers to the credit of the new account, a payment of the benefit of the bankers directly, and in consequence of an agreement between them and Mrs Johnston?’

These comments are difficult to understand. While there have certainly been suggestions both before and after Gray v Johnston that recipient liability requires some element of fault on the part of the recipient, it was here being suggested that there must have been some agreement between the trustee and the recipient to achieve such a benefit. If anything, that suggestion seems more consistent with accessory liability having been in issue. The third member of the House of Lords, Lord Colonsay, merely agreed with both judgments. In the end, therefore, the case is an unsatisfactory one in relation to the position of banks as agents in equity.

Foxton v Manchester and Liverpool District Banking Company, although a decision at first instance, is frequently cited in the present context. The facts were similar to Gray v Johnston. A trustee effected a transfer of funds from a trust account to his overdrawn personal account. On this occasion it is clear that there was no element of agency on the part of the bank. The transfer was from one account held by the trustee to another. It was the same in effect as if the trustee

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116 (1868) LR 3 HL 1, 15.
117 Ibid.
118 (1881) 44 LT 406.
119 (1868) LR 3 HL 1.
120 There were in fact two trustees, each separately committing the same fraud.
had walked in and deposited a bag of cash; the bank took the money transferred as principal.\textsuperscript{121} The bank was therefore \textit{prima facie} liable as the recipient of misdirected trust property, having received beneficially.

Fox J held that the result of the case was clear. He found the bank liable to make good the loss to the trust beneficiaries. In today’s terms, however, it is not clear whether the right to restitution flowed from the bank’s receipt of misdirected trust money, or because the bank had dishonestly assisted the trustee to commit a breach of trust. Early in the judgment, Fox J said ‘those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit’.\textsuperscript{122} That language is consistent with recipient liability being in issue. But later in the judgment, when dealing with the bank’s plea based on the Statute of Limitations, Fox J rejected the defence by expressly adopting\textsuperscript{123} the words of Lord Brougham LC in \textit{Wilson v Moore}:\textsuperscript{124}

‘If the defendants are bound … it is because they have made themselves accessories to a breach of trust …’.\textsuperscript{125}

This is clearly the language of accessory liability. Again therefore this case does help determine the extent of a bank’s liability in unjust enrichment.

\textsuperscript{121} Above 154.
\textsuperscript{122} \textit{Foxton v Manchester and Liverpool District Banking Co} (1881) 44 LT 406, 408.
\textsuperscript{123} Ibid 409.
\textsuperscript{124} (1832) 1 My & K 337.
\textsuperscript{125} Ibid 350.
J R Thomson v Clydesdale Bank Ltd\textsuperscript{126} is the second House of Lords case in this series. A stockbroker was instructed by a client to sell certain shares and to deposit the proceeds in a bank account in the name of the client. The stockbroker sold the shares, and received a cheque payable to himself. Instead of obeying his instructions, the stockbroker deposited the cheque in his own bank account which at that time was overdrawn. Unable to recover from the stockbroker, the client sued the bank. The House of Lords held that he could not succeed. The money in question was received by the bank when it collected payment on a cheque drawn in favour of the stockbroker by the purchaser of the shares. As collector of a third party cheque (that is, a cheque not drawn by the account holder), the bank received as agent. The payment into the stockbroker’s account was made by a third party: the purchaser’s bank (acting itself as agent for the purchaser). On the ‘beneficial receipt’ analysis of recipient liability, that should have been the end of the matter so far as a claim in unjust enrichment was concerned. As an agent, the bank could only have been liable if it had acted dishonestly, for it would then have been liable for the wrong of dishonest receipt or assistance. Agency status is irrelevant in that respect.

The fact that the bank had received as agent by collecting payment of a cheque formed no part of the analysis by the House of Lords. Their Lordships evidently thought the case could be treated just as if the stockbroker had deposited the sum in cash. Lord Herschell LC, for example, said:

\textsuperscript{126} [1893] AC 282 (HL).
'under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it.'

His Lordship would apparently have held the bank liable if it had received the money with ‘reason to believe’ that the payment was being made in fraud of a third person. Lord Shand would similarly have found the bank liable if it had been put on inquiry. The case therefore appears to favour Dr Bryan’s view that agents, including banks receiving third party payments, are not immune from personal liability for the receipt of misdirected trust funds. On the other hand, it may well have been that Lord Shand and Lord Herschell took the view that receiving property with notice of a breach of trust renders the recipient liable as a wrongdoer. That is certainly how Lord Watson seems to have treated the case. He held that the client had to prove that the bank had acted ‘with bad faith’, by taking with knowledge of both the trust and its breach. This test of dishonesty would render any recipient, agent or otherwise, liable. Again, the analysis of the law is hampered by the failure of the court to clarify the difference between liability for what used to be called ‘knowing assistance’ and the liability or liabilities for ‘knowing receipt’. It is quite possible that, confronted with that distinction, even Lord Herschell and Lord Shand would have said that only the former was in play on those facts.

127 Ibid 287.
128 Ibid.
129 Ibid 293.
130 Ibid 290.
Coleman v Bucks and Oxon Union Bank\textsuperscript{131} is another first instance decision that is often cited in this context. The defendant bank received a sum of money from its London associates to be credited to J’s ‘trust account’. J did not have a trust account with the bank, but he did have an ordinary account. The money was placed into that account and J was advised accordingly. At that stage J’s account was overdrawn by an amount in excess of the deposit. The account was also close to the overdraft limit. For several years thereafter J continued to draw on his account in the usual way. Almost three years after the deposit J became bankrupt. The beneficiaries of the relevant trust sued the bank seeking restitution of the amount of the deposit. On the supposition of an immunity for those who receive as agents, this case should not have got over the first hurdle so far as ‘knowing receipt’ was concerned. The bank received as agent. Indeed, that fact was pleaded in the bank’s defence.\textsuperscript{132} But Byrne J held that the bank was free from liability not because of its status as agent, but because the bank did not have ‘the slightest notion that a breach of trust was intended’ nor did the bank have ‘any idea of any benefit to themselves’.\textsuperscript{133} Again, it is not entirely clear whether Byrne J thought that ‘knowing receipt’ or accessory liability was in issue.

In Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd\textsuperscript{134} the bank collected payment on a cheque in circumstances in which it did receive beneficially. A cheque drawn on a company’s account was signed by the

\textsuperscript{131} [1897] 2 Ch 243 (Byrne J).
\textsuperscript{132} Ibid 245.
\textsuperscript{133} Ibid 250.
\textsuperscript{134} [1902] AC 543 (PC).
company’s managing director and deposited into his own overdrawn account. As discussed in Chapter 2,135 ‘knowing receipt’ claims in relation to the misdirection of a company’s funds by a director of the company are dealt with in the same way in this respect as claims in relation to trustees. When a trustee draws a cheque on a trust account and deposits it into his personal account, the bank which operates the trustee’s personal account does not collect as agent. There is merely a transfer between two accounts held by one person. The same is true when a director of a company draws a cheque on the company’s bank account and deposits it into his personal account. The collecting bank, even if different from the company’s bank, does not receive as agent.

No agency was therefore involved in Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd. There was merely a transfer from one account controlled by the director of the plaintiff company to another. The appropriate test was thus for recipient liability. The Privy Council did indeed determine the case on the basis that the bank was ‘not affected with notice of any irregularity’ and therefore not liable.136 The case can therefore be viewed as indirectly supporting the model of beneficial receipt exposed by later cases in equity. A lower threshold of knowledge was required in circumstances where the bank received for its own benefit and not as agent. On the other hand, the Court did not expressly subject the facts to the question whether the bank received as agent.

135 Above 154.
Occasionally it is more clear that a court is thinking in terms of the accessory’s liability. In *British North American Elevator Co v Bank of British North America* the plaintiff company appointed Y to be its agent for dealings with customers in a certain town. The bank had a branch in that town. Y drew a draft on the plaintiff’s account. Pursuant to his agreement with the plaintiff, Y should have cashed the draft with the defendant bank and used the cash to pay the plaintiff’s customers. Instead Y deposited the company’s draft into his overdrawn personal account. The bank therefore received as agent. Three parties were involved in the payment: the company, the bank and Y. Y was not in the same position as a director of the company. A director is in effective possession or control of the company’s funds and owes fiduciary duties to the company in that respect. As a consequence, a director is regarded for the purposes of ‘knowing receipt’ as holding the company’s assets on trust for the company. Here Y was merely a contractual service provider to the company. Consequently, when Y deposited a company draft into his own account, the bank collected as agent. Three parties were involved: the plaintiff company as payer, the bank as collector, and Y as the payee. As an agent, the bank could only be liable as an accessory and not as a recipient. This is how the case seems to have been treated by the Privy Council. The bank knew that the company’s representative had instructions only to collect the proceeds of the draft in cash and pass that cash on to the company’s debtors. The Privy Council held that the bank therefore ‘knowingly became

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137 [1919] AC 658 (PC).
138 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555.
parties to a misapplication of what were trust funds’. This is the language of accessory liability. The judgment of the Privy Council does not emphasise the bank’s status as collecting agent, but that fact was irrelevant to the question whether the bank was guilty of an equitable wrong.

**Recent bank cases**

The NSW Court of Appeal had occasion to revisit this subject in *Stephens Travel Services International v Qantas Airways*. Qantas appointed Stephens to sell the airline’s tickets as a Qantas agent. The contract provided that money collected by Stephens upon the sale of Qantas tickets was to be held by Stephens on trust for Qantas. Instead of keeping the ticket money in a separate account as it should have done, Stephens paid all receipts into its ordinary account with ANZ. At all relevant times that account was overdrawn. Stephens usually drew cheques on this account to pay Qantas, and while it continued to do so Qantas suffered no harm as a result of Stephens’ breach of trust. But after closely monitoring the account, ANZ dishonoured a cheque drawn by Stephens in favour of Qantas and closed Stephens’ account. Qantas sued ANZ to recover the amount of payments made by Stephens into its account that Stephens had not already accounted for. ANZ was held liable.

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139 Ibid 663. Cf 664: ‘[The bank’s conduct] was, in their Lordships’ opinion, improper, having regard to … the duty of a banker who has notice that he is receiving a trust fund.’

140 (1988) 13 NSWLR 331 (CA).
ANZ did not receive the money in question as agent. The trustee, Stephens, deposited the money collected from the sale of Qantas tickets into its own account. The bank received the money from the account holder and thus on the bank’s own behalf. Recipient liability was therefore in issue. The bank was indeed held liable for ‘knowing receipt’. The Court of Appeal held that while ANZ had not acted dishonestly, it was aware of the terms of the agreement between Qantas and Stephens and must have known that Stephens had no right to use the money to reduce its overdraft. The Court did not make clear whether this knowledge defeated whatever defence ANZ might have had available, or was an ingredient of the cause of action. Part of the language used by the Court of Appeal might be said to be consistent with the existence of an immunity for agents from claims for ‘knowing receipt’. The Court said that the case was one where the defendant ‘has knowingly received trust property and applied it for his own benefit with actual notice that the application was a breach of trust’.  

Hope JA, giving the judgment of the Court of Appeal, said that this principle ‘is to be found running throughout all the cases’. However, in another respect, the case is inconsistent with this thesis. The reason ANZ was found to have received the money beneficially was not the fact that the bank had received as principal and not agent. Rather, it was the fact that the account into which the money was deposited was overdrawn. That fact has already been rejected above as irrelevant. It is revisited briefly below.

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141 Ibid 361E (emphasis added).
142 Ibid. Confusingly, Hope JA refers to the beneficial receipt principle as an ‘exception’ to the form of liability established in *Barnes v Addy* (1870) LR 9 Ch App 244 (CA). Later, his Honour appears to add to this exception ‘a qualification applicable in the case of banks’, 362E.
143 Above 156.
One further aspect of *Stephens Travel v Qantas* must be noted. It was stated above that ANZ did not appear to have received the trust money as an agent. Rather, ANZ received the money in question directly from the account holder Stephens, and the bank therefore received beneficially. In fact, it is not clear from the case whether that was so. If customers who purchased tickets from Stephens paid in cash, and Stephens deposited the cash into its account, then the assumption made above is correct: ANZ received the cash as principal and not as agent. However, if customers gave Stephens a cheque or credit card details as payment for the tickets, then the money received by ANZ in relation to those tickets would have been received as agent. It seems reasonable to assume that some customers did pay for their tickets by cheque or credit card. The Court of Appeal nowhere mentions any distinction between cash and non-cash sales. The inference is that the Court saw no relevance in that distinction. To that extent the case might be counted against the contention of this thesis that ‘knowing receipt’ will not lie against a bank which receives money as agent. It must be noted, though, that the result in the case should not have been different even if part of the money was received by ANZ as agent. The bank’s knowledge was such that by permitting the reduction of Stephens’ overdraft by the deposit of trust money, the bank was guilty of dishonest assistance, despite the Court of Appeal’s reluctance to characterise the bank’s conduct in that way. ANZ knew that the money was

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144 Below 210.
145 (1988) 13 NSWLR 331 (CA) 360B.
146 Ibid 358E-G; 359F, 360B.
received by Stephens on trust for Qantas. Using trust money to reduce a personal overdraft is a most patent breach of trust.\(^{147}\) If that conclusion is wrong so that the result was different for non-cash transactions, no anomaly is thereby exposed. Different forms of payment clearly have different legal effects on the parties involved.

**Reasons for sparse authority supporting agents’ immunity**

The lack of direct support from the early cases for the existence of an immunity in favour of agents from claims for ‘knowing receipt’ is not very surprising. The main reason was canvassed at the start of the previous section. Not much can be expected of cases which did not distinguish between different liabilities. Another closely related reason is that there are other claims against the agent who has received misdirected trust property. If the agent still has the original trust property, as opposed to a traceable substitute, then the agent must give up the property to the trust’s beneficiary. Agency is irrelevant when the defendant vindicates a proprietary right which was not generated by an event of unjust enrichment.\(^{148}\) Even where the agent is not in possession of the original trust property, his status as agent will not protect him where he acted dishonestly. Dishonest assistance of a breach of trust is an equitable wrong for which the concept of beneficial receipt is irrelevant. Another reason is that, in a world before change of position, most courts held that ‘knowing receipt’ required proof of fault.

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\(^{148}\) Chapter 1 above 14.
It is a short step from saying that the recipient is at fault and is therefore liable for ‘knowing receipt’, to saying that the recipient is barred by his fault from setting up his status as agent to defeat the claim.

3. COLLECTED MONEY CREDITED TO OVERDRAWN ACCOUNT

Some of the cases just discussed concerned the receipt of money by a bank as agent for a customer whose account was overdrawn at the time. There are three ways of analysing the question whether there is a beneficial receipt when misdirected money is paid into an overdrawn account by someone other than the account holder. It could be said that:

(1) there is always a beneficial receipt by the bank in those circumstances; or

(2) such a receipt is sometimes beneficial, as where the bank is pressing for payment of the overdraft by the account holder; or

(3) the receipt is never beneficial because the fact that the bank receives as agent necessarily means that the bank receives non-beneficially.

Although the first and second views appear in some literature and authorities, the third approach is right. That approach was adopted by Street CJ in an important but unfortunately unreported decision of the NSW Court of Appeal, *Bank of NSW v Vale Corp (Management) Ltd*.\(^{149}\) The defendant company, VCML, was the

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\(^{149}\) NSW CA, 21 October 1981.
manager of a unit trust. It opened a current account with the Bank of NSW into which it deposited subscriptions from the public pending payment of those subscriptions to the trustee under the unit trust. In breach of its fiduciary duties, VCML used some of the money in that account for its own purposes and transferred the rest to the overdrawn Bank of NSW accounts held by companies in the same corporate group as VCML. The trustee brought a claim against the Bank of NSW. The claim was pleaded as a ‘knowing assistance’ claim, but in argument and in the judgment the prospect of the Bank of NSW being liable in ‘knowing receipt’ was also discussed. Street CJ said:

‘It was said that the bank had acted as an agent of a trustee and that it fell within the second of the categories put forward by Lord Selbourne as a basis for erecting a constructive trusteeship. It was suggested in passing that the bank might also have rendered itself liable as being within the first of these two categories. The facts, however, disclose that it was not the bank, but rather it was the Vale Group which was the recipient of almost the entirety of the moneys paid out of the account.’

A payment to a bank account was thus seen as a payment to the account holder, and it made no difference that the account was overdrawn.

Some commentators take a different approach. They accept the criterion of beneficial receipt in order to found a claim for ‘knowing receipt’. But they say that a bank which receives a deposit of money in reduction of an overdraft always receives beneficially. That is so even if the source of the deposit in question was a third party from whom the bank collected as agent. Consequently, according to

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this view, the bank is *prima facie* liable to make restitution if it transpires that the money deposited was being dealt with in breach of trust. Millett J, in the context of the ‘knowing receipt’ claim in *Agip (Africa) Ltd v Jackson*,\(^{151}\) adopted this view. He said that the bank does not act as agent when the funds collected by the bank on the customer’s behalf are credited to an overdrawn account:

> ‘The essential feature of the first class is that the recipient must have received the property for his own use and benefit. This is why neither the paying nor the collecting bank can normally be brought within it. In paying or collecting money for a customer the bank acts only as his agent. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer’s overdraft. In doing so it receives the money for its own benefit.’\(^{152}\)

However, since deciding *Agip* his Lordship’s stand appears to have shifted somewhat. Writing in the *Law Quarterly Review* he used the same words as those quoted above from *Agip*, but importantly added this footnote:

> ‘The mere continuation of a running account in overdraft should not be sufficient to render the bank liable as a recipient: there must probably be some conscious appropriation of the sum paid into the account in reduction of the overdraft.’\(^{153}\)

This supports the second view of the relevance of an overdraft account – where money is deposited into an overdrawn account, the bank receives as agent and not beneficially unless there is a ‘conscious appropriation’ of the sum deposited to reduce the overdraft. This analysis is difficult. When a third party deposit is made to a bank account, the bank has no choice as to the account to which the money should be credited. The relevant account has already been designated by the third...

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\(^{152}\) [1990] 1 Ch 265, 292.

party depositor. The bank is not in a position to make a ‘conscious appropriation’ of the deposit. The better view is that when a bank receives funds paid to it by a third party for the benefit of the bank’s principal, the bank always acts as agent, and therefore ought not be liable if ‘beneficial receipt’ truly is a precondition of liability.

Professor Cranston adopts the second view of overdrafts. The ‘beneficial receipt’ requirement is said to be satisfied where, though the bank receives as agent, there is a ‘real benefit’ flowing to the bank from the reduction of the overdraft:

‘Consequently, beneficial receipt cannot be equated with the bank being benefited in the ordinary way through payment in. It must be confined to situations of real benefit, for example, to the bank pressing the customer to reduce its indebtedness under a facility when the customer is of doubtful insolvency.’154

A receipt is beneficial when the person concerned receives on his own behalf and not as agent on behalf of another. If that is correct, then any incidental benefit flowing to the bank from a third party receipt cannot change the fact that the bank received as agent, and hence cannot turn a non-beneficial receipt into a beneficial one. Beneficial receipt is not a receipt which makes the recipient better off. It is a receipt by someone acting on his own behalf and not as agent. The principled and practical reasons supporting this approach are explored further in Chapter 4.

As stated above, cases can be found which suggest that a bank is not acting as agent when money is paid to it by a third party for the credit of an account holder at a time when the relevant account is overdrawn. *Citadel General Assurance Co v Lloyds Bank Canada*¹⁵⁵ is a recent example. A company (referred to here as ‘Sub Co’) was wholly owned by another (‘Parent Co’). The same directors controlled each company. Sub Co sold insurance policies on behalf of Citadel. The premiums Sub Co collected were paid into its bank account at Lloyds. Each month Sub Co remitted the premiums less commissions to Citadel. Parent Co also banked at Lloyds. At the relevant times Sub Co’s account was in credit, whereas Parent Co’s account was overdrawn. The directors of Parent Co instructed Lloyds to transfer the entire balance standing at the end of the month in Sub Co’s account into Parent Co’s account. This arrangement continued for two months before Sub Co and Parent Co were each placed in liquidation. For those two months no premiums were remitted to Citadel. The Supreme Court of Canada held, first, that the premiums collected by Sub Co were held by it on trust for Citadel. Next, and importantly for present purposes, the Court unanimously¹⁵⁶ held that the bank was liable as the recipient of misdirected trust funds. This was despite the fact that the Court accepted that recipient liability in equity depends upon the defendant having received the funds in question not as an agent but for its own benefit.¹⁵⁷

¹⁵⁶ The judgment of La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ was given by La Forest J. Sopinka J agreed with that judgment subject to his Honour’s judgment in *Gold v Rosenberg* [1997] 3 SCR 767.  
¹⁵⁷ *Citadel v Lloyds* para 25.
Strictly speaking, the Court ought to have characterised the facts as involving a collection of money by the bank as an agent. This was because the case involved three different parties: the third-party payer (Sub Co), the bank, and the payee (Parent Co). The third party paid money to the bank for the benefit of the bank’s customer. There is, however, a way in which the same result could be reached consistently with the existence of an agents’ immunity from liability for ‘knowing receipt’. That is to say that on the facts the act of Sub Co in ordering the transfer of the funds in question was really the act of Parent Co. Sub Co was a wholly owned subsidiary of Parent Co. Moreover, the directors were exactly the same. In those circumstances, although technically the two companies were separate legal entities, it would not be irrational to treat them as one for the purposes of analysing whether or not the bank effectively received the funds as agent. This may well be one situation where ‘[t]he ordinary requirement of the principles of unjust enrichment that regard be paid to matters of substance rather than technical form is applicable.’

If this analysis is considered contrived, then the bank ought still to have been liable to Citadel but on the basis of dishonest assistance and not ‘knowing receipt’. Despite the Supreme Court’s finding that the bank had not behaved dishonestly, that finding can be questioned. The bank knew that Sub Co held funds in its account on trust for Citadel. Moreover, it must have known that the use of those

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trust funds to discharge the debt of Parent Co was a breach of trust. Finally, the instructions to transfer the money out of Sub Co’s account came not from Sub Co but from Parent Co. Although the Supreme Court made nothing of that fact, it must be wondered how the bank could think it was acting honestly in moving funds out of an account without authorisation of the account holder.

_Foxton v Manchester and Liverpool District Banking Co_\(^\text{159}\) and _Coleman v Bucks and Oxon Union Bank_\(^\text{160}\) were noted above.\(^\text{161}\) Both cases seem to suggest that a bank can be liable for ‘knowing receipt’ when it receives a ‘benefit’ by way of the partial reduction of a customer’s overdraft, the reduction having been achieved by the deposit of misdirected trust funds. However, other authorities seem inconsistent with the proposition that recipient liability always comes into play when trust funds are used improperly to reduce an overdraft. In _British North American Elevator Co v Bank of British North America_,\(^\text{162}\) for example, the Privy Council seems to have held the bank liable only because its knowledge and conduct rendered them accessories to a breach of trust, and not because they were liable as recipients. In that case the account in question was overdrawn.

Mr Harpum analyses two well-known banking cases to support his contention that money credited to an overdrawn account always means that the

\(^{159}\) _Foxton v Manchester and Liverpool District Banking Co_ (1881) 44 LT 406.

\(^{160}\) [1897] 2 Ch 243 (Byrne J).

\(^{161}\) Above 199, 203 respectively.

\(^{162}\) [1919] AC 658 (PC), above 205.
bank has received the money in question ‘beneficially’. Both *Selangor United Rubber Estates Ltd v Cradock (No 3)* and *Karak Rubber Co Ltd v Burden (No 2)* were cases in which a bank had unknowingly participated in an unlawful scheme to use a company’s money to assist in the purchase of the company’s own shares. The essence of each scheme was that the perpetrator would borrow money from the bank involved, buy the target company with the borrowed funds, and then use the company’s money to repay the bank. It is that repayment which potentially gives rise to *prima facie* liability on the part of the bank for ‘knowing receipt’.

In *Selangor United Rubber Estates Ltd v Cradock (No 3)* District Bank provided the finance for the take-over scheme. The loan from District Bank was repaid by way of a cheque drawn on the target company’s account at District Bank. That cheque was deposited into the rogue’s overdrawn account, thereby effecting a repayment of the initial loan to the rogue, as well as placing the rogue’s account in credit to the extent of £37,500. As discussed above, the deposit of a cheque into a bank account almost always involves the bank receiving payment as an agent from the drawer of the cheque. That is so even if the collecting bank is also the paying bank. Consequently, the bank received as agent and could not

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164 [1968] 1 WLR 1555.
165 [1972] 1 WLR 602.
166 [1968] 1 WLR 1555.
167 The facts were neither this simple, nor quite as stated above, but for present purposes the description above illustrates the effect of the relevant transactions.
168 The only exception being where the drawer of the cheque is the account holder himself.
169 See Chapter 2, 152.
have been liable for ‘knowing receipt’. This is consistent with the way the case was treated by Ungoed-Thomas J, who considered the claim to be one of ‘knowing assistance’. Mr Harpum argues, however, that the bank should have been liable as a recipient. In support of that proposition, Mr Harpum refers to the clearing of a personal overdraft as ‘a personal benefit … designed or stipulated for’, putting the bank on inquiry. But if this was so, surely the bank was put on inquiry as to the whole payment. It may be that Mr Harpum was adopting the ‘net benefit’ view favoured in the New Zealand cases discussed above, *Nimmo v Westpac Banking Corp*[^171^] and *Cigna Life Insurance New Zealand Ltd v Westpac Securities Ltd.*[^172^]

The Courts in those cases considered that a payment to a bank account could not normally qualify as a ‘beneficial receipt’, but would do so where the bank ‘retained’ the money in question by way of a reduction of the account holder’s overdraft.[^173^]

The view that a reduction of an overdraft automatically means that the bank receives beneficially appears to be derived from Lord Cairns LC’s judgment in *Gray v Johnston.*[^174^] Lord Cairns LC said that the bank’s liability for the receipt of misdirected trust property was determined by whether or not the bank was ‘privy to the intent to make this misapplication of the trust funds.’[^175^]


[^171^]: [1993] 3 NZLR 218 (HC), above 182.


[^173^]: The facts of *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602 (Brightman J) were for all practical purposes the same as in *Selangor* (above).

[^174^]: (1868) LR 3 HL 1, above 195.

[^175^]: Ibid 11.
this regard was said to be this:

‘…if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.’

Even assuming that the mere reduction of an overdraft is a relevant ‘benefit’ to the bank, this passage makes clear that that benefit is not enough. The benefit must be ‘designed or stipulated for’.

In fact, it is illogical to suppose that a bank ‘benefits’ from a reduction of an overdrawn account but not from a deposit into an account already in credit. The error was captured by the High Court of Australia in ANZ v Westpac:

‘… [T]he proposition that a financial institution which makes profits by lending money at interest is better off whenever a corporate customer, which is not known to be insolvent, reduces its use of an overdraft facility which has been made available on commercial terms sounds somewhat strangely in modern ears.’

Even this statement needs tightening. The state of the customer’s account is, by itself, irrelevant to claims for ‘knowing receipt’ because the beneficial receipt principle exempts from liability in unjust enrichment a receipt by an agent. In such a case, the payer’s claim in unjust enrichment lies against the principal alone, for it is the latter whose enrichment gives rise to liability. For any particular

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176 Ibid.
177 M Bryan, *Restitution and Banking Law* 184 makes the same point, but for a different reason. As noted above 194, he considers that a bank receives all money beneficially.
179 Above 172
180 See further Chapter 4.
receipt, a bank either does or does not receive as agent. What it knows of the customer’s insolvency at the time cannot change its status. Knowledge may give rise to liability on the part of the bank for other reasons (and in particular accessory liability), but it does not render irrelevant for the purposes of ‘knowing receipt’ the fact that the bank received as agent.

It may have been reasoning such as this which led some courts, and Sir Peter Millett extra-judicially,\(^{181}\) to say that the mere fact that the relevant account is overdrawn is not enough to render the receipt ‘beneficial’. Some additional fact is said to be required. Usually the additional fact is that the bank was pressing the customer to reduce an overdraft, or decided to close the customer’s account immediately after the relevant deposit.

**Bank pressing account holder or closing the account**

The suggested relevance of the bank pressing the account holder to reduce his or her overdraft has been emphasised in a number of cases\(^ {182} \) and texts.\(^ {183} \) In part this view is based on Lord Cairns LC’s judgment in *Gray v Johnston*,\(^ {184} \) and in particular his Lordship’s view that the bank will be ‘privy’ to the trustee’s fraud

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\(^{181}\) Sir Peter Millett, ‘Tracing the Proceeds of Fraud’ (1991) 107 LQR 70, 83 n46.

\(^{182}\) (1868) LR 3 HL 1, 13 (Lord Cairns); *Foxton v Manchester and Liverpool District Banking Co* (1881) 44 LT 406, 408; *Dixon v The Bank of NSW* (1896) 17 LR (NSW) Eq 355 (Full Crt); *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243, 254 (Byrne J); *Westpac Banking v Savin* [1985] 2 NZLR 41 (CA) 53 (Richardson J); *Stephens Travel Services International v Qantas Airways* (1988) 13 NSWLR 331 (CA) 365.


\(^{184}\) *Gray v Johnston* (1868) LR 3 HL 1.
where a benefit to the bank flows from the breach of trust and that benefit is ‘designed or stipulated for’ by the bank. Once again, the later cases seem to have overextended Lord Cairns LC’s dictum. It cannot be relevant that the bank, without any notice at all that a breach of trust was intended, had asked the trustee to reduce his overdraft. That fact could only be relevant, if at all, when combined with the bank’s knowledge that the trustee might use trust funds to pay his personal debts. It is wrong to conclude, as some judges have, that because the bank was pressing the trustee to reduce his overdraft the bank must automatically be taken to have ‘designed and stipulated’ for a benefit from a breach of trust. In any event, to make liability turn on whether or not the bank was pressing for payment seems strange. Say a trustee owes money both to A and to B. B happens to see the trustee in the street and reminds him of the debt. The next day the trustee uses trust funds to repay both his creditors. Is B really to be made liable whilst A is not?

Other judges have said that a mere reduction of an overdraft is not enough to render beneficial a receipt by a bank as agent, but it will be so if the bank closes the account or withdraws overdraft facilities immediately or soon after the receipt in question. For example, in *Gray v Johnston* Lord Westbury said:

> ‘if a balance had been immediately struck, and the sum of money so paid in had been appropriated at once to the payment of the balance due on that account to the bankers, or if any other transaction had been made by which you might follow the money and say that it was applied according to the agreement of the parties and expressly in

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185 *Westpac Banking v Savin* [1985] 2 NZLR 41 (CA) 53 (Richardson J).
186 *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243, 247.
187 *Gray v Johnston* (1868) LR 3 HL 1.
discharge of a debt due from the new firm to the bankers, then we should want no more to compel restitution from the bankers...’.\textsuperscript{188}

In \textit{Stephens Travel Services International v Qantas Airways}\textsuperscript{189} both factors – pressure from the bank, and closure of the relevant account – were present. Hope JA placed weight on them in finding the bank liable. Again, the bank’s knowledge of the customer’s insolvency can give the bank notice of an actual or potential breach of trust,\textsuperscript{190} or it might go to show that the bank received a preference voidable in the customer’s insolvency. But it is difficult to see why the mere fact that the bank is pressing the customer to reduce his overdraft turns what would be a non-beneficial receipt into a beneficial one. The same arguments apply to the relevance of the bank closing an account. Whilst that fact might possibly be relevant in assessing the bank’s dishonesty, it cannot by itself turn a non-beneficial receipt into a beneficial one.\textsuperscript{191}

C. \textbf{CONCLUSION}

From the standpoint of logic and principle, a bank should be immune from recipient liability in equity when it receives as agent. The early case law unsurprisingly offers uncertain support because distinctions which have been only recently recognised could not then be taken. Later cases unequivocally do accept the existence of a principle immunising agents from liability in ‘knowing receipt’.

\textsuperscript{188} Ibid 15 (Lord Westbury).
\textsuperscript{189} (1988) 13 NSWLR 331 (CA). The facts are described Above 206.
\textsuperscript{191} \textit{Fuglsang v English Scottish and Australian Bank Ltd} [1959] Tas SR 155, 159 (Cox AJ).
But a prevalent view is that a bank which receives trust money as agent in reduction of an overdraft will always (or, according to some cases, sometimes) be liable as a beneficial recipient of misdirected trust money notwithstanding the fact that it received as agent. This uncertainty paves the way for the analysis in Chapter 4 of an important question: As a matter of principle and policy, should banks in receipt of misdirected funds as agent ever be liable in unjust enrichment?
CHAPTER 4 - A GENUINE DEFENCE OF MINISTERIAL RECEIPT

A. INTRODUCTION

At common law an agent who receives money on behalf of a principal is liable to a claim in unjust enrichment unless he has paid over the money received to or on behalf of his principal.\(^1\) The position is different in equity.\(^2\) Equity immunises agents from claims in unjust enrichment, which must be brought against the agent’s principal. Those who argue that the common law position is correct according to the principles of unjust enrichment start from a position of strength. In *BP Exploration Co (Libya) Ltd v Hunt (No 2)*,\(^3\) Robert Goff J said:

> ‘Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited’.\(^4\)

According to this view all recipients are inevitably enriched by the receipt of money. There is no suggestion that the position is any different when the recipient is an agent. Why should that fact make any difference to the *prima facie* liability of the recipient? Despite this strong start, one does not have to dig very deep to discover a tension between the orthodox position on ministerial receipt adopted by the common law, and a different but equally well established orthodoxy under the

\(^1\) Chapter 2 above.
\(^2\) Chapter 3 above.
\(^3\) [1979] 1 WLR 783.
\(^4\) Ibid 799F.
The general principles of agency law provide one of the main arguments in favour of the present thesis. This chapter contends that those who receive as agents, including for this purpose banks who receive as intermediaries, should not be even prima facie liable in unjust enrichment. Instead liability should fall on the principal / account holder alone. Other arguments, independent of the general principles of agency, support that proposition. In particular, the manner in which the common law treats ministerial recipients can place agents in an impossible dilemma. This latter argument is particularly strong for banks.

As noted in the Introduction, the contention of this thesis in relation to ministerial receipt is that the law ought to immunise agents from liability in unjust enrichment. That contention is encapsulated by the phrase ‘a genuine defence of ministerial receipt’. Despite the convenience of this phrase, it is important to appreciate that what is being asserted is that technically there should be no cause of action in unjust enrichment against a ministerial recipient; that is, against an agent. Thus there would be no defence of ministerial receipt in the strict sense of the word defence.


B. **THE GENERAL LAW OF AGENCY**

1. **PAYMENT TO THE AGENT IS PAYMENT TO THE PRINCIPAL**

   It is an entrenched part of the general law of agency that when an agent receives money for the benefit of his principal, payment to the agent is regarded in law as a payment to the principal himself and not as a payment to the agent. More than a century ago Erle CJ expressed that doctrine in *Edgell v Day*:

   ‘The general principle of law is, that a payment of money to an agent is payment to the principal.’

The same proposition continues to be recognised to the present day. Lord Millett has twice affirmed it. As Millett J in *Agip (Africa) Ltd v Jackson* he said that where a payment was made to a known agent:

‘… the agent is treated as a mere conduit pipe and the money is taken as having been paid to the principal *rather than* the agent.’

Then as Millett LJ in *Portman Building Society v Hamlyn Taylor Neck (a firm)* his Lordship said:

‘At common law the agent recipient is regarded as a mere conduit for the money, which is treated as paid to the principal, *not to the agent.*’

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5 (1865) Law Rep 1 CP 80.
6 Ibid 84 (Erle CJ). See too *Harington v Hoggart* (1830) 1 B Ad 577, 586 (Lord Tenterden LC).
8 [1990] Ch 265, 288 (emphasis added).
9 [1998] 4 All ER 202 (CA).
10 Ibid 207 (emphasis added).
A number of consequences follow. One is that the payer’s debt to the principal is discharged at the time payment is made to the agent. Another consequence is that the principal is *prima facie* liable to meet any claim in unjust enrichment from the moment of his agent’s receipt, a fact established below. This chapter argues in favour of a third consequence: that the agent ought to be immune from liability in unjust enrichment even before payment over. At present the common law position is that the agent is jointly liable with his principal to make restitution until payment over.

At common law a mistaken payment to an agent is recoverable from the agent if he is notified of the mistake before payment over. But if a payment to an agent is treated as a payment to the principal directly, and *not* as a payment to the agent, why is the payer entitled to sue the agent in unjust enrichment? Why is the plaintiff not restricted to a claim against the true payee, the principal? If the payer was indeed so restricted, the common law position would be the same as that in equity, where claims in unjust enrichment cannot be brought against those who receive as agents.

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12 Below 234.
For a long time this tension has remained largely unexplored. Recently, however, the issue has been given some consideration. In the main the common law position has been supported. But queries have begun to be raised. One source of doubt is the latest edition of the leading work on the English principles of agency. These doubts are explored below, together with another advanced with the great authority of Sir John Paget KC over 75 years ago.

2. THE ESSENCE OF AGENCY – THE AGENT DROPS OUT

Where an agent conducts a transaction on behalf of his principal, the agent usually drops out of the legal picture unless he or she has committed some wrong which renders him personally liable. This is the essence of agency. Thus Bowstead and Reynolds refers to:

‘the normal agency reasoning whereby the agent drops out of the transaction unless there are other indications that he undertakes a duty.’

A clear example of this reasoning comes from the law of property. Say X is obliged, by contract or otherwise, to transfer goods to Y. X and Y agree that X’s

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15 See ‘Emerging Doubts in Bowstead and Reynolds’ below 232.

16 See ‘Recognition of the bank’s dilemma by Sir John Paget KC’ below 273.

17 Bowstead and Reynolds 507. The agent does not drop out of the transaction if in the course of his dealings he has committed a tort or some other wrong; see below 230.
obligation will be satisfied if X delivers the goods to Y’s agent. X does so. The law of agency in this situation is clear: property in the goods passes directly from X to Y.\textsuperscript{18} The agent’s title after such a transfer is merely possessory. Indeed, the principal is considered to come into possession of the goods at the moment they are delivered to his agent.\textsuperscript{19} Consequently, the goods enhance the principal’s wealth and not the agent’s. The agent is a mere conduit pipe for the passing of both the value of and the title to the goods.

So far as title is concerned the same principle can, but almost always does not, apply to payments of money. The passing of title is dependent upon the intention of the transferor. If a person pays a debt owed to a creditor via the creditor’s agent, the debtor will usually not intend that the agent hand over to his principal the very notes and coins paid by the debtor. If the debtor does so intend, property in the notes and coins passes directly from the debtor to the principal. Commonly, however, the debtor will intend only that the agent account to his principal for an equivalent sum. In that case, property in the notes and coins transferred to the agent passes to him. But the normal agency reasoning should still apply. The underlying transaction remains one between the debtor and the principal. The agent is used only as a mechanism of payment, pursuant to which the debtor’s obligation to the principal is discharged from the moment the agent receives the money. The agent is still a conduit pipe with respect to the value of

\textsuperscript{18} Bowstead and Reynolds 494, Article 91(1); AG Guest et al, (eds), Benjamin’s Sale of Goods (5\textsuperscript{th} edn, 1997) para 5-097.

\textsuperscript{19} PS Atiyah, The Sale of Goods (9\textsuperscript{th} edn, 1995, JS Adams, (ed)) 97.
the money. Subject to a point considered below about factual enrichment through the use of money, the payment to an agent should be seen as enhancing the principal’s wealth and not the agent’s.

Two separate points flow from this discussion. First, the basic principles of agency require that agents drop out unless there is a special reason for keeping them in. In relation to wrongdoing there is a special reason. That reason is discussed in the next section. But in relation to unjust enrichment no obvious reason exists why agents should be jointly liable with their principals. Secondly, if it is true to say that a payment to an agent enhances the principal’s wealth but not the agent’s, then there is even more reason for saying that agents should drop out in the law of unjust enrichment. An absence of enrichment on the part of the agent ought to entail an absence of liability in unjust enrichment. Both those points are developed below.

3. AGENCY AND TORT

It is first necessary to notice the support which the orthodox common law defence of payment over receives from Mr Swadling. He sees no inconsistency between the orthodox view of ministerial receipt and the law of agency. On the contrary, Mr Swadling suggests that if the law were to say that an agent is immune from liability in unjust enrichment there would then be an inconsistency of a different

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20 Below 256.
kind: between the law of tort as it applies to agents and the law of unjust enrichment. Agents do not drop out in tort. It is no defence to a claim in tort for the defendant to prove that at the time he did the acts complained of he was acting as the agent of someone else. Why then, asks Mr Swadling, should agents drop out in unjust enrichment? After all, the obligations which arise in both unjust enrichment and tort do so by imposition of law and not, as in the law of contract, as the result of any agreement between the parties.

There is of course nothing in the law of agency which suggests that agents should not bear personal responsibility for wrongs committed by them. But it is not logical to infer that because an agent is not immune from liability in one non-contractual category, he must necessarily be exposed to liability in another. The position of the agent depends on the precise impact of agency on each form of non-contractual liability. If unjust enrichment were a form of wrongdoing, Mr Swadling’s argument might be correct. But it is not. Unjust enrichment is not a wrong. Its focus is always on either the intention of the plaintiff or some public policy which requires restitution. Unjust enrichment does not focus on any wrongful conduct of the defendant. Even where the conduct of the defendant is considered relevant to the cause of action, it is not because the defendant has committed a wrong. As Mr Swadling himself says:

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22 Ibid citing Bennett v Bayes (1860) 5 H & N 391, and Heugh v Earl of Abergavenny & Delves (1874) 23 WR 40. See too Perkins v Smith (1752) 1 Wils KB 328; Cranch v White (1835) 1 Bing N C 414; Bowstead and Reynolds Article 115, 635.

‘There is a world of difference between wrongs and not-wrongs. Unjust enrichment, triggering restitution (of a thing to a person), is unequivocally a not-wrong.’

This is not to suggest that the analogy ought to be between the law of unjust enrichment and the law of contract. Unjust enrichment is an area of law governed by its own principles. The way in which this subset of the law treats agents must be internally justified both in principle, and by the need to avoid adverse practical consequences. But unjust enrichment must also be consistent with general principles of law. As discussed above, one of those principles is that the agent drops out of the transaction unless he commits a wrong. If an agent is to be kept within unjust enrichment, there must be a rational reason why the general agency reasoning does not apply.

4. EMERGING DOUBTS IN BOWSTEAD AND REYNOLDS

If agents should drop out from transactions giving rise to claims in unjust enrichment, it would be surprising if there was not some doubt expressed about the orthodox common law position by jurists who specialise in the general law of agency. Although that would not be wholly inexplicable, given the relative immaturity of unjust enrichment in English law, as it happens the latest edition of Bowstead and Reynolds does express such doubts. Within Article 113 (‘Duty of agent to repay money received for use of principal’), and under the new sub-heading ‘Questions of principle’, Professor Reynolds begins his commentary with


\[25\] Such as the agent’s dilemma, considered below 262.

\[26\] Bowstead and Reynolds 622.
these remarks:

‘The cases of this subject indicate two different and possibly inconsistent lines of reasoning which could be taken in respect of recovery of money from an agent. The first uses the notion that payment to an agent for the principal in respect of a matter on which the agent has actual or apparent authority to receive it is payment to the principal. Under this reasoning, unless there is a separate liability in the agent (as where the principal is undisclosed, or where he is liable together with his principal, or where he himself commits a wrong), the proper defendant is the principal and the agent is not liable. The money is in contemplation in the hands of the principal: for example, in the case of a deposit.

The second line of reasoning uses the notion that where the agent holds money to which neither he nor his principal is entitled, it can be intercepted and recovered at this stage unless without knowledge of the claim he has paid it over to his principal.’

The second line of reasoning to which this passage refers is the orthodox common law treatment of agents discussed in Chapter 2. Professor Reynolds clearly questions whether that treatment is correct. Bowstead and Reynolds goes on to suggest that there is ‘perhaps’ a way in which these two lines of reasoning can be ‘assigned to their own spheres’. The attempted reconciliation – the essence of which has appeared in most earlier editions of Bowstead and Reynolds – is examined below. For present purposes, it is important to note that even Professor Reynolds seems unconvinced of the correctness of that reconciliation. He concludes his discussion of the two inconsistent lines of reasoning by saying:

‘In view of the above, however the matter should be approached in a book on the law of restitution, it is most convenient in a work on agency to start with the general agency-based rule that money paid to an agent for his principal and received within the agent’s actual or apparent authority, or the receipt of which is ratified, is regarded as

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27 Ibid 623 (footnotes omitted).
28 Ibid 624.
29 Below 277.
having been paid to the principal and is recoverable from the principal only.\(^{30}\)

5. **The Principal’s Liability in Restitution From the Moment of the Agent’s Receipt**

Is the principal liable to repay a mistaken payment even before his agent has paid it over? More importantly for present purposes, is the holder of a bank account liable to repay a mistaken deposit to his account from the moment the deposit is made, even before the account holder has withdrawn or otherwise used the sum deposited? The central thesis of this chapter would lose much of its force should the answer to these questions turn out to be no. If the agent (bank) was immune from liability in unjust enrichment, but the principal (account holder) could not be sued until there had been payment over, the plaintiff would remain in limbo in the interval between payment and payment over. In that intervening period the payer would be without a right of recovery. That could not be right. Such a situation might place an intolerable burden on deserving plaintiffs, and the case for a genuine defence of ministerial receipt would be significantly weaker. When, then, does the principal’s liability arise: at the moment of the agent’s receipt, or only upon payment over?

Uncertainty continues to surround this issue. Professor Birks, writing in 1995, adopted the intuitive response. He felt sure that the principal was liable from the moment of the agent’s receipt:

\(^{30}\) *Bowstead and Reynolds* 625.
'A tenant pays his rent to his landlord’s collector. Shortly afterwards, he discovers that his wife has already sent a cheque directly to the landlord. There can be no doubt that the tenant has an immediate right in this situation to sue the landlord, even before the agent pays over. Payment to the agent is payment to the principal.'  

Doubts have, however, since crept in. Professor Birks more recently remarked:  

‘The German rule entails the conclusion that the plaintiff can immediately sue the principal, even before the agent pays over. On general principles that ought to be the English rule too, despite the continuing liability of the agent till payment over. But in Barclays Bank v Simms [1980] QB 677, 702 Robert Goff J hesitated to enter judgment against a principal who had not yet received and wanted to hear argument on the point. The report records only that, after a discussion with counsel and, semble on the basis of the resulting agreement on both sides, he did enter judgment against the principal.’  

As this passage discloses, Robert Goff J was also unsure of the position in Barclays Bank v W J Simms Son & Cooke (Southern) Ltd. In that case Barclays made a mistaken payment to the defendant’s bank, NatWest, for the credit of the defendant’s account. The defendant had not withdrawn the amount in question from its NatWest account at the time of trial. It was held that Barclays had a right to recover the payment, and that the defendant had no defence to that claim. Robert Goff J, after delivering his reasons, did not proceed to enter judgment. The hesitation was this:  

‘As at present advised I am reluctant to enter judgment against the defendant company without further argument. I say that because the argument before me was concentrated on the right of recovery generally, and there was not fully canvassed before me the question whether, assuming that the National Westminster Bank received the payment as agent for the defendant company, an action will lie against its principal to whom the bank had neither paid the money nor done anything equivalent

31 P Birks, Laundering and Tracing 341.  
32 P Birks, Restitution and Banking Law 209 n59.  
33 [1980] QB 677 (‘Barclays v Simms’).
to payment. I will be glad, therefore, to hear submissions from counsel as to how the parties wish the matter to be taken from here.\(^{34}\)

Counsel for the account holder conceded that judgment ought to be entered against his client. The concession removed the need for Robert Goff J to decide the issue.

Leading texts take contrary positions. In *Paget* the principal is said not to be liable until payment over:

‘When money is paid to an agent of the defendant, the defendant may resist a claim for money paid under a mistake of fact if … the money has not been paid to him or used on his behalf by an agent acting for him …’.\(^{35}\)

*Bowstead and Reynolds*, however, says the exact opposite: the principal is liable from the moment of the agent’s receipt. Article 73 states:

‘(1) A disclosed principal, whether named or unnamed, may … be sued … in respect of any money … received on his behalf, by his agent acting within the scope of his actual authority or whose acts are validly ratified.’\(^{36}\)

The commentary makes the position clear:

‘Restitution: liability of principal. A disclosed principal may also be liable for money paid to his agent as such in connection with transactions effected within the agent’s authority, even though he has not received it.’\(^{37}\)

Similarly, Professor Tettenborn says that there is ‘no doubt’ that where a sum of money is paid by mistake to P’s agent, P is liable to refund the payment.\(^{38}\)

\(^{34}\) Ibid 702.

\(^{35}\) *Paget* 367.

\(^{36}\) *Bowstead and Reynolds* 361.

\(^{37}\) Ibid 365.

On this issue *Bowstead and Reynolds* is right, *Paget*, unusually, wrong. *Portman Building Society v Hamlyn Taylor Neck (a firm)*\(^\text{39}\) demonstrates the principal’s liability from the moment of the agent’s receipt:

‘The true rule is that where the plaintiff has paid money under (for example) a mistake to the agent of a third party, he may sue the principal whether or not the agent has accounted to him, for in contemplation of law, the payment is made to the principal.’ \(^\text{40}\)

There are other cases as well. *Bowstead and Reynolds* cites *Coulthurst v Sweet*.\(^\text{41}\)

In that case an agent was appointed by the owner of a ship to receive freight. The agent demanded too much freight from certain consignees, who paid under protest. The consignees then sued one of the owners of the ship for repayment of the excess. The owner was held liable even though no part of the money received by the agent had been paid over. That was not a case of mistaken payment, but it was a case where the action arose at the time of payment. Moreover, the action for money had and received must be seen today as lying in unjust enrichment. A routine objection is that the action for money had and received can be functioning as a procedural instrument for conversion.\(^\text{42}\) But on these facts it is almost impossible to imagine that it was.

\(^{39}\) [1998] 4 All ER 202 (CA).

\(^{40}\) Ibid 207 (Millett LJ).

\(^{41}\) (1866) LR 1 CP 649.

\(^{42}\) *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL).
Another case in favour of the *Bowstead and Reynolds* stance is *Cary v Webster*. 43 There an agent of a company received payments for subscriptions of shares. By mistake the agent omitted to enter the plaintiff’s name in the company’s book. That fact gave the plaintiff a right of recovery. The agent was held entitled to plead payment over, but importantly Pratt CJ said *obiter* that:

‘… if he had not paid over the plaintiff would have had his option, either to charge him or the Company’. 44

A series of cases involving contractual deposits supports the *Bowstead and Reynolds* position, and those cases certainly did involve claims for restitution of unjust enrichment.

**The deposit cases**

In *Ellis v Goulton* 45 a party to a contract paid a deposit to the other party’s agent. When the contract was later terminated the first party sued the agent to recover the deposit. The claim was disallowed on the basis that recovery could only be sought from the agent’s principal, even though the agent had not paid over the deposit. As in the cases considered above, the principal was liable in unjust enrichment before payment over. The same result was reached in *Duke of Norfolk v Worthey*. 46 The plaintiff’s action against the defendant for recovery of the deposit was resisted on the ground that there was no proof that the money in question had

43 (1721) 1 Str 480.
44 Ibid.
45 [1893] 1 QB 350 (CA).
46 (1808) 1 Camp 337.
been paid over to the defendant by his agent. But Lord Ellenborough said that made no difference:

‘[W]hen the deposit was lodged with the agent, this was in law eo instanti a payment to the principal.’

An appeal was dismissed because:

‘… the Judges were all of the opinion that the deposit was to be considered the money of the Duke of Norfolk and that being paid to the agent of the defendant it was money had and received by the latter to the plaintiff’s use.’

There are many other cases concerning attempts by disappointed purchasers to recover deposits from vendors’ agents. The purchasers’ actions all failed. In each case the court took it as axiomatic that payment of a deposit to an agent acting as such and within his authority was equivalent to payment to the principal, and that the actions to recover the deposit could be brought against the principal regardless of payment over. The result is no different where the agent who receives a contractual deposit is a bank. A bank in this context is in the same position as any other agent who receives a deposit, and thus is free from liability to repay the deposit even before payment over. Edgell v Day, though not itself involving a bank, establishes this. Willes J said:

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48 Ibid 341.
49 Hurley v Baker (1846) 16 M & W 26; Edgell v Day (1865) Law Rep 1 CP 80; Bamford v Shuttleworth (1840) Camp 337; Christie v Robinson (1907) 4 CLR 1338; Tudor v Hamid [1988] 1 EGLR 251 (CA). The rule is not limited to cases involving land. In Goodey and Southwold Trawlers Ltd v Garriock, Mason and Millgate [1972] 2 Lloyd’s Rep 369 the rule was applied to the sale of a ship.
50 (1865) Law Rep 1 CP 80.
'The defendant was clearly solicitor for the vendor, and for him only; and we see from the third condition of sale that the deposit was to be paid to him, as agent for the vendor, which seems to me the same as if it had been provided that the deposit should be paid into some bank to the account of the vendor. The plaintiff [vendor], therefore, is clearly entitled to the money.'

Reconciliation of the deposit cases in Bowstead and Reynolds

Bowstead and Reynolds now acknowledges a possible inconsistency between the orthodox common law treatment of ministerial recipients and the general agency reasoning that the agent drops out unless he commits a wrong. In relation to a mistaken payment the agent is liable to the payer until he has paid over the money received to his principal. But in relation to a payment of a deposit for a consideration which has failed, the general agency reasoning applies so that the agent is never liable, even if he has not yet paid over to his principal. Professor Reynolds suggests that these two principles can ‘perhaps be assigned to their own spheres.’ He says that when the plaintiff’s claim in unjust enrichment arises immediately upon the making of the payment to the agent, as where the payment is made by mistake, the agent will be personally liable to return the payment. However, when the claim in unjust enrichment does not arise until some time after the payment is made, as where the payment is made for a consideration which subsequently fails, the agent drops out and only the principal will be liable. The plaintiff will not be able to sue the agent even where the agent retains the sum concerned.

51 Ibid 85 (emphasis added).
52 Above 232.
53 Bowstead and Reynolds 624.
This explanation of the cases is consistent with the way in which *Bowstead and Reynolds* has, for most of its life, treated the position of agents who receive mistaken payments.\(^{54}\) The *Restatement* adopts the same position.\(^{55}\) Although this analysis explains most of the cases,\(^{56}\) it does not justify the distinction that the law presently draws. It is difficult to understand why the distinction should make any difference. If the money is recoverable and is still in the agent’s possession, why should it make any difference when the action arose? The justification for immunising the agent from a claim in unjust enrichment arising after payment should also apply when the claim arises at the time the payment is made. The justification in the former situation is clear. Payment to an authorised, disclosed agent must be treated in the same way that a payment made directly to the principal would be treated. Thus, the Court of Appeal in *Ellis v Goulton*\(^{57}\) said:

‘when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal…. The three cases of *Edgell v. Day*,\(^{58}\) *Bamford, v. Shuttleworth*,\(^{59}\) and *Duke of Norfolk v. Worthy*,\(^{60}\) abundantly shew this, and carry us back as far as the time of Lord Ellenborough… I am of opinion that the payment of the money to the solicitor was equivalent to payment to his principal, and that the money cannot be recovered from the solicitor, whether he has paid it over to his principal or not.’\(^{61}\)

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\(^{56}\) Contrast *Murray v Mann* (1848) 2 Ex 538, discussed below 263.

\(^{57}\) [1893] 1 QB 350 (CA).

\(^{58}\) (1865) Law Rep 1 CP 80.

\(^{59}\) (1840) Camp 337.

\(^{60}\) (1808) 1 Camp 337.

\(^{61}\) [1893] 1 QB 350 (CA) 353-354 (Bowen LJ).
This passage places no emphasis on the fact that the cause of action arose after payment. Rather, the agent is immune because the law treats the payment as if it was made to the principal directly. The reasoning should apply to cases where the cause of action in unjust enrichment arises at the moment the agent is paid. Two consequences would follow. First, the agent would be immune from liability in unjust enrichment even before payment over. Secondly, the principal would be liable at the moment the agent is paid.

The first consequence is not the law at present. But there are other cases, besides the deposit cases, which clearly show that the second consequence is already the position in English law. In addition to the cases discussed above, and in particular *Portman Building Society v Hamlyn Taylor Neck (a firm)*, there are cases specifically involving a mistaken payment to a bank for the credit of one of the bank’s customers.

**Mistaken payments to bank accounts**

Where a bank receives a mistaken payment with directions to credit that payment to the account of one of its customers, two questions arise. First, is it correct to say that the bank receives such a payment as agent for the account holder? Secondly, does the mistaken payment give rise to an immediate liability on the

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62 See Chapter 2.
63 [1998] 4 All ER 202 (CA), above 237.
part of the account holder to make restitution? The answer to both questions is yes. It has already been seen that a bank is appointed as the account holder’s agent to receive money paid to the bank for the credit of the account holder.\textsuperscript{64} That is an ordinary incident of the contract between the bank and the customer. The same situation applies to third party payments made by mistake. Unless there is a specific provision to the contrary, a bank’s authority to accept such sums on behalf of his principal is not limited to sums which are truly owing to the principal. The bank’s instructions are simply ‘Accept all sums paid to you on my behalf and credit those sums to me’. The High Court of Australia said exactly this in \textit{ANZ v Westpac}:\textsuperscript{65}

‘There is nothing at all in the evidence, in banking practice or in common sense to suggest that Westpac’s authority, as between Jakes and itself, to receive payment to the credit of Jakes’ account was limited to amounts which it could somehow ascertain in advance were in fact due and owing to Jakes. Be that as it may however, it is plain that, regardless of the theoretical limits of Westpac’s authority as between itself and Jakes, the funds were received by it not on its own behalf as principal but as an intermediary: they were paid to it and received by it as Jakes’ banker on the express basis that they were to be credited to Jakes’ account and they were in fact so credited.’\textsuperscript{66}

There is an apparently contrary dictum in \textit{Admiralty Commissioners v National Provincial and Union Bank of England Limited}.\textsuperscript{67} In that case a bank resisted a claim for the return of a mistaken deposit to an account of the bank’s customer. The bank argued that the claim ought not be allowed unless the

\textsuperscript{64} See Chapter 2, 141.
\textsuperscript{65} (1988) 164 CLR 662.
\textsuperscript{66} Ibid 675.
\textsuperscript{67} (1922) 127 LT 452 (Sargant J).
customer was a party to the action. One reason advanced by the bank in support of this argument was that as soon as the sum in question was credited to the account of the customer, the bank became liable to meet cheques drawn against that amount. In a short *ex tempore* judgment Sargant J rejected the bank’s argument, saying:

‘In my opinion, any contract by which a bank agrees to honour cheques of the customer on his current account does not extend to amounts standing to the credit of that account in so far as they are swollen by inadvertent payments made in mistake of fact.’

This passage might be taken as suggesting that a bank is not liable to pay to a customer, whether by cash withdrawal or by the meeting of a cheque, sums paid into the customer’s account by mistake. That would mean that until the customer uses the money in question, he is not liable to the mistaken payer. This suggestion must be rejected. All sums paid into a bank account become debts owed by the bank to the account holder. That proposition applies just as much to mistaken payments as to other payments. Suppose that there was no claim at all by the mistaken payer for the return of the payment. The bank would be bound to pay the sum to or at the direction of the account holder. The bank could not retain the benefit of the payment for itself. That shows that it is not true to say, as Sargant J said, that the contract with the bank ‘does not extend to amounts standing to the credit of that account in so far as they are swollen by inadvertent payments made in mistake of fact’. The bank is bound by its contract of agency to obey its

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68 Ibid 453.
69 Ibid.
customer’s instructions even in relation to inadvertent payments. Whether that contract is restricted by the general law relating to ministerial receipt is another question. In other words, it is a separate question whether, in the face of a claim by a payer to recover a mistaken payment, the bank is liable to meet a cheque which, once met, would have the effect of withdrawing the mistaken payment from the account. The point here is that the bank’s contract with its customer does extend to all sums paid to the bank for the credit of its customer, at least until a claim is made to recover a mistaken payment.

The fact that the bank receives third party payments as agent for the relevant account holder, even where the payment is made by mistake, must mean that the account holder is liable to make restitution from the moment of the bank’s receipt. That is indeed the law. In National Westminster Bank Ltd v Barclays Bank Ltd70 NatWest paid out on a cheque which had been stolen from its customer. NatWest claimed restitution of its mistaken payment. It sued both the holder of the Barclays Bank account into which the cheque had been deposited, and Barclays Bank itself. Kerr J did not hesitate to find the account holder liable to make restitution despite the fact that the sum in question had not been withdrawn from the account.71 The doubt expressed by Goff J in Barclays Bank v W J Simms Son & Cooke (Southern) Ltd (‘Barclays v Simms’)72 caused no difficulty in National

71 Ibid 665.
Westminster Bank Ltd v Barclays Bank Ltd.\textsuperscript{73}

The liability of the account holder to repay a mistaken payment was also assumed without question in Chase Manhattan Bank v British-Israel Bank (London).\textsuperscript{74} That was a case of one bank suing another to recover a mistaken payment. But what is often overlooked is the fact that the defendant bank was in exactly the same position as an ordinary account holder. The plaintiff made the mistaken payment to Mellon Bank International for the account of the defendant. The account holder was held liable to Chase Manhattan from the moment that the mistake was made. Similarly, in ANZ v Westpac\textsuperscript{75} the High Court clearly viewed the account holder as liable from the moment the payment was made.

In practice as well, account holders often repay mistaken third party deposits.\textsuperscript{76} If the account holder was not actually liable to make restitution until the sum in question had been withdrawn, an odd analysis would result. One would have to say that in these situations the account holder was merely making a gift to the mistaken payer which happened to extinguish the payer’s claim against the account holder’s bank. That conclusion is obviously incorrect.

\textsuperscript{73} [1975] QB 654.
\textsuperscript{74} [1981] Ch 105.
\textsuperscript{75} (1988) 164 CLR 662.
\textsuperscript{76} Below 285.
Taken with the unequivocal *dicta* of Millett LJ in *Portman Building Society v Hamlyn Taylor Neck (a firm)*, the cases discussed above establish that a principal is liable in unjust enrichment from the moment of his agent’s receipt. That is true whether the payer’s claim in unjust enrichment arose at the time of payment or some time later. It is also true where the agent in question is a bank collecting money from a third party on behalf of a customer. The account holder is liable because in this context the bank receives as the agent of the account holder. A principal is liable in unjust enrichment from the moment of the agent’s receipt.

The account holder’s liability to make restitution of a mistaken deposit to his account follows naturally from the fact that he is enriched at the moment the payment was made. Common sense suggests that any deposit, mistaken or otherwise, into a person’s bank account enriches that person. The account holder’s wealth, and his spending power in particular, is enhanced by that payment. The law thus takes the common sense view that payment to a bank for the credit of a particular account is payment to the account holder.

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77. [1998] 4 All ER 202 (CA) 207, above 237.

78. *Parkside Leasing Ltd v Smith* [1985] 1 WLR 310, 314 (Scott J).
C. BANKS AS MINISTERIAL RECIPIENTS

1. THE GERMAN & DUTCH POSITIONS

The views adopted on restitutionary issues in Germany have frequently been considered to be of persuasive force in England.\textsuperscript{79} With respect to the present point, the law in Germany is clear:

‘the recipient of a performance is the person to whom a deliberate and intended transfer is made. If an agent acts on behalf of the recipient and makes it known that he is acting in such a capacity, the performance will be one made not to the agent but directly to the principal…. [U]nder German law there is no need in agency cases to have recourse to the rules of “cessation of enrichment” because through the definition of the party liable for unjustified enrichment the focus is on the true defendant from the very start…’.\textsuperscript{80}

Banks provide no exception to this well-established principle in German law. After discussing the facts of ANZ v Westpac,\textsuperscript{81} Professor Dörner notes:

‘Similar cases have also come before the German courts, cases which all involved a ten-fold amount being credited to the recipient. In each case it was simply taken for granted that the action should be brought against the holder of the account (i.e. Jakes) and not the receiving bank (i.e. Westpac), as the latter is only seen as the place of payment and completely disappears from view in the further settlement of the enrichment matters. From the German standpoint, the credit to Jake’s account only increases his wealth by $100,000…. ANZ cannot be treated in any other way than if it had paid out the money to Jake in cash and Jake had then paid it into his account at Westpac…’.\textsuperscript{82}

\textsuperscript{79} Woolwich Equitable Building Society v Inland Revenue [1993] AC 70, 174 (Lord Goff); Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 (HL) 374 (Lord Goff), 408 (Lord Hope).


\textsuperscript{81} (1988) 164 CLR 662.

This is an axiom of German law. In discussing the difficulties which arise in a multi-party situation, Professors Markesinis, Lorenz and Dannemann say:

‘The most difficult category of multi-party relationships are arguably those between two account holders and their two banks when something has gone wrong with a payment apparently made from the account of the one holder to that of another. Having said this, there is one category of cases which is so straightforward that we will not even perceive them as multi-party cases: if both banks have performed their tasks properly, and the only problem is that the receiving account holder was not entitled to the payment by the sending account holder, this is treated as a case involving two parties. The fact that wealth is shifted onto the final recipient by this person's bank and to the recipient’s bank by the sender’s bank is, in this situation, entirely ignored for the purposes of unjustified enrichment. The banks have done no more than transferred the funds between these two parties.

Matters become more complicated if one of the two banks, usually the sender’s bank, does not comply with the sender’s instructions. This will turn the situation into a tripartite case – again, the recipient’s bank is ignored for the purposes of unjustified enrichment unless something goes wrong on the recipient side as well.’

The recipient bank drops out of the picture, leaving the claim to be brought against the account holder himself. The German answer to the issue of the agent’s liability in this situation is also the Dutch answer, as Professor Schrage explains:

‘Where the immediate recipient was or claims to have been the agent of another the normal rules of agency apply. Thus, the acts of an authorised agent are the acts of the principal himself, provided that he acts in the name of the principal. If the payment is undue, the action for restitution then lies against the principal. There is no action against the agent, not even under the general action for unjustified enrichment, since the agent is not enriched, being bound to transfer the sum to his principal…. According to Dutch law the authorised agent simply falls out of the picture whether he has paid over or not, because the authorised agent’s receipt is the principal’s receipt.’


Why does the law in Germany and the Netherlands take it as obvious that the bank as agent should drop out of the unjust enrichment picture? The short answer is that this is the only position consistent with the general principle of agency explored above. A payment effected through an agent to the agent’s principal is regarded by the law as a payment to the principal directly and not as a payment to the agent.\footnote{Portman Building Society v Hamlyn Taylor Neck (A Firm) [1998] 4 All ER 202 (CA) 207 (Millett LJ).} If the agent does not commit an actionable wrong, he is regarded as a simple conduit for the facilitation of transactions between others. Hence in one German case\footnote{NJW 1961, 1461 (BGH).} the Federal Supreme Court (BGH) said:

‘The insertion of a disclosed agent certainly is no bar to seeing the shift of wealth as being directly from the payer to the person standing behind the said agent.’\footnote{Ibid (emphasis added).}

A payment to a bank account enriches the account holder. The corollary of this is that the bank is not enriched by its receipt as agent.

2. **No Enrichment of the Agent**

It was established above that payment to an agent is treated by the law as a payment to the principal, and that the principal is regarded as the true payee. The principal is therefore liable in unjust enrichment from the moment of the agent’s receipt. A principal is enriched by his agent’s receipt. It should follow that the
agent is *not* enriched by the same payment. After all, the agent is immediately liable to his principal for all sums received on the latter’s behalf. The agent never received for himself. That is why it is wrong to say ‘a bank always receives beneficially, even if it receives as agent’. A payment received as agent is received non-beneficially. If that is so, no defence of payment over should be needed by the agent. Payment over is irrelevant, for the agent is not even *prima facie* liable in unjust enrichment.

Some commentators believe that an action in unjust enrichment can be based on a non-beneficial receipt. In other words, it is said that the law of unjust enrichment should operate according to the common law model where agents are liable (jointly with their principals) until payment over. That argument is most commonly advanced in respect of banks. It is necessary to deal with the question of whether an agent is enriched by the receipt of money in two stages; in relation to the capital sum received, and in relation to the use of the money.

*The capital sum*

The agent’s liability to his principal arises at exactly the same time as the agent receives the payment. The agent’s wealth is therefore never enhanced. Even where title to the money paid to an agent passes to him, so that his stock of assets rises by the amount of the payment, the agent is instantly liable to his principal for an equivalent sum. The increase in the agent’s liabilities offsets the increase in his

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88 Above 176.
assets.

The notion that the agent is never enriched when account is taken of his liability to the principal is not the same as the ‘no net benefit’ argument rejected in Chapter 3.\(^{89}\) It was there concluded that the receipt of money for one’s own benefit is always enriching, even if the receipt is immediately accompanied by a disenrichment on the part of the recipient. So if a trustee pays £10,000 to purchase a car, the car dealer is enriched by that amount even though he disenriched himself at the moment of receipt by giving the trustee the car. The disenrichment is a matter of defence. Even if the recipient comes under a liability to a third party at the moment of receipt, as where the car dealer promises to deliver a car to the trustee’s wife in one week’s time, the liability of the car dealer to the trustee’s wife is still a matter of defence. The crucial difference between that situation and the agent’s receipt is that at the moment the car dealer receives the £10,000 from the trustee, there is no one but the car dealer who can be said to be enriched. In the agency context there is always someone else that is enriched by the receipt: the agent’s principal. And that is the very person to whom the agent is liable at the moment the agent is paid. The fact that the law should not regard the agent as enriched by a payment received for his principal makes perfect sense in view of the fact that the law treats the payment as having been made directly to the principal. Payment to an agent is regarded in law as a payment to the principal directly and not as a payment to the agent.\(^{90}\) But when the trustee pays the car

\(^{89}\) Above 182.

\(^{90}\) *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202 (CA) 207
dealer there is nothing in our law which says that the payment is to be treated as having been made to someone else.

The same proposition applies to banks. At least with respect to the actual sum paid, the bank is not enriched by a third party deposit. A deposit to a bank account by someone other than the account holder gives rise to an immediate liability in unjust enrichment on the part of the account holder (if the facts are otherwise appropriate for such a claim). The customer is enriched, not the bank. Although the bank’s stock of money rises by the amount deposited, the bank is immediately liable to its customer for an equivalent sum. One offsets the other.

_Foley v Hill_ 91

Mr Gleeson has criticised the argument that a bank, when it receives as agent, should be free from liability in unjust enrichment. But he appears to have misunderstood that argument:

‘To say that a bank receives merely as minister is to misunderstand fundamentally the nature of banking. A bank does not merely ‘hold’ moneys paid into an account with it. It takes those moneys and deals with them in the capital markets, lending them at interest or purchasing investments, and takes credit for the profit made on those investments for itself. There is no legal connection between the money of the depositor and the profit made by the bank through its use. Now under these circumstances, to speak of the bank holding these moneys merely as ‘minister’ is a nonsense.’ 92

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91 (1848) 2 HLC 28.
Part of this passage relies on the fact that the bank has the use of the money paid by a third party. That particular point is dealt with in the next section. Of present importance is Mr Gleeson’s supposition that the argument in favour of a genuine defence of ministerial receipt relies to any extent on the supposition that a bank ‘holds’ the money of its customer as agent. That is not so. The bank’s liability for ‘holding’ money is not in question. Rather, the issue is whether the bank is liable for having received money. ‘Knowing receipt’ in equity and money had and received at common law are both liabilities based upon and established at the point in time of receipt. If that receipt is ministerial, it cannot cease to be so by reason of any event thereafter. In other words, where the bank receives as agent, its status as agent with respect to the payer is fixed at the point of receipt. That fact is not altered by reason of the automatic loan of the money by the account holder to the bank.

There is nothing in *Foley v Hill*,

93 relied on by Mr Gleeson,

94 which contradicts the arguments advanced here. In that case the plaintiff deposited a sum of money with the defendant bank. The bank was supposed to credit the plaintiff’s account with interest annually, but did not do so for six years. The plaintiff commenced proceedings against the bank seeking an account in equity, claiming an entitlement to that remedy because he was either a beneficiary of a trust or the bank’s principal. The House of Lords held that he was neither. The plaintiff was therefore not entitled to the remedy sought. Rather, his remedy was limited to a

93 (1848) 2 HLC 28.
94 Above n 92 126.
common law action in debt. In rejecting the suggestion that the bank took the plaintiff’s money as trustee, and in holding that the relationship between the parties was simply that of debtor and creditor, Lord Cottenham LC said:

‘The money paid into the banker’s, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker’s money; he is known to deal with it as his own; he makes what profit he can, which profit he retains to himself …’.  

In other words, when the bank receives money, whether from the account holder or from a third party, it takes the money as its own: property in the money passes to the bank. The bank merely promises to pay its customer an equivalent sum on demand.

It is important to appreciate that the issue in question in *Foley v Hill* concerned the relationship between the customer and his bank (and between the customer and the sum standing to his credit in his account) at the time the action was commenced. No third party payment was relevant to the case. Consequently, no question arose as to the capacity in which a bank acts when it collects money paid to it by a third party for the benefit of the bank’s customer. It is undoubtedly true that all money deposited into a customer’s account becomes the bank’s money, and that it is ‘free to use the money as [its] own’. But this does not detract from the fact that, in the situations with which this chapter is concerned,

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95 See too *Croton v The Queen* (1967) 117 CLR 326, 330 (Barwick CJ).

96 *Foley v Hill* (1848) 2 HLC 28, 36. See too *Space Investment Ltd v Canadian Imperial Bank of Commerce Trusts Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC) 1073, 1075 (Lord Templeman).

97 *Paget* 161.
the bank receives the money as agent at the moment of receipt. Nor does it detract from the fact that the deposit of money by a third party involves two transactions: the collection of money by an agent on behalf of the principal, and then a loan of the money from the customer to the bank. The conflation of these two transactions has led to the confusion that all money received by a bank is received ‘beneficially’; that is, as principal and not as agent.

**Factual enrichment - the use of the money**

It might be argued that, although the agent is not enriched by the actual payment received by him for his principal, he is enriched by his temporary possession of the money. The agent has the use of the money until he is required to pay over to his principal. This fact seems to form part of the argument of some commentators that a bank should be liable in unjust enrichment even in relation to payments which it receives as agent. According to Dr Bryan and Mr Gleeson, all money deposited with a bank is received by it beneficially and is therefore an enrichment of the bank. Dr Bryan puts the argument this way:

‘[I]t is suggested that restricting constructive trusteeship to beneficial receipt is wrong in principle, and that *any* recipient should, subject to defences, be accountable in equity for the value of the benefit received. The restriction is flawed, as Simon Gleeson has pointed out, because it is inconsistent with the principle of *Foley v Hill* that a bank is entitled to do anything it pleases with money it has received to the credit of a customer provided that it pays the customer an equivalent sum upon demand. The principle applies to trust money as to any other…. Banks are in the business of making all money, irrespective of source, work for them, with a view to yielding profit

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98 M Bryan, *Restitution and Banking Law*.
for the institution, as well as interest for the customer. They receive beneficially all money deposited. To distinguish between “beneficially” and “non-beneficially” received money is to draw a distinction that reflects neither the law nor the practice of banking.  

As a matter of law a bank does receive as agent, and therefore non-beneficially, when it receives a sum of money for the credit of an account from someone other than the account holder. Neither of the two incidents of banking referred to by Dr Bryan and Mr Gleeson alters that truth. First, it makes no difference that the bank takes title to the notes and coins deposited by a third party. An agent who gains title to money paid to him for his principal still takes as agent. Secondly, and most importantly in the present context, the fact that the bank uses all money paid to it to make whatever profit it can does not give rise to an enrichment on the part of the bank at the expense of the third party. If money paid by a third party is used by the bank to make a profit, that profit must be seen as derived from the loan of the money by the account holder, not from the third party’s payment. When money is paid to a bank by a third party for the credit of a particular account, the bank automatically borrows that sum from the account holder pursuant to the contract entered into when the account was opened. The use of the money is a consequence of that loan. For this purpose, a third party payment to a bank must be seen as two transactions, not one. There is a payment of money from the payer to the account holder (the true payee), and then a loan of

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100 M Bryan, *Restitution and Banking Law* 181-182.
101 Above 142.
102 Above 148
the money from the account holder to the bank.\textsuperscript{103}

In any event, if the bank was seen as enriched by having the use of the money, its enrichment should be seen as limited to that use value. If the capital sum paid is an enrichment of the account holder and not the bank (as argued above), then the claim in unjust enrichment against the bank should apply only in respect of the profit which the bank earned through its use of the money. That profit would have to take into account the interest paid by the bank to the account holder. This profit is the net amount that the bank’s wealth is enhanced by the receipt in question. If the law is to continue to give a plaintiff two defendants to sue in unjust enrichment in respect of the one payment, the claim against each should be restricted to each defendant’s enrichment. But that is merely a fall-back position. By far the better view is that the bank, when it receives as agent, should drop out of the transaction so far as claims in unjust enrichment are concerned.

\textit{A windfall to the recipient bank?}

A hypothetical set of facts can be constructed in relation to which it might be said that the bank’s wealth is enhanced by more than the use value of the money in question. Take the facts of \textit{ANZ v Westpac}\textsuperscript{104} but with a twist. ANZ makes a large mistaken payment into the overdrawn account of Jakes at Westpac which wipes out the overdraft. Instead of continuing to write cheques on that account, Jakes

\textsuperscript{103} A further example of this two-transaction analysis is encountered below, 327.

\textsuperscript{104} (1988) 164 CLR 662.
goes into liquidation the day after the mistaken payment. ANZ has no hope of recovering anything from Jakes. If Westpac does not have to repay ANZ, then Westpac will be far better off than before the mistaken payment had been made. Instead of being a large unsecured creditor in Jakes’ insolvency, Westpac will have its debt repaid in full.

There is nothing that logically requires us to say that a mistaken payment to an agent which discharges a debt owed to the agent by his principal is a windfall to the agent. Indeed, Collins MR in Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co\textsuperscript{105} said that the windfall was that of the principal:

‘He [the agent] has thus no doubt benefited by getting his debt paid, but he has done so in discharging his primary duty of passing the money on to his principal. He has constructively sent it on and received it back, and has done nothing incompatible with his position as a conduit-pipe or intermediary. He was entitled to be paid, and has been paid by his debtor, who was no doubt put in funds to do so by the receipt of the money, and who therefore, and not the intermediary, has had the benefit of the windfall.’\textsuperscript{106}

It makes far more sense to say that the accidental discharge of a debt is a windfall to the debtor and not the creditor. But even if the opposite view was taken, so that Westpac should be required to give up the benefit related to ANZ’s payment, the answer is not to let ANZ recover and thereby avoid the risk of Jakes’ insolvency. The windfall to the recipient bank, if it is one, should be dealt with by way of the avoidance provisions of insolvency law, and not by bringing back into the law of

\textsuperscript{105} Continental Caoutchouc & Gutta Percha Co v Kleinwort Sons & Co (1904) 90 LTR 474 (CA).

\textsuperscript{106} Ibid 476.
unjust enrichment an agent who should otherwise drop out. It is probably the case that under the present law of insolvency in England the payment to Westpac by ANZ is not a voidable preference in Jakes’ insolvency. At the time of an allegedly preferential payment, the insolvent company must have been influenced by a desire to produce the effect of putting the creditor in a better position than he otherwise would have been. That is obviously not the case here, for Jakes was unaware of the payment at the time it was made. Moreover, the potentially preferential payment was not made by the company in liquidation. The answer is, however, to amend the avoidance legislation to bring this situation within its reach. The payment by ANZ to Westpac for the credit of Jakes must be treated as a payment to Jakes. A reduction of Jakes’ debt to Westpac should be seen as a constructive payment over by Westpac and a repayment by Jakes, and thus as a preferential payment by Jakes to Westpac. Moreover, there should be no need for the insolvent company to have intended to benefit the creditor. As Professor Goode said when discussing the avoidance of preferential payments:

‘The principle is long-established but its implementation is seriously defective, because instead of looking simply at the objective effect of the transaction it focuses on the desire of the company to put the creditor in a better position …. We should follow the path of other jurisdictions such as those in Australia and the United States and treat a preference as voidable if its effect is to improve the position of one creditor at the expense of others, regardless of the company’s desires or intentions’.

108 See Chapter 2 131.
Conclusion

A bank that receives a third party payment is not enriched at that person’s expense. That is true both in relation to enrichment viewed from the perspective of the payment itself, and enrichment viewed from the perspective of the use of the money paid. The bank is simply a conduit pipe for the passing of value from the third party to the true payee, the account holder. The payment should be treated as if the third party had paid the account holder in cash. An absence of enrichment on the part of the bank ought to entail absence of liability,\textsuperscript{110} for a person ‘cannot be unjustly enriched if he has not been enriched at all’.\textsuperscript{111} Payment over should irrelevant, for the bank ought not be even \textit{prima facie} liable in unjust enrichment.

The lack of enrichment provides one main ground for the argument that agents ought to be immune from liability in unjust enrichment. But it is possible to argue that, even if an agent is enriched by a receipt for his principal, he should still be immune from liability in unjust enrichment. A genuine defence of ministerial receipt is necessary to avoid exposing an agent to an impossible dilemma.

\textsuperscript{110} P Birks, \textit{Laundering and Tracing} 344-345.
\textsuperscript{111} \textit{Portman Building Society v Hamlyn Taylor Neck (A Firm)} [1998] 4 All ER 202 (CA) 207 (Millett LJ).
3. **THE UTILITY OF AGENCY AND THE AVOIDANCE OF THE AGENT’S DILEMMA**

Agency relationships are a useful and indeed necessary part of society worthy of legal recognition and protection. Part of that protection should be the avoidance of agents being placed by the law in an impossible dilemma. Dr Bryan has recently noted the argument stemming from the agent’s dilemma.\(^\text{112}\) Suppose an agent receives a payment for his principal from the plaintiff. Before paying over the agent is notified by the plaintiff that there is a ground for restitution. Suppose too that the agent is not sure whether the claim is good or bad. What is he to do? On the one hand, if the money is repaid to the plaintiff the agent may well be liable to his principal. The ground for restitution may turn out to have been bad. Even if the ground was good, the principal may have had a good defence to the plaintiff’s claim. On the other hand, if the agent pays the money over to his principal, he may later be ordered to make restitution to the plaintiff. The legal framework within which agents operate sets them apart from other recipients. Their contractual and fiduciary obligations ‘will be a powerful inducement to pay money to the principal even where doubts might be entertained as to whether the principal was entitled to the payment.’\(^\text{113}\) The agent should not be penalised, but instead protected, if he takes the natural course of paying the money over and referring the claimant to his principal. As is explored below, the agent’s dilemma is made much worse now that the law incorporates the defence of change of position.

\(^{113}\) Ibid 169.
It is necessary to begin with a central aspect of the agent’s dilemma. Might the law at present lead to the worst possible result for the agent: having to pay twice for the one receipt, once to the principal and once to the mistaken payer? What happens if an agent, being liable in unjust enrichment to repay a mistaken payment, repays and is then sued by his principal for the amount received? Bowstead and Reynolds suggests that the agent would never be liable to the principal in that situation:

‘Where money is wrongfully obtained by an agent or is paid to him under a mistake of fact or for a consideration which wholly fails he can resist an action by his principal on the grounds that he has repaid it to the person who paid it to him’.\textsuperscript{114}

In respect of a payment for a consideration which subsequently fails, it may be doubted whether this passage is correct in all relevant situations. The deposit cases examined above,\textsuperscript{115} suggest that the agent is never liable to return a deposit paid to him as agent when the ground for restitution is failure of consideration. On the other hand, there are other cases involving a claim for failure of consideration where the agent who has not paid over has been liable to the third party. In Murray v Mann\textsuperscript{116} an agent sold a horse on behalf of his principal and received the proceeds of sale. The purchaser subsequently rescinded the contract on the ground of the agent’s fraud. The agent repaid the purchaser but was then sued for the purchase price by the principal. It was held that the agent was not liable to the

\textsuperscript{114} Bowstead and Reynolds 262.
\textsuperscript{115} Above 238.
\textsuperscript{116} (1848) 2 Ex 538.
But restricting the present focus to claims for restitution which arise immediately a payment is made, the passage quoted from *Bowstead v Reynolds* must generally be right. In most circumstances the principal ought not be allowed to sue the agent for money that the agent has lawfully had to return to a third party. But the position may not be absolute. It is at least arguable that in some circumstances the agent would be liable to his principal despite the agent having been forced to return a payment. That might be so when the agent is estopped from denying that he is bound to pay the principal the sum received. Suppose an agent receives payment of a debt owed by the plaintiff to his principal. The plaintiff mistakenly pays too much, £1,000 instead of £100. The agent telephones his principal and tells him that he has just received payment of the plaintiff’s debt in the amount of £1,000. Neither the agent nor the principal realises that the plaintiff was supposed to pay only £100. Immediately after the telephone call the principal changes his position on the faith of the plaintiff’s payment. The next day the plaintiff realises his mistake and demands repayment of £900 from the agent. If the agent repays the plaintiff, he may be required to pay the principal nonetheless, on the basis that he is estopped from denying his liability to the principal.

In that situation it may be the case that the law will protect the agent from having to repay the plaintiff. The fact that the agent is estopped from denying his liability to pass the money on to the principal might give the agent a defence of
change of position to the plaintiff’s claim. Suppose that a bank receives money on behalf of an account holder. As the bank knows that its customer was expecting some sort of payment, it sends a facsimile to the customer to let her know that the money she was expecting has arrived. Before the customer has withdrawn the payment, the payer arrives at the bank and tells the manager to hand the money back because it was paid by mistake. The bank manager telephones its customer and asks for instructions. She tells him that on the faith of the bank’s facsimile she has already changed her position. Assuming all these facts are true, the position will be that the bank is estopped from debiting the customer’s account by reason of the customer’s change of position. The manager will then be able to turn to the plaintiff and say that the bank has also changed its position. By sending the fax, and becoming estopped from debiting the customer’s account, the bank has changed its position in a way that cannot be unilaterally reversed. If the bank is made to return the money to the plaintiff, it will be left worse off than before. The bank will therefore have the defence of change of position to the plaintiff’s claim.

Will this always provide the bank with adequate protection? In all likelihood, the bank will not be adequately protected in all situations. First, the payer’s claim may not always be clearly and easily verified. Secondly, there may be doubt about whether the bank’s customer does or does not have a defence of change of position. Thirdly, the bank may not always be able to communicate speedily with its customer. In answer to all these problems, it might be said that
the agent should interplead. Indeed Lord Millett has suggested that solution. In

*Portman Building Society v Hamlyn Taylor Neck (a firm)*[^117^] he said:

‘If the agent retains the money, however, the plaintiff may elect to sue either the
principal or the agent, and the agent remains liable if he pays the money over to his
principal after notice of the claim. If he wishes to protect himself, he should
interplead.’[^118^]

In fact, interpleader cannot work in the most common agent’s dilemma of all:
where the agent is a bank.

**The inadequacy of interpleader**

The reason why interpleader cannot realistically protect a bank lies in the fact that
most account holders rely on the ready availability of their most liquid asset, the
debt owed to them by their bank. The agent’s dilemma for a bank will, as a result,
be most acutely felt when the bank is faced with cheques drawn by the account
holder on the relevant account. It may be the case that those cheques would not be
met by the bank if it was required to repay the plaintiff and debit the customer’s
account accordingly. This is exactly what happened in *ANZ v Westpac*.[^119^] ANZ’s
mistaken overpayment came to the attention of Westpac at a time when Jakes was
in financial difficulty but continuing to draw cheques. Westpac conceded at every
stage of the case that after the mistaken overpayment was brought to its attention,
it should have dishonoured all Jakes cheques received thereafter. When the

[^117^]: [1998] 4 All ER 202 (CA).
[^118^]: Ibid 207 (Millett LJ).
mistaken credit was taken into consideration, Jakes was well beyond its overdraft limit. But did that mean that all subsequent cheques had to be dishonoured? It was noted in Chapter 2 that the High Court expressed serious reservations. And in so doing the Court focused on the very possibility that this work suggests is crucial: that the account holder might have a defence to the plaintiff’s claim:

‘Indeed, one is led to speculate about what Westpac’s position vis-à-vis Jakes would have been if it had, of its own initiative, dishonoured those cheques…. Certainly, its position would have been a somewhat difficult one if it had subsequently turned out that ANZ’s claim for repayment could be met by a good defence on the part of Jakes.’

How can interpleader solve the bank’s dilemma in that situation, at least without causing unnecessary damage to the account holder? The bank has only a matter of days, at most, to decide whether to meet or dishonour the cheques. Interpleader is as good as a refusal to meet the cheque. The bank cannot possibly pay the money into court and at the same time meet the customer’s cheque. Even if interpleader could conceivably protect the bank from a subsequent action brought against it by the account holder, who is to protect the account holder from the disastrous consequences which might flow from the dishonour of its cheque?

**Principal left unprotected**

If ANZ acted reasonably in bringing its claim against Westpac and forcing it to interplead, a claim by Jakes against ANZ for compensatory damages would most

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120 Ibid 678.
likely not have succeeded. Yet to leave Jakes to suffer the consequences of having honestly changed its position on the faith of the bank’s receipt is unsatisfactory. It is also unnecessary. The answer, it is suggested, must be for the bank to drop out of the picture completely, so that the claim lies only between plaintiff and principal.

Thus the law at present exposes the principal to a risk of injustice. The principal will be worse off than before the mistaken payment was made if the following circumstances occur:

(a) the agent informs the principal of the plaintiff’s payment; and
(b) on the basis of that information the principal changes his position; but
(c) the agent is not estopped from asserting that his liability to the principal will be extinguished by the agent’s repayment to the plaintiff.

It is difficult to establish an estoppel. The mere relaying of information by the agent to the principal may not be a sufficient representation to form the basis of an estoppel. If the agent is not estopped, so that he has no reason to deny his liability to the plaintiff, the agent must repay the plaintiff. That will leave the principal worse off by reason of the plaintiff’s payment. That is not a just result. If the plaintiff had brought his claim against the principal (which the law entitles him to do), that claim would be defeated by the principal’s change of position. The plaintiff should not be able to subvert the operation of that defence by suing the
agent instead. There is no justification for denying the principal the benefit of having honestly changed his position on the faith of the plaintiff’s payment.

This situation just discussed supposed that the agent had informed the principal of the plaintiff’s payment and that the principal changed his position on the basis of that information. In that situation the agent may or may not be estopped from denying his liability to the principal. If the agent is estopped, he may himself have a defence of change of position to the plaintiff’s claim. But there will be other cases in which the agent is certainly not estopped as against his principal. Suppose the principal was informed by a stranger of the plaintiff’s payment to the agent. As the agent has not himself made any representation to the principal about the plaintiff’s payment, there is no basis for an estoppel. Yet if the principal has changed his position on the faith of the plaintiff’s payment, the plaintiff should not be allowed to recover from either the agent or the principal.

It might be suggested that the answer to all this is to give the agent a defence to the plaintiff’s claim whenever the principal would have a defence had he been sued by the plaintiff instead. That would indeed be an improvement on the present law, which says that unless the agent personally has a defence he is liable to make restitution to the plaintiff. But that change would not go far enough. Even if the argument that agents should drop out in accordance with the normal agency reasoning is put to one side, the law should do more than merely give the agent a defence whenever the principal would have a defence. If that is all the law did, one would simply be led straight back to the difficulty of interpleader relieving
agents, especially banks, of the burden of their dilemma.\textsuperscript{121}

The inadequacy, or inappropriateness, of interpleader can be approached from another direction. Once one takes into account the possibility that the principal may have a defence to the plaintiff’s claim, so that as against the plaintiff the principal is entitled to keep the sum concerned, the situation is no different from the case where an agent receives money for a principal and a third party alleges an interest in the sum so received. The law in the latter situation is clear. The agent must pay over to his principal.\textsuperscript{122} More than that, the courts have said that such a case is \textit{not} a proper one for the agent to interplead.\textsuperscript{123}

\textit{A particularly acute agent’s dilemma for banks}

The possibility of the agent’s dilemma, based on the fact that the account holder may have a defence to the claim, is particularly acute for a bank. The account holder will often have the capacity to learn of the receipt by his bank of the third party deposit almost immediately. Modern technology enables customers rapid and easy access to the details of transactions affecting their account. Many banks provide facilities enabling customers to track changes to their accounts via the Internet, and transactions are normally posted to accounts within 24 hours. Moreover, the account holder may have access to the funds deposited not only by cash withdrawal but also by electronic transfer and cheque facilities. This allows

\begin{itemize}
\item \textsuperscript{121} Above 266.
\item \textsuperscript{122} \textit{Nickolson v Knowles} (1820) 5 Madd 47, described above 162.
\item \textsuperscript{123} Ibid.
\end{itemize}
rapid use of funds in reliance upon the payment in question.

Another important reason why the agent’s dilemma is acute for banks arises from the nature of modern banking. Every major bank conducts thousands of transactions each day. In light of that fact it is unreasonable to expect banks to assess the validity of claims made by third parties for the return of payments. As Dr Bryan notes:

‘Banks, in a world made more frenetic by the pace of technological change, have very little time to make more than a tentative assessment of a claim to restitution. Even if the terms of the contract with the customer permit the debiting of a wrongful payment, there seems no good reason for placing on the bank the responsibility for assessing the merits of the plaintiff’s claim. The task should be left to the principal…. The merits of the plaintiff’s case will not always be … overwhelming. And, even if they are, the bank will not always initially appreciate the strength of that case and should not be called to account for failing to do so.’

The force of these comments is clear. They provide further justification for a genuine defence of ministerial receipt.

Other defences the principal might have

In discussing the utility of agency and the avoidance of the agent’s dilemma this chapter has so far assumed that the principal may have a defence to the plaintiff’s claim based on the principal’s change of position. But there are other defences which need to be considered. One such defence is derived from Aiken v Short. That case is said to stand for the existence of a defence of ‘good consideration’ to

124 M Bryan, Restitution and Banking Law 180.
125 (1856) 1 H & N 210.
claims in unjust enrichment. That assertion is explored in detail in Chapter 5. For now it need only be noted that one explanation of that case relies on the principle that a debt once paid cannot be recovered by the debtor, even if the debtor discharged the debt by mistake. Suppose A owes B £10,000. At present, A is repaying that debt by monthly instalments of £1,000 paid into B’s bank account. A mistakenly believes that he has won the lottery. On the basis of that mistake, A repays the balance of his debt to B. A realises his mistake immediately after he deposits the balance of the debt into B’s bank account. It is too late, at least as far as a claim against B is concerned. But what if A sues B’s bank instead? Common sense would suggest that A should not recover. But on the present law, the situation is at least unclear. A payment has been made by mistake to an agent, and the agent has not paid over the money received to the principal.

There are thus some circumstances in which, though a third party deposit to a bank account is prima facie recoverable, the claim is defeated by a defence of ‘good consideration’. That defence does not depend on the bank’s customer being informed of the payment. The defence operates immediately the debt is discharged by the payment in question. This is therefore another defence which a bank has to (or should) take into consideration before returning a mistaken payment received for one of its customers. Even if one were to say that the bank has a defence because the account holder does, the bank still faces a dilemma. It must discover whether the account holder does have that defence, and the bank

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126 Below 296.
127 *Bize v Dickason* (1786) 1 TR 285 (Lord Mansfield).
may have little time to make enquiries of that sort.

**Recognition of the bank’s dilemma by Sir John Paget KC**

More than 75 years ago Sir John Paget KC, the leading banking lawyer, identified the very problem highlighted above; namely, the difficulties caused by the possibility that an account holder may change his position on the faith of the bank’s receipt of a mistaken payment. In a note on *Admiralty Commissioners v National Provincial and Union Bank*¹²eight he said:

> ‘If the payment has been notified to the customer, and he has definitely altered his position in reliance thereon, the bank will not be entitled to debit him…. The estoppel is based on representation, and it would seem immaterial whether the mistake originated with the bank or not. Such estoppel would presumably constitute sufficient alteration of the bank’s position to preclude its having to refund, even if the money had not been actually drawn out.’¹²nine

Thus the principal’s change of position constitutes a reason why the agent, the bank, is freed from liability in unjust enrichment to the mistaken payer. A little earlier in the same note, he said:

> ‘It would be unreasonable if the bank had to fight a losing case for the benefit of the customer. When the mistake is unquestionable, the bank would probably be safe in paying without reference to the customer. When in any way doubtful, they should get in touch with the customer, take steps to bring the money into Court or undertake to hold it till further order, and let the interested parties fight the question ….

If outstanding cheques are presented which there is not sufficient surplus to meet, the situation is a difficult one, and the banker’s course will probably be guided by his knowledge of the customer and his financial position.’¹³⁰

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¹²eight (1922) 127 LT 452 (Sargant J), discussed in Chapter 3, 109.
¹²nine *Admiralty Commissioners v National Provincial and Union Bank* (1922) 3 Legal Decisions Affecting Bankers 260, 263.
Thus Paget did not quite push the argument all the way to what this thesis contends is the logical conclusion: that the law ought to be changed. As stated above, the very fact that the bank might, as occurred in ANZ v Westpac, be presented with outstanding cheques after it is notified by the third party depositor that he has a claim to the return of the money, together with the inadequacy of interpleader as a protective measure for the bank in this situation, means that the bank should be able to defeat the third party’s claim entirely. In other words, the bank should be entitled to say to the third party ‘Take that up with my customer’. But given the fact that, at the time of Paget’s note, the recognition of change of position as a definite defence to all claims in unjust enrichment was still 70 years away, the hesitation is perfectly understandable.

**Conclusion**

In the end, the force of previous justifications for the denial of an immunity for a bank which receives money as an agent must be regarded as significantly undermined by the introduction of the defence of change of position. In Colonial Bank v Exchange Bank of Yarmouth, for example, the recipient bank claimed that it ought not be required to make restitution of a mistaken payment because it had used the payment to reduce its principal’s overdraft. The Privy Council

131  
Customer in Australia (1975) 467.

132  

133  
Above 266.

(1885) 11 App Cas 84 (PC).
rejected the bank’s defence, saying:

‘it was not true that the sum had been used and could not be recalled. The defendants had only got to run a pen through some private entries in their own books and the matter would then have stood in precisely the same position as it stood before the mistake was made.’\textsuperscript{134}

But that is not so if the account holder became aware that his overdraft was lower than he previously thought and relevantly changed his position. If the bank returns the overdraft to its previous level, things will not stand as they were. The account holder will be worse off than before the mistake was made.

By holding the agent liable in unjust enrichment, the law at present leaves out of the equation the position of the person who matters, the principal. He is, after all, the true payee of the plaintiff’s payment. Yet the law never asks, before it makes the agent liable to return the payment, whether the principal has in good faith relied on it being his to dispose of freely. Nor does it ask whether the principal has any other defence to the plaintiff’s claim, such as that held to exist in \textit{Aiken v Short}.\textsuperscript{135} Recovery from the agent may leave either the agent or his principal worse off despite the fact that the principal had a defence to the claim. That situation gives rise to the agent’s dilemma.

In recognising the agent’s dilemma, it is submitted that Dr Bryan does not give it sufficient weight. Although ultimately favouring a wide model of the

\textsuperscript{134} Ibid 98 (emphasis added).

\textsuperscript{135} (1856) 1 H & N 210.
defence of payment over,\textsuperscript{136} he deals with the agent’s dilemma in this way:

‘Looked at from the agent’s point of view, ministerial receipt\textsuperscript{137} avoids the dilemma of being unable to escape liability for its handling of a misdirected payment…. An agent who is not on the horns of this particular dilemma should arguably not be entitled to the defence.’

This rationale clearly underpins the present law as to the defence of payment over, at least as it exists in England where the cases have focused on the need for a bank pleading payment over to establish some specific detriment.\textsuperscript{138} Absent that dilemma, and absent some established detriment to the agent if he makes restitution to the plaintiff, the security of the agent’s position is protected.\textsuperscript{139} Yet this approach does not go far enough. It does not protect the principal’s security of receipts. If the agent makes restitution without incurring liability to his principal, but the principal has already changed his position in reliance upon the agent’s receipt, the principal will suffer an injustice which the law would not countenance were the plaintiff’s claim in unjust enrichment brought against the principal directly. Whilst Dr Bryan quite properly perceives the need, in constructing a model of the defence of ministerial receipt, to protect the agent’s security of receipts, a principled model must do more. It must also protect the principal’s position, and in particular the security of his receipts.

\textsuperscript{136} M Bryan, \textit{Restitution and Banking Law} 180.
\textsuperscript{137} Clearly intending to refer to the present defence of payment over.
\textsuperscript{138} See Chapter 2 above 117.
\textsuperscript{139} M Bryan, \textit{Restitution and Banking Law} 164.
4. **ONE RATIONALE FOR THE DEFENCE**

There is a series of shorter arguments, separate from those considered above, in favour of a genuine defence of ministerial receipt. One shorter point is based on the rationale suggested by some commentators for the present defence of payment over. A person who makes a payment to another via that other’s agent intends to deal with, and to benefit, the principal. The payer does not intend to benefit the agent or to form legal relations with anyone other than the principal. It can make no difference to the payer whether he pays the principal directly or via an agent. Why, then, should the fortuitous fact that payment is made via an agent mean that the law affords the plaintiff the luxury of choosing between two possible defendants? This argument has already been expressed extra-judicially by Lord Millett, but only in relation to the situation after payment over by the agent:

‘Where the recipient is an agent who has accounted to his principal without notice of the plaintiff’s claim, the money cannot afterwards be recovered from the agent but only from the principal…. The defence, however, is not available if the defendant received the money as principal or as agent for an undisclosed principal. The insistence that the recipient must have been known to the plaintiff to have been acting for a disclosed principal reveals the true basis of the defence. It is not a defence of ministerial receipt or of change of position. It is merely a rule for deciding which of two possible defendants the plaintiff must sue. He is compelled to sue the principal because he himself treated the agent as a mere conduit-pipe for channelling the money to the principal. Accordingly, he is treated as if he had paid the principal directly.’

For present purposes, the important part of this passage is Lord Millett’s view that the plaintiff is ‘compelled to sue the principal because he himself treated the agent as a mere conduit-pipe for channelling the money to the principal.’

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140 Sir Peter Millett, ‘Tracing the Proceeds of Fraud’ (1991) 107 LQR 70, 76.
remarks were made by the High Court of Australia in ANZ v Westpac.\textsuperscript{141} This reasoning provides some justification for the defence of payment over, but does not explain it entirely. It cannot explain the operation of the defence in relation to subsequent recipients (that is, persons who do not receive directly from the plaintiff). The defence of ministerial receipt operates at common law in relation to agents who are subsequent recipients. That was established in Agip (Africa) Ltd v Jackson.\textsuperscript{142} Millett J allowed a subsequent recipient to take advantage of the defence of payment over. If that was right, then the law regards agents as mere conduit pipes even where there was no dealing between the agent in question and the plaintiff. In other words, the defence applies even where the plaintiff was unaware of the payment to the agent. In that situation the defence of payment over cannot be justified by saying that the plaintiff himself treated the recipient as an agent.

Nevertheless, to the extent that the explanation does provide a justification of the agent’s defence, there is no reason why it ought to be restricted to the situation after payment over. The argument relied upon by Lord Millett for protecting the agent after payment over applies with equal force to the agent who has not yet paid over. In either situation, the plaintiff ought to be compelled to sue the principal because he himself treated the agent as a mere conduit-pipe at the moment of payment. Indeed, in Portman Building Society v Hamlyn Taylor Neck (a firm)\textsuperscript{143}

\textsuperscript{141} (1988) 164 CLR 662, 682.
\textsuperscript{142} [1990] 1 Ch 265, affirmed [1991] Ch 547 (CA).
\textsuperscript{143} [1998] 4 All ER 202 (CA).
Millett LJ’s explanation of ministerial receipt at common law seemed not to be restricted to the situation after payment over:

‘I myself do not regard the agent’s defence in such a case as a particular instance of the change of position defence, nor is it generally so regarded. At common law the agent recipient is regarded as a mere conduit for the money, which is treated as paid to the principal, not to the agent. The doctrine is therefore not so much a defence as a means of identifying the proper party to be sued.’ 144

5. AVOIDANCE OF THE RISK OF INSOLVENCY

Another short but important additional argument in favour of a genuine defence of ministerial receipt is based on the risk of the principal’s insolvency. A person who chooses to pay and to deal with another ought not be able to avoid the effect of that other’s insolvency by electing to sue the insolvent’s agent. The only fact which differentiates such a plaintiff from any of the principal’s other creditors is the fortuitous circumstance that the payment to the principal was made via the principal’s agent. That circumstance does not warrant a windfall avoidance of the ordinary consequences of the principal’s insolvency. This reason cannot apply where the plaintiff has not dealt directly with the agent. But where he has, so that the plaintiff knows he is paying an agent, an additional argument in favour of a genuine defence of ministerial receipt exists in the fact that the plaintiff should bear the risk of insolvency of the person with whom the plaintiff chose to deal.

144 Ibid 207.
6. A Unified Restitutionary Regime

On numerous occasions both judicial and extra-judicial Lord Millett has called for the modification of restitutionary principles in order to establish a unified regime common to both law and equity.\(^{145}\) His Lordship is by no means alone in so doing.\(^{146}\) This is clearly a desirable goal. There exists already an immunity for ministerial recipients in equity, but at common law there is only the limited defence of payment over. For the reasons discussed above, the treatment of agents in equity is preferable to that of the common law. Lord Millett certainly seems to think that the position of equity is correct. His view is that ‘the common law … defines receipt too widely, affording only a limited defence to the ministerial recipient’\(^{147}\).

7. Inconsistent Authority and Practice

Inconsistency in our legal system with respect to ministerial receipt is not confined to the contrast between common law and equity. The common law itself seems to


\(^{147}\) Sir Peter Millett, ‘Tracing the Proceeds of Fraud’ (1991) 107 LQR 70, 79.
adopt inconsistent positions. In one recent case, *Box v Barclays Bank plc*, Ferris J held that for money had and received at common law ‘the defendant must have received the plaintiff’s property for its own benefit’. The strength of that case in the present context is weakened somewhat by the failure to analyse the common law cases discussed in Chapter 2. That said, a requirement of beneficial receipt at common law is exactly the position for which this work contends. There are other groups of cases in which agents have been held free from liability in unjust enrichment before payment over on the basis that the agent did not receive for his own benefit.

*Deposit cases*

These cases have already been discussed. Briefly, a claim in unjust enrichment for failure of consideration cannot be brought against an agent for the return of a deposit by reason of a failure of consideration even though the agent has not paid over the money in question to his principal. As discussed, some jurists have sought to reconcile the deposits cases with the fact that in other circumstances an agent who has not paid over can be sued by a third party. It was concluded that this distinction does not justify the different treatment of agents.

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149 Ibid 201.
150 Above 238.
151 Above 240.
Bank cannot set up claims of third parties

*Paget* also makes the point that when the bank’s duties to its customer conflict with its duties not to involve itself in fraud, the courts have almost always held that unless the bank acts dishonestly:

‘the banker must recognise the person from or for whom he received the money as the proper person to draw it, and the money as available for the purpose. The banker cannot set up the claims of third parties or dispute his customer’s title to money he has received from him or for his account.’\(^{152}\)

It may be doubted whether this can be treated as an absolute payment in all circumstances. But in the context of banks receiving as agents one of the cases cited in *Paget* is authority for that proposition. In *Tassell v Cooper*\(^{153}\) a bank collected payment on a cheque to which the plaintiff was not entitled. The owner of the cheque requested the bank to freeze the plaintiff’s account, and furnished the bank with an indemnity. The bank consequently dishonoured one of the plaintiff’s cheques. The plaintiff sued the bank and recovered. It was held that the bank was bound to deal with the funds in the plaintiff’s account in accordance with his directions. That was so *even if* it was assumed that the account holder had no right to receive the proceeds of the cheque.\(^{154}\) Compare that situation to one in

\(^{152}\) *Paget* 350 citing *Calland v Loyd* (1840) 6 M & W 26; *Tassell v Cooper* (1850) 9 CB 509; *Gray v Johnston* (1868) LR 3 HL 1, 14 (Lord Westbury); *Fontaine-Besson v Parr’s Banking Company and Alliance Bank Ltd* (1895) 12 TLR 121 (CA); *Szek v Lloyds Bank* (1908) Times, 15 January; *Banque Belge pour l’Étranger v Hambruck* [1921] 1 KB 321 (CA); *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107; *John Shaw (Rayners Lane) Ltd v Lloyds Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 396; *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd’s Rep 373.

\(^{153}\) (1850) 9 CB 509.

\(^{154}\) Ibid 534 (Maule J). An exception exists where a principal pays money into a bank to the account of a person known to the bank to be his agent upon terms that the agent shall have authority to draw upon the account. In such a situation the principal has the power, if he
which a bank receives a mistaken payment. In the latter context the law says that a bank is bound to return the payment to the mistaken payer if a claim is made before the bank pays over to or on the order of its customer. If the bank does that, it will be setting up a claim of a third party to dispute its customer’s title to money received on his behalf – the very thing that the Court said the bank cannot do in *Tassell v Cooper*, a case which involved not a mistake but a possible fraud.

**Agent should not be sued alone**

Some cases have suggested that the agent should not be sued for restitution of money paid to the agent without the principal also being sued. *Rahimtoola v Nizam of Hyderabad* is one example. In 1948, during the conflict arising from the partition of India, money standing in the account of the Indian Government at Westminster Bank in London was transferred without authority by M (one of the persons entitled to operate the account) into the name of R (then the High Commissioner for Pakistan in the United Kingdom). R received the money on the instructions of the Foreign Minister of Pakistan. The Indian Government brought an action against R and the bank, claiming the money as money had and received to their use. R applied for an order that the writ in the action be set aside as against him and that the proceedings be stayed as against the bank on the ground that the English courts had no jurisdiction to entertain an action against the

determines the agency and revokes the authority of the agent to draw upon the account, to require the bank to return any undrawn balance to him: *Société Coloniale Anversois v London & Brazilian Bank Ltd* [1911] 2 KB 1024.

[155] [1958] AC 379 (HL).
property of a foreign sovereign. The House of Lords allowed R’s application. The case was of course very much influenced by the fact that the principal in question was the State of Pakistan which was entitled to sovereign immunity. Nevertheless, some of the remarks by the House of Lords were directed to the situation where the principal is a private citizen. Viscount Simonds said:

‘My Lords, I am not concerned to deny that in a suit in which private persons only are concerned the rule in Buller v Harrison, if I may call it so, may prevail, though I would suppose that, in any case, the principal should not be denied the opportunity of asserting that the money was not paid to his agent in consequence, for instance, of a mistake of fact.’

Of course the principal can be given the opportunity of disputing the claim being made against his agent in a number of ways. One way is to allow or require the agent to interplead, but it has already seen that at least in respect of banks that solution does not work. Another is to require the plaintiff to serve notice of the proceedings on the principal. That solution suffers from the same defects as interpleader. The very fact acknowledged by Viscount Simonds – that the principal should be given the opportunity to dispute the merits of the claim (or establish a defence) – simply emphasises the point already made: the real dispute in question lies between the payer and the principal. The appropriate way for the law to facilitate litigation of the real dispute is to say that the agent drops out of the transaction once the payment is made.

\[156\] Ibid 397 (emphasis added).

\[157\] Above 266.
A common practice of banks as plaintiffs

In some cases it seems that plaintiffs which make mistaken payments simply forego their right to sue the recipient bank and instead exercise their right to sue the account holder directly. Intuitively, it would seem, these parties operate their common law claims according to the treatment in equity of agents in the law of unjust enrichment. In *Chase Manhattan Bank v British-Israel Bank (London)* the plaintiff went to the enormous trouble of persuading the trial judge for the first time in England that a constructive trust arose in response to a mistaken payment. The argument succeeded, and the plaintiff was thus able to avoid the effect of the account holder’s insolvency. On the orthodox treatment of agents at common law there appears to have been no reason why Chase Manhattan could not have sued the defendant’s bank instead, Mellon Bank International. It chose not to do so. That was not an idiosyncratic approach. It seems to be a common practice. In a recent incident well known locally, the fellows of an Oxford College received their monthly salary twice. The mistake was caused by an error on the part of the College’s bank, NatWest, which made electronic transfers twice to each fellow’s bank account. Many of the fellows banked somewhere other than NatWest. The common law cases explored in Chapter 2 gave NatWest a right to sue these other banks to recover the mistaken payments. NatWest chose not to do so. Instead, NatWest wrote to each fellow individually seeking repayment. One can only assume that the bank saw this as the most practical approach. In light of the arguments advanced here, it was the most principled approach as well. Similarly,

in *ANZ v Westpac*\textsuperscript{159} the first thought of ANZ was to seek recovery from the account holder Jakes.

On other occasions an action against the bank, though formally part of the claim, is almost completely ignored in favour of the concurrent claim brought against the account holder. In *National Westminster Bank Ltd v Barclays Bank Ltd*,\textsuperscript{160} a case noted above,\textsuperscript{161} the account holder’s bank was a defendant but took no active part in the litigation apart from claiming its costs. The account holder lost in his attempt to keep the mistaken payment made to his account, but rather than awarding Barclays its costs against the account holder, the report states that Kerr J allowed Barclays its taxed costs out of the judgment sum.\textsuperscript{162} That order seems inconsistent with the present law, which says that a plaintiff is entitled to sue both the account holder and his bank. Consequently, if the recipient bank is to be indemnified for its costs, those costs should be paid by its customer, and not out of the judgment sum. Allowing Barclays its costs out of the judgment sum is consistent with the notion that the recipient bank ought not to have been embroiled in a dispute between payer and payee.

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\textsuperscript{159} *ANZ v Westpac* (1988) 164 CLR 662.

\textsuperscript{160} [1975] QB 654 (Kerr J).

\textsuperscript{161} Above 245. Cf *Barclays v Simms* [1980] QB 677, discussed above 235.

\textsuperscript{162} *National Westminster Bank Ltd v Barclays Bank Ltd* [1975] QB 654, 677.
D. APPLICATION TO PROPRIETARY CLAIMS

The legal right of a person to say to another ‘That is my property!’ is recognised only in equity. As discussed in Chapter 1, there is no *vindicatio* at common law.\(^{163}\) It was also seen that some proprietary rights arise in response to an event of unjust enrichment.\(^{164}\) In the context of ministerial receipt, a question concerning the liability of agents springs to mind. If there was a genuine defence of ministerial receipt in our law that rendered agents immune from liability in unjust enrichment, should an agent be able to plead that immunity in relation to all claims arising in unjust enrichment, including proprietary claims?

This is a very difficult question. In *Agip (Africa) Ltd v Jackson*\(^ {165}\) Millett J held that in equity the agent cannot escape the effect of a proprietary right asserted by way of a ‘tracing claim’ - what is now known as a proprietary right generated by an event of unjust enrichment.\(^ {166}\) In *Agip* the defendant accountants assisted in a scheme to steal and launder the plaintiff company’s money. The accountants were sued both for money had and received at common law (a claim which failed due to the defence of payment over) and constructive trusteeship in equity based on ‘knowing receipt’ and ‘knowing assistance’. Personal liability in ‘knowing receipt’ against the accountants failed entirely. They were not even *prima facie* liable because they did not receive for their own benefit. But they were held liable

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\(^{163}\) Above 11.

\(^{164}\) Above 23.

\(^{165}\) [1990] 1 Ch 265 (Millett J), affirmed by the Court of Appeal without considering the present point: [1991] Ch 547.

\(^{166}\) See Chapter 1, 23.
to a ‘tracing claim’ in relation to the money still in their bank account at the time of the claim and subsequently paid into court.

The fact that the equitable proprietary claim which arose to reverse unjust enrichment in *Agip* succeeded, despite the failure of the plaintiff’s personal claim for ‘knowing receipt’ on the basis that the defendants had not received beneficially, suggests that there is no beneficial receipt requirement inherent in the equitable proprietary claim. In other words, the fact that the defendant received the property in question as agent on behalf of another is irrelevant. If he still has the property or its traceable proceeds, he must give it up to the plaintiff.

This chapter has advanced three main reasons why the law should incorporate a genuine defence of ministerial receipt immunising agents from liability in unjust enrichment. Each of those reasons would seem to apply to proprietary rights generated by unjust enrichment. The first reason is that pursuant to the general law of agency, payment to an agent is regarded by the law as a payment to the principal and not as a payment to the agent. The agent thus drops out of the transaction where he has not committed a wrong. The enforcement of a proprietary claim against an agent reverses that reasoning. Instead of dropping out, the agent would be brought back into the picture.

The second ground supporting a genuine defence of ministerial receipt is that an agent is not enriched by a payment received from a third party. That is true either absolutely, or at least insofar as the third party is concerned. In other words,
if the agent is regarded as enriched by that receipt he is not enriched at the expense of the third party. If there is an absence of enrichment on the part of the agent, then there ought to be an absence of liability in unjust enrichment. It is illogical to say that, although there is no personal right to restitution from the agent because he is not enriched, there is a proprietary right to restitution enforceable against the agent generated by the very same event. A ‘tracing claim’ is the enforcement of a proprietary right generated by the unjust enrichment of the defendant. If an agent is not enriched by the receipt in question, that receipt cannot give rise to a ‘tracing claim’ against him. Such a claim may still exist in relation to property held by the principal. That proposition is explored shortly.

The third reason why the law should incorporate a genuine defence of ministerial receipt is that the defence provides the most efficient way to protect agents (especially banks) from an insoluble dilemma. Again, that argument would seem to apply as much in relation to proprietary claims as it does to personal claims. Take the case of a bank which receives a third party deposit in a world where agents can plead a genuine defence of ministerial receipt. The plaintiff says to the bank that the money standing to the credit of the relevant account was fraudulently transferred there by its dishonest employee. The plaintiff claims that the bank is personally liable as the recipient of misdirected funds. But at the same time that the plaintiff makes this claim against the bank, cheques drawn by the account holder are presented to the bank for payment. Momentarily anxious as to what it should do, the bank is relieved to be advised by its lawyers that it is able to exercise its right to immunity from claims in unjust enrichment in these
circumstances. It tells the plaintiff ‘The bank is a ministerial recipient. You must take up your claim with our customer.’ In response, the plaintiff switches tack. It brings a tracing claim instead. That is, the plaintiff claims that the bank holds the plaintiff’s money on resulting trust, and that the money can be traced into the bank’s own account with the Reserve Bank of England. Consequently, so the plaintiff asserts, regardless of whether the personal claim in unjust enrichment will fail by reason of the bank’s ministerial receipt, the bank will never defeat the plaintiff’s proprietary claim. The bank is back to square one. It faces a dilemma. Should it meet the cheques, at risk of later being liable to satisfy the plaintiff’s proprietary claim yet being unable to recover the funds from its customer? Or should it refuse to meet the cheques, at risk of being liable to its customer if it turns out that the customer had a defence to the plaintiff’s proprietary claim? The defence of change of position is available in relation to proprietary claims generated by unjust enrichment.\(^\text{167}\) That defence offers little protection to a bank in the situation just described. The bank can only establish a change of position if it turns out that its customer has relied on the relevant credit to the account, thereby estopping the bank from reversing the entry.\(^\text{168}\) There will often be precious little time, if any, for the bank to consider whether its customer has such a defence to the plaintiff’s claim. Nor is interpleader adequate to resolve the bank’s dilemma.\(^\text{169}\)

\(^{167}\) See Chapter 1, 30.

\(^{168}\) Above 264.

\(^{169}\) Above 266.
A PROPRIETARY CLAIM AGAINST THE PRINCIPAL

In many cases the plaintiff will still have a proprietary right, but it will be one enforceable against property in the hands of the principal. That makes sense. Pursuant to a genuine defence of ministerial receipt, the personal claim in unjust enrichment lies against the principal and not the agent. If the facts are right for the generation of a proprietary right by the same event of unjust enrichment, then that right should be enforceable in relation to property in the hands of the principal.

Third party payments to banks provide a good example. Take a common law case first. A mistaken payment is made by the plaintiff into the defendant’s bank account. If the account was already in credit, then the plaintiff’s payment swells the defendant’s credit balance. If that is so, and if mistaken payments give rise to a proprietary right on the part of the payer by way of resulting trust, then part of that balance is held by the account holder on trust for the payer. That trust arises because the defendant received an asset in circumstances where the provider of that asset did not intend the recipient to have the benefit of it. In other words, property has been received in circumstances where the person beneficially entitled to that property did not intend to pass his entitlement to the recipient. So far as the payer and the true payee of money paid into a bank account (the account holder) are concerned, that is exactly what happens. A debt owed by a bank is a form of property. If the plaintiff’s payment increases the

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171 R Chambers, Resulting Trusts (1997) 125.
172 Ibid 220; Air Jamaica Ltd v Charlton [1999] 1 WLR 1399 (PC) 1412 (Lord Millett).
bank’s debt to the account holder, then the account holder has received property in
circumstances where the provider of that property did not intend the account
holder to have the benefit of that receipt.

The same analysis may be applied to ‘tracing claims’ in equity. Suppose
trust money is misappropriated by a trustee and paid into his wife’s account. She
clearly has acquired a benefit: an increased debt owed to her by her bank. But she
was not intended to have that benefit by the persons beneficially entitled to the
money, the beneficiaries under the trust. Consequently, the wife holds the
increased portion of her claim against the bank on resulting trust for those
beneficiaries. Similarly, in Agip a claim could have been brought against the
principals standing behind the accountants. Of course, those principals would
almost certainly not have entered the jurisdiction to defend the fraud they had
directed from afar. But they were clearly subject to the jurisdiction of the court.
Moreover, to safeguard its interests the plaintiff company could easily have
obtained a Mareva\textsuperscript{173} injunction, the effect of which would have been to prevent
the overseas principals demanding that the accountants transfer the money
remaining in the accountants’ bank account. The effect, therefore, would have
been the same as allowing a proprietary claim against the accountants directly.
But there are important differences. First, for the reasons discussed above it is
right as matter of principle that the claim be made against the principal and not the
agent. Secondly, where a claim is doubtful, a plaintiff who wishes to enjoin the

\textsuperscript{173} Mareva Compania Naviera SA v International Bulkers and Carriers SA (The Mareva) [1975] 2
principal from calling on his agent to pay over will have to give an undertaking as to damages. Pursuant to that undertaking the plaintiff will have to compensate the principal if it transpires that the claim was unenforceable and the principal suffered damage as a result of the injunction. The prospect of the principal being harmed by a claim against his agent was a central argument discussed above as to why agents should drop out in the law of unjust enrichment. That prospect should not be entertained in relation to proprietary claims generated by a claim of that nature.

E. CONCLUSION

BANKS AS CONDUITS – AN AUTHORITATIVE AFFIRMATION

An immunity for agents from claims in unjust enrichment would treat the bank, when it receives as agent, as a mere conduit to pass value from depositor to account holder. That treatment of banks as ministerial agents fits in with Sir John Paget KC’s interpretation of the House of Lords’ decision in Capital and Counties Bank v Gordon. In the fourth edition of Paget (the last to be written by the original author) it is said:

‘The legal conception of the collecting banker enunciated in Capital and Counties Bank v Gordon … was that of a mere conduit pipe, receiving the cheque from the customer, presenting it and receiving the money for the customer, and then, and not till then, placing it to the customer’s credit, exercising functions strictly analogous to those of a clerk of the customer sent to a bank to cash an open cheque for his employer.’

174 [1903] AC 240 (HL).
No one would think of suing the customer’s clerk in unjust enrichment in the latter situation if it turned out that the bank had cashed the cheque by mistake, even if the clerk still had the cash in his hands. There is direct authority that the clerk cannot be sued.\textsuperscript{176} A bank, performing a function strictly analogous to the clerk’s, ought to be treated in precisely the same way – as an agent who cannot be sued.

\textsuperscript{176} \textit{Eden v Read} (1813) 3 Camp 338 (Lord Ellenborough).
CHAPTER 5 - ‘GOOD CONSIDERATION’, BONA FIDE

PURCHASE AND SET-OFF

A. INTRODUCTION

This chapter considers a group of potential defences that a bank might raise in answer to a claim for the restitution of unjust enrichment. Each of the three defences discussed relies on the fact that the bank gave value for the enrichment received. Controversy continues to surround their nature and extent. The first is a defence which sometimes goes under the heading ‘good consideration’. This phrase is used by some to refer to a situation where, acting in good faith, the recipient of an enrichment received it for good consideration passing from him to the person from whom he received or to some third party. There are growing suggestions, which must be repelled, that ‘good consideration’ (or ‘good faith exchange’ as it is sometimes called) might be a general defence to claims in unjust enrichment. In fact, the true principle applies only in a narrow range of circumstances, the best known examples being those in Aiken v Short\(^1\) and Barclays Bank v W J Simms Son & Cooke (Southern) Ltd (‘Barclays v Simms’).\(^2\)

The narrowness of the true principle, together with the misleading nature of the phrase ‘good consideration’, explains the use of quotation marks whenever those words appear.

\(^1\) (1856) 1 H & N 210.
The second defence discussed in this chapter is bona fide purchase. One controversy surrounding that defence is unique to banks. That is whether a bank can be a bona fide purchaser of money deposited into an account in credit and not withdrawn. Recent dicta of high authority say that the answer is no. Those dicta are, however, inconsistent with suggestions in earlier cases, and with the assumption of a number of commentators. Dr Smith has argued that the dicta are wrong. In the end, it will be submitted that Dr Smith’s view must be preferred.

The third defence considered here, set off, is sometimes referred to in relation to a bank’s right to combine two or more accounts held by one customer. The better view is that this right of combination is simply a particular application of the more general defence of bona fide purchase.

B. ‘GOOD CONSIDERATION’

The relevance of ‘good consideration’ to the position of banks as defendants in the law of unjust enrichment lies partly in the distinction between the present law and what Chapter 4 said the law ought to be. That chapter suggested that the law should recognise a genuine principle of ministerial receipt in the context of claims in unjust enrichment advanced against banks who receive as agents. Pursuant to such a defence, a bank in receipt of a third party deposit would be immune from a

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3 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 562C (Lord Templeman), 577B (Lord Goff).

claim in unjust enrichment. However, as was noted in Chapter 2, the present position at common law (though not in equity) is to the contrary. The question might arise therefore whether a bank has a defence of ‘good consideration’ in this situation. Suppose that X deposits £100 into Y’s bank account by mistake. At that time Y’s account is overdrawn. X claims that the bank is liable to make restitution to him of the mistaken payment. Assuming that X has made no withdrawals in the meantime, so that there is no (orthodox) defence of payment over available to the bank, can the bank argue that it gave ‘good consideration’ for the deposit, the consideration being the partial discharge of the debt owed to it by Y? That question is explored here.

1. **No General Defence**

In a very important case in the history of the law of unjust enrichment, *Barclays v Simms*,5 Robert Goff J appeared to suggest that there was an independent defence known to the law based on the giving of ‘good consideration’ by the defendant for the enrichment in question. The formulation of that defence, which was ultimately held not to apply on the facts, arose in this context. A customer of Barclays owed money to the defendant. The customer wrote out a cheque and sent it to the defendant. Before the cheque was presented to Barclays the customer stopped payment. A clerk at Barclays overlooked the countermand and paid the cheque. Later realising its mistake, the bank sued the defendant to recover the sum paid and won. Goff J considered that the authorities established a principle pursuant to

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which a claim for the recovery of a mistaken payment will:

‘fail if… the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt …’. ⁶

This proposition was mainly based on Goff J’s interpretation of *Aiken v Short*,⁷ a decision which is examined below. Goff J added the following qualifications to the principle just stated:

‘However, even if the payee has given consideration for the payment, for example by accepting the payment in discharge of a debt owed to him by a third party on whose behalf the payer is authorised to discharge it, that transaction may itself be set aside (and so provide no defence to the claim) if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith…’. ⁸

The words ‘for example’ in this passage suggest that ‘accepting the payment in discharge of a debt owed to [the payee] by a third party on whose behalf the payer is authorised to discharge it’ is merely one example of a wider defence of giving good consideration. This interpretation appears to be the basis of the view that ‘good consideration’ is a general defence to claims for restitution. The defence of ‘good consideration’ is said to have independent existence separate from bona fide purchase and change of position.⁹ Dr Chambers, for example, refers throughout *Resulting Trusts* to the ‘defence of good faith exchange’. ¹⁰

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⁶ Ibid 695C-D.
⁷ (1856) 1 H & N 210.
Others take the same approach. In *National Mutual Life Association of Australasia Ltd v Walsh*,\(^\text{11}\) a mistaken payment case discussed below, Clarke J held that the ‘provision of consideration’ was a complete defence in all mistaken payment cases.\(^\text{12}\) The High Court of Australia implicitly accepted the existence of such a defence in *David Securities Pty Ltd v Commonwealth Bank of Australia*.\(^\text{13}\) Most recently, the Court of Appeal, following *Barclays v Simms*,\(^\text{14}\) referred to the ‘defence of good consideration’ in *Lloyds Bank Plc v Independent Insurance Co Ltd*.\(^\text{15}\)

In fact no such general defence exists in English law.\(^\text{16}\) *Goss v Chilcott*\(^\text{17}\) illustrates the true position. In that case a finance company lent money to a couple. The couple made two repayments of interest before falling into arrears. They were sued by the finance company for the balance of loan and interest. Two claims were made by the finance company. First, there was the claim on the contract of loan. Secondly, there was a claim in unjust enrichment for failure of consideration. The first claim failed on the basis that the loan documentation had been altered without the consent of the defendants, thus falling foul of the rule in *Pigot’s Case*.\(^\text{18}\) The second claim was upheld, despite the couple’s plea that the

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\(^{11}\) (1987) 8 NSWLR 585.

\(^{12}\) Ibid 595-596.

\(^{13}\) (1992) 175 CLR 353, 380-381, 392, 406.


\(^{15}\) [1999] 2 WLR 986 (CA).

\(^{16}\) Though there is such a defence in America, there called ‘discharge for value’: American Law Institute, *Restatement of the Law of Restitution – Quasi Contracts and Constructive Trusts* (1937) s 14(1).

\(^{17}\) [1996] AC 788 (PC).

\(^{18}\) (1614) 11 Co Rep 26b.
failure of consideration had not been total because of the two repayments of interest. Lord Goff said that there was a total failure of consideration, for no part of the principal sum owing had been repaid. More importantly, however, his Lordship added that even if the principal sum had been partly repaid, the finance company would still have recovered in unjust enrichment. This case illustrates that the requirement of a total failure of consideration is soon to be rejected.\(^\text{19}\)

However, if the law were to recognise a general defence of good consideration it would resurrect, with all its injustice, the very requirement of total failure of consideration. In the modified version of *Goss v Chilcott*, for example, the defendants did give consideration for the receipt of the money in question. Not only did they promise to repay the loan, they partly performed that promise. But Lord Goff held that the defendants would still have had to make restitution even if there was only a partial failure of consideration, that is, even if the couple had given ‘good consideration’ for the loan.

Where there is a partial failure of consideration, the requirement of counter-restitution is perfectly adequate to ensure the absence of a windfall for either party. Moreover, the recipient’s valid interest in the security of his receipt is protected by the defences of change of position and (in the appropriate context) bona fide purchase. A further defence, that of ‘good consideration’, is both unnecessary and undesirable.

\(^{19}\) See too *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Ferguson (DO) v Sohl* (1992) 62 BLR 95 (CA).
Kleinwort Benson Ltd v Lincoln City Council\(^{20}\) also illustrates the non-existence of a ‘good consideration’ doctrine. In that case the plaintiff bank recovered on the basis of mistake despite the fact that it had received all the consideration the bank had paid for. It is true that the contract in that case, as well as in Goss v Chilcott,\(^{21}\) was void. But the suggested ‘good consideration’ doctrine is not said to be limited to valid or extant contracts. Moreover, it is not said to be inapplicable when a contract is void or discharged. It is stated as a defence which permits a mistaken payee to keep the payment if he gave any consideration in return. Stated without major modification, the apparent defence of ‘good consideration’ must be rejected.

The rejection of ‘good consideration’ as the basis of the results in Barclays v Simms and Aiken v Short is vital. There is at least one case where a plaintiff definitely lost because of the suggested doctrine that giving consideration is a bar to restitution. In National Mutual Life Association of Australasia v Walsh\(^{22}\) the manager of the local office of an insurance company was remunerated by a relatively low fixed salary and a very high rate of bonus for business done. Through no fault of his own, but by virtue of the fraud of third parties, the business throughput for his office was hugely exaggerated. The manager therefore received a far higher bonus than he should have done. The fraud of third parties caused the insurance company to pay him the higher bonus by mistake. The insurance

\(^{20}\) [1999] 2 AC 349 (HL).
\(^{22}\) (1987) 8 NSWLR 585 (Clarke J).
company reclaimed the extra, but the claim was disallowed. Clarke J simply said that the company had received consideration. The defendant had ‘devoted his time and his efforts’ to the company’s business,\(^{23}\) and thus had a defence of ‘good consideration’ to the plaintiff’s claim. That cannot be right.

In all likelihood Lord Goff would have said that *National Mutual Life Association of Australasia v Walsh* was a case where there was no defence. There was simply a miscalculation of what was due under the contract, and the payment in excess of the true amount owed cannot be said to have been given for consideration. Walsh gave his work to be remunerated according to the formula properly applied. It could not be said that he had given consideration for any more than that. But the general problem lies with the terms in which the suggested defence of good consideration is stated. To reach the right result in *Walsh*, one would have to break up the consideration passing from each party into pieces, and say that for part of the payment National Mutual received consideration but for another part it did not. That is what the High Court of Australia was forced to do in *David Securities Pty Ltd v Commonwealth Bank of Australia*\(^{24}\) in order to allow the plaintiff to recover a simple mistaken payment to the bank without unsettling Goff J’s *dicta* in *Barclays v Simms*. That is completely unnecessary. Goff J’s *dicta* must be re-examined.

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\(^{23}\) Ibid 595.

\(^{24}\) (1992) 175 CLR 353.
2. **THE PRINCIPLE IN AIKEN v SHORT**

To what principle, then, was Goff J referring in *Barclays v Simms*?\(^\text{25}\) To answer that question requires an analysis of the central example cited by Goff J of the defence of ‘good consideration’ in operation, *Aiken v Short*.\(^\text{26}\) A man named Carter owed money to both the plaintiff bank and to the defendant Short. Pursuant to a will made by Carter’s father, Carter was to acquire an interest in his father’s estate. In order to secure his debt to Short, Carter granted Short an equitable mortgage over that interest. After his father died, Carter transferred the interest to the bank subject to Short’s charge. That transfer was made pursuant to an arrangement between Carter and the bank under which the bank agreed to pay off Carter’s debt to Short, the amount so paid being added to Carter’s debt to the bank. After the bank had paid off Short, it transpired that the property was not owned by Carter at all. A later will of Carter’s father was found. Under the new will Carter acquired no property at all. At no stage therefore did either the plaintiff bank or Short have a valid security interest in the property. Realising its mistake, the bank sued Short for restitution of the money paid.

The bank clearly had a *prima facie* right to restitution for causative mistake. If the bank had not thought that it had a sufficient security interest in the property, it would never have paid Short. Recovery was, however, denied. The majority reasoned that the ‘money which the defendant got from her debtor was actually


\(^{26}\) (1856) 1 H & N 210.
due to her, and there can be no obligation to refund it.\textsuperscript{27} The result in \textit{Aiken v Short} is free from academic attack,\textsuperscript{28} and was recently affirmed by the Court of Appeal.\textsuperscript{29} But the attempt to justify the case in terms of legal principle has proved extraordinarily difficult.

Goff J in \textit{Barclays v Simms} said that the ‘good consideration’ principle dictated the result in both \textit{Barclays v Simms} and \textit{Aiken v Short}. Simms had given no consideration in exchange for the Barclay’s payment and so the bank recovered. Short had given consideration for the bank’s payment, so the bank lost. The reason why Simms gave no consideration but Short did is this. In \textit{Barclays v Simms} the debt owed to Simms by Barclays’ customer was not discharged by the bank’s payment. That in turn was because the bank had no authority to make the payment. The customer’s instructions to the bank to pay Simms had been countermanded.\textsuperscript{30} By contrast, in \textit{Aiken v Short} the debt owed to Short by Carter was discharged because the bank paid Short with Carter’s authority. Thus, of \textit{Aiken v Short} Goff J said:

‘It is a crucial fact in the case that, the payment having been authorised by Carter, it was effective to discharge the debt which was in fact owed by Carter to the defendant;

\textsuperscript{27} Ibid 215 (Platt B).
\textsuperscript{29} \textit{Lloyds Bank Plc v Independent Insurance Co Ltd} [1999] 2 WLR 986 (CA) (‘\textit{Lloyds v Independent}’).
the defendant therefore gave consideration for the payment which was, for that reason, irrecoverable.\textsuperscript{31}

Goff J suggested that the same result as \textit{Aiken v Short} would follow in a case where a bank, in meeting one of its customer’s cheques, overlooked the fact that the customer had insufficient funds in his account. Such a payment is still a payment made by the bank with the customer’s authority. It discharges the customer’s debt to the payee, and the bank cannot recover from the payee.

Contrasting that situation with the facts before him, Goff J said that where a bank pays a cheque overlooking the countermand:

‘the bank’s payment is without mandate. The bank has no recourse to its customer; and the debt of the customer to the payee on the cheque is not discharged. Prima facie, the bank is entitled to recover the money from the payee, unless the payee has changed his position in good faith, or is deemed in law to have done so.’\textsuperscript{32}

It has already been suggested that where the bank is precluded from recovering from the payee in these cases, it is not because the payee gave ‘good consideration’ for the payment. What other principle can explain these results?

\textit{Bona fide purchase}

Some jurists have sought to explain \textit{Aiken v Short} on the basis that it represents the application of the defence of \textit{bona fide purchase}. As Professor Burrows points out, if the defence of good consideration is interpreted literally then the defence ‘is the

\textsuperscript{31} Barclays v Simms [1980] QB 677, 687H.
\textsuperscript{32} Ibid 700D.
direct equivalent in a two party mistake case of the bona fide purchaser defence in a three party mistake case.\textsuperscript{33} In \textit{Lloyds Bank Plc v Independent Insurance Co Ltd}\textsuperscript{34} Peter Gibson LJ appeared to suggest that the defence of bona fide purchase explains the result in \textit{Aiken v Short}.\textsuperscript{35} Lloyds Bank made a large electronic funds transfer to its customer’s creditor with that customer’s authority. Lloyds would not have made that payment had an employee of the bank not been mistaken as to the funds available to the customer. The Court of Appeal held that the bank was not entitled to recover the payment despite its undoubted causative mistake. Waller LJ, applying Goff J’s dicta in \textit{Barclays v Simms}, held that the payee had a defence to the bank’s claim because it had given ‘good consideration’ for the payment. Thorpe LJ agreed with Waller LJ’s reasons. But Peter Gibson LJ preferred to explain the result in terms of bona fide purchase.

\textit{Goff and Jones}\textsuperscript{36} also used to take this bona fide purchase line to explain \textit{Aiken v Short}.\textsuperscript{37} But that explanation, since abandoned in \textit{Goff and Jones},\textsuperscript{38} is not correct. \textit{Aiken v Short} does not contain the right factual matrix for the operation of the defence of bona fide purchase. As is seen below, the defence of bona fide purchase applies only when the defendant purchased the relevant asset (including money) from a third hand.\textsuperscript{39} It does not apply to transfers of value between the

\textsuperscript{34} [1999] 2 WLR 986 (CA).
\textsuperscript{35} Ibid 1005.
\textsuperscript{36} \textit{Goff and Jones} (3rd edn, 1986) 108-110.
\textsuperscript{37} (1856) 1 H & N 210.
\textsuperscript{38} \textit{Goff and Jones} (5th edn, 1998) 205.
\textsuperscript{39} Below 325.
defendant and the plaintiff directly. In such direct transfer cases, there is no question of the defendant claiming to take free of a proprietary interest which burdened the title of the property transferred. That is the function of the bona fide purchase defence, and the defence is only brought into play when that function needs to be performed.\textsuperscript{40} In \textit{Aiken v Short} the plaintiff paid Short directly. Bona fide purchase was therefore irrelevant. The answer must lie elsewhere.

\textit{Change of position}

\textit{Goff and Jones} now argues,\textsuperscript{41} albeit somewhat tentatively, that the defence of change of position may offer a suitable explanation. Mr Virgo similarly explains the principle in \textit{Aiken v Short} as based on the rationale of change of position.\textsuperscript{42} So in \textit{Aiken v Short} itself, \textit{Goff and Jones} and Mr Virgo say that Short changed her position by accepting the bank’s payment in discharge of the debt owed to her by Carter. Is this a sufficient change of position? Waller LJ in \textit{Lloyds Bank Plc v Independent Insurance Co Ltd}\textsuperscript{43} thought that it was. His Honour said:

‘If a payment has discharged the debt, then unless an order to return the money reinstates the debt, the payee will have changed his position in no longer having a remedy against the debtor.’

Mr Hapgood QC, counsel for Lloyds Bank, argued that the debt could indeed be reinstated in this context. He contended that where a creditor was ordered to make

\textsuperscript{40} \textit{Barclays Bank Plc v Boulter} [1999] 1 WLR 1919 (HL).

\textsuperscript{41} \textit{Goff and Jones} 205.


\textsuperscript{43} [1999] 2 WLR 986 (CA) 999-1000.
restitution of money received in payment of a debt, the debt could be and was revived when restitution was made. The following passage in the judgment of Bramwell B in *Aiken v Short*\(^{44}\) was relied upon to make good that contention:

> ‘It does not seem to me that the argument derived from the supposed position of the parties, in the event of the money having been refunded, comes to much, because it strikes me that if the plaintiff could recover this money back no difficulty would arise in consequence of Carter saying he has paid the debt. In *Pritchard v Hitchcock*,\(^{45}\) already referred to, a person having paid a debt and having become bankrupt, and the assignees having got the payment back, the creditor was still held at liberty to sue. So, I take it, here, if this money could have been recovered back, the defendant would have been at liberty to sue George Carter; but, although that part of the argument does not help the defendant, in my mind there are abundant grounds on which I think this rule ought to be made absolute.’\(^{46}\)

Waller LJ suggested that *Pritchard v Hitchcock*\(^{47}\) did not apply outside the context of payments to creditors voidable by a liquidator or trustee in bankruptcy.\(^{48}\) But that still leaves Bramwell B’s *dicta*. Bramwell B was clearly of the view that, had there been no ground preventing the recovery by the plaintiff bank, Carter’s debt to Short would have been revived.

The rejection of the possibility that the debt could be revived outside the insolvency cases is unfortunate. English law does revive debts (or treat parties as if debts are revived) in some circumstances outside the statutory insolvency regime. As Dr Mitchell has shown, one large limb of the law of subrogation rests

\(^{44}\) (1856) 35 LJ Ex 321.

\(^{45}\) (1843) 6 M & G 151.

\(^{46}\) *Aiken v Short* (1856) 35 LJ Ex 321, 324. The equivalent part of Bramwell B’s judgment is differently reported, though to the same effect, at (1856) 1 H & N 210, 215.

\(^{47}\) (1843) 6 M & G 151.

\(^{48}\) *Lloyds Bank Plc v Independent Insurance Co Ltd* [1999] 2 WLR 986 (CA) 999.
on the principle of reviving subrogation.\footnote{C Mitchell, \textit{The Law of Subrogation} (1994) 4 and ch 5.} That principle was recently applied by the House of Lords.\footnote{\textit{Banque Financière de la Cité v Parc (Battersea) Ltd} [1999] 1 AC 221 (HL) 236 (Lord Hoffman).} Moreover, in a closely related context the law seems to say that a release of a debt is not a sufficient change of position precisely because the released debt is effectively revived when restitution is made. The common law cases at present say that a mistaken third party payment credited to an overdrawn bank account is recoverable from the bank.\footnote{Above 95.} If change of position could really be based on the acceptance of a sum of money in discharge of a debt owed to the recipient by a third person, the bank would have a defence. The bank accepted the deposit of money from the plaintiff and simultaneously released the account holder from part of his debt to the bank. In between the moment of payment and the time the bank repays the mistaken payer, the amount of money owed by the account holder is reduced. In other words, his debt is discharged. That proposition can be tested by asking this question: What if the mistaken payer never actually brings any claim to recover? It must be the case that, as between the recipient bank and the account holder, the payment is received for the benefit of the latter. The reduced balance in the overdrawn account accordingly reflects the legal relationship between bank and customer as from the moment the payment is made. But despite the fact that the debt is discharged, change of position provides no defence for the bank in this situation.\footnote{\textit{Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia} (1885) 11 App Cas 84, 88-89 (PC), above 92.} When the bank is forced to repay the mistaken payer, the debt owed by the account holder to the bank is revived. It
would seem then that Waller LJ’s dicta based on the impossibility of reviving a debt in *Lloyds Bank Plc v Independent Insurance Co Ltd*\(^\text{53}\) should be regarded as wrong. Change of position is not the right explanation of *Aiken v Short*.

**A contractual restriction on the right to restitution**

There are three other candidates for the principle in play in *Aiken v Short* and *Barclays v Simms*, all of which seem to work at least to some extent:

1. A person who has a contractual right to be paid a sum of money by one person cannot sue another person in unjust enrichment to recover that sum;

2. the plaintiff cannot recover a payment made to the defendant where the payment was not at the expense of the plaintiff. A payment to the defendant will not be at the expense of the plaintiff where the defendant was not the true payee;

3. a debt, once discharged, cannot be recovered by the debtor or his authorised agent even if the debt was discharged by mistake.

Professor Birks uses the first principle to explain *Aiken v Short*. The effect of that principle requires a person to bear the risks of his contractual partner's insolvency. In essence, this is a restriction on the normal right to restitution. The law sometimes places special restrictions on restitutionary rights. The most common restriction exists where the relationship between the plaintiff and the defendant is

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\(^53\) [1999] 2 WLR 986 (CA) 1000.
governed by a valid contract. Generally speaking the plaintiff has no claim in unjust enrichment until the contract has been brought to an end.\footnote{A Burrows, \textit{The Law of Restitution} (1992), 280; \textit{David Securities Pty Ltd v Commonwealth Bank of Australia} (1992) 175 CLR 353, 374, 376, 395-396; \textit{Portman Building Society v Hamlyn Taylor Neck (A Firm)} [1998] 4 All ER 202 (CA) 208E (Millett LJ); \textit{Bell v Lever Bros Ltd} [1932] AC 161 (HL).} Thus a plaintiff who makes a payment caused by mistake cannot, without more, recover if the payment was made pursuant to a contract with the payee. In such a case, the plaintiff must go further and prove either that the contract has been lawfully brought to an end, or that the contract was void from the start. That restriction is justified by the need to uphold the interest in security of bargains and the bargaining process. Similarly, the principle here restricting the normal right to recover a mistaken payment may be justified by the need to render willing contractual parties subject to the ordinary incidence of insolvency.

The reason why this principle is activated in \textit{Aiken v Short} but not \textit{Barlcays v Simms} is not that the debt owed to the payee was discharged in the former case and not in the latter. Rather, it is the fact that in the former but not the latter the payer had an alternative contractual means of recovery:

‘A plaintiff who has a contractual right to be paid or repaid by X may not in general leapfrog X by suing another defendant in unjust enrichment. However badly a bank may be mistaken in paying the defendant a sum due from a third party, yet if it paid out on the credit of a third party (the customer) and has a right under its\footnote{The word ‘his’ appears in the text, but ‘its’ was clearly intended.} contract with the third party (the customer) to charge that sum to the customer, the defendant will have a defence and by that defence will remit the bank or other payer to his action against the customer.’\footnote{P Birks, \textit{Restitution and Banking Law} 220.}
Thus the relevant difference between the two cases is that in *Aiken v Short* the bank had a direct contractual claim against its customer, whereas in *Barclays v Simms* no such claim existed. In the latter case, the terms of the contract between banker and customer required that the bank *not* pay the holder of the cheque, the customer having countermanded his mandate and stopped payment on the cheque. Having mistakenly omitted to comply with that requirement, the bank could hardly have a direct claim in contract against the account holder. That would be equivalent to saying that a customer cannot countermand an unpresented cheque.

This contractual restricter explanation of *Aiken v Short* and *Barclays v Simms* has an intuitive logical attraction. It seems to be the basis of several other apparently unrelated areas of the law. The general reluctance of the courts to allow a plaintiff to avoid the risk of his contractual partner’s insolvency was clearly evident in, for example, *Re Goldcorp Exchange Ltd.*57 Again, the result in *Brown & Davis v Galbraith*58 is certainly explicable on the basis of this contractual restriction principle. A garage, acting in accordance with its contract with an insurance company, repaired the car of one of the insurance company’s customers. After the repairs were completed, but before the garage had been paid, the insurance company was wound up in insolvency. Could the garage sue the insured in restitution for failure of consideration? There certainly seems to have been such a failure. The work was performed by the garage for the insured on the basis that the insurance company would pay for it, and that basis had failed. But the court

57 [1995] 1 AC 74, 109-110 (PC)
58 [1972] 3 All ER 31 (CA).
held that the garage could not recover from the owner of the car.\textsuperscript{59} The garage was restricted to its legally enforceable claim in contract against the insurance company, even if that claim was factually worthless because the company was insolvent.

A similar contractual answer was given by the House of Lords to the problem posed by \textit{Pan Ocean Shipping v Creditcorp Ltd, The Trident Beauty}.\textsuperscript{60} Charterers of a ship owed advance hire charges under their contract with the ship’s owner. The owner assigned that claim to his bank and notified the charterers who duly paid the bank. After that payment was made the ship was withdrawn. The basis of the charterers’ payment therefore failed. They paid hire charges to obtain use of the ship and they did not get what they paid for. The charterers sued the bank to recover the payment on the basis of failure of consideration. The House of Lords rejected the claim. One important factor which led to that result was that under the contract between the charterers and the ship’s owner, unearned hire charges were to be repaid by the ship’s owner. It may therefore be that the contractual restriction principle explains this result as well. The claim to recover the payment lay only against the party with whom the charterers had contracted (the owner of the ship) and that claim blocked the charterers’ right to restitution from a third party.

\textsuperscript{59} As does \textit{Gray’s Truck Centre Ltd v Olaf L Johnson Ltd} (CA, 25 January 1990).

\textsuperscript{60} \textit{[1994] 1 WLR 161} (HL).
Professor Burrows offers a similar analysis of *The Trident Beauty*.\footnote{Pan Ocean Shipping v Creditcorp Ltd, The Trident Beauty [1994] 1 WLR 161 (HL).} He says that the case shows the existence of an independent restriction on the right to restitution which would normally arise when the basis of a payment fails:

‘To allow a restitutionary claim by Pan Ocean against Creditcorp would unjustifiably undermine the valid contact of assignment between Trident and Creditcorp and would in effect leave Creditcorp, rather than Pan Ocean, as the unsecured creditors of Trident.’\footnote{A Burrows, ‘Restitution From Assignees’ [1994] RLR 52, 55.}

In other words, though there is a *prima facie* right to restitution, that right is cut off by the fact that recovery is inconsistent with the allocation of risks in a directly related contract between the defendant and a third party. The inconsistency is resolved in favour of giving effect to a valid contract and remitting the plaintiff to its contractual claim against a third person. The reasoning is slightly different, but the effect is the same. Contractual allocations of insolvency risks are not to be redistributed by claims in unjust enrichment arising from the same transaction.

**Handling of the qualifications**

Returning to *Barclays v Simms* one strikes a difficulty with the contractual restricter explanation. The difficulty concerns the qualifications which Goff J placed on his version of the *Aiken v Short* principle. Goff J held that the provision of ‘good consideration’ would not provide the payee with a defence to a claim for the recovery of a mistaken payment if:

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\footnote{Pan Ocean Shipping v Creditcorp Ltd, The Trident Beauty [1994] 1 WLR 161 (HL).}

\footnote{A Burrows, ‘Restitution From Assignees’ [1994] RLR 52, 55.}
(a) the payee contributed to the making of the payer’s mistake; or

(b) the payee knew of the payer’s mistake and therefore did not receive in good faith.

If there is a *prima facie* cause of action, but it is cut off because a valid contract gives the plaintiff the right to recover the sum in question from a third party, it is difficult to see why the result should be different in the two situations just described. It is perhaps easier to explain the first situation, where the payee contributes to the making of the payer’s mistake. As Professor Birks says:

‘The bank bears the risk of its customer’s insolvency, but not the risk of a misrepresentation by the outsider.’\(^{63}\)

The second situation is more problematic. If the payer willingly enters into a contract with its customer, and thus bears the risk of that customer’s insolvency, why should it make any difference that the payee, contrary to the plaintiff’s belief, happened to know that the payment was not in the payer’s best interests? Recovery by the payer, and his escape from the ordinary effect of his contractual partner’s insolvency, would then turn on the fluke of what the recipient did or did not know. Moreover, the second qualification effectively imposes a duty of utmost good faith on otherwise innocent recipients. No bargain at all exists between the plaintiff and the defendant, let alone a bargain of *uberrimae fidei*. Why should a creditor, about to receive payment of his debt from an authorised agent of the debtor, speak up in the agent’s best interests?

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\(^{63}\) P Birks, *Restitution and Banking Law* 220.
**An ‘at the expense of’ (true payee) explanation**

The second explanation of *Aiken v Short* and *Barclays v Simms* was initially favoured but recently doubted by Professor Birks. This principle relates to an element in all claims for restitution of unjust enrichment. A claimant in unjust enrichment must show that the enrichment in question was received by the defendant ‘at the expense of the plaintiff’. A payment from A to B cannot be at the expense of A if the payment was made by A on the credit of C. In such a case, there are really two payments: from A to C, and from C to B. For the sake of convenience, those two payments are rolled into one, but for the purposes of the law of unjust enrichment they are treated separately. C was the true payee from, and received at the expense of, A. If A wants to recover, he must recover from C. A cannot recover from B because the law treats B as having been paid by C. There is direct authority supporting the ‘true payee’ explanation. In *Porter v Latec Finance (Qld) Pty Ltd* Kitto J said:

> ‘*Aiken v Short* would support a proposition that a payment of money by A to B on behalf of C, made with C’s authority … amounts to two payments, one by A to C, and the other by C to B; so that even though A made the payment under a mistake of fact he cannot recover it back from B, because the money was received by B not as A’s money but as C’s money.’

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66 *Banque Financière de la Cité v Parc (Battersea)* [1999] 1 AC 221 (HL) 227 (Lord Steyn), 234 (Lord Hoffman), 239 and 243 (Lord Hutton); *Portman Building Society v Hamlyn Taylor Neck (A Firm)* [1998] 4 All ER 202 (CA) 206F (Millett LJ).
67 (1964) 111 CLR 177.
68 Ibid 191-192.
In *Aiken v Short* the unsuccessful plaintiff paid not with the intention of fulfilling an obligation to the defendant, but as a performance of an obligation it owed a third party. The third party, Carter, was therefore the ‘true payee’. The bank was really lending more money to its customer Carter. Short was merely the means by which the further loan was made. Purely for the sake of convenience, two payments were collapsed into one – a loan of the money from the bank to Carter, and a payment of the money from Carter to Short. If those two payments had been made separately, so that the bank paid Carter, the action would have to go against him. Why should the situation be any different simply because, for the convenience of all, the two payments were collapsed into one? In reality the situation remains the same: the bank intends to pay Carter, and it is to Carter that the bank’s claim for recovery must be directed. Similarly, the car repairer in *Brown & Davis v Galbraith* at all times intended to perform a service for the insurance company that engaged him. The defendant who owned the car was merely the means by which the car repairer performed his contractual obligation to the insurance company. As the insurance company was the true and intended recipient of the repairer’s services, recovery had to be sought from it.

However, Professor Birks now doubts whether the ‘true payee’ explanation will explain *Barclays v Simms*:

‘The explanation through the ‘true payee’ proves too much. It cannot stand unmodified, since it would otherwise endanger the bank’s right to recover from the immediate payee any mistaken payment made in the belief that it was paying on the credit of its

69 [1972] 3 All ER 31 (CA)
customer, even an accidental second payment.\textsuperscript{70}

This does not appear to be a good reason for doubting the ‘true payee’ explanation. For C to be the true payee of a payment from A to B, A must be \textit{in fact} paying on the credit of C. It is not enough for A to believe, falsely, that he is paying on C’s credit.\textsuperscript{71} The relevant arrangement between A and C, whereby A will pay B on C’s behalf, must be extant at the time of payment. If there is no such arrangement, then the payment from A to B is not made on the credit of C, and B is thus the true payee. So in \textit{Barclays v Simms} the true payee was Simms, for Barclays’ customer had in fact terminated the arrangement for the bank to pay Simms on the customer’s behalf.

\textit{Handling of the qualifications}

The real difficulty with the ‘true payee’ explanation lies in its inability to cope with the two \textit{Barclays v Simms} qualifications. The ‘true payee’ explanation says that there is no cause of action in unjust enrichment at all against the recipient. If that is so, then unless the recipient was guilty of deceit, it should make no difference that he innocently contributed to the making of the plaintiff’s mistake or knew that the plaintiff was mistakenly acting against his own best interests. Those two facts alone do not create a cause of action where none otherwise exists.\textsuperscript{72} It is for this reason that the true payee explanation, at least as it presently stands, must

\textsuperscript{70} P Birks, \textit{Restitution and Banking Law} 220.

\textsuperscript{71} \textit{Porter v Latec Finance (Qld) Pty Ltd} (1964) 111 CLR 177, 192 (Kitto J).

defer to one of the others.

*A debt, once paid, cannot be recovered by the debtor*

There is another explanation which cannot yet be discarded. The majority in *Aiken v Short*, Pollock CB and Platt B, rested the decision expressly on the proposition that the plaintiff bank paid Short as X’s agent. If this was so, it meant that the payment discharged the valid debt owed to Short by X, and hence:

‘money which the defendant got from her debtor was actually due to her, and there can be no obligation to refund it’. 73

Thus it was not the mere fact that the debt was discharged which mattered. Rather, the important point was that the debt was discharged *by the debtor*. Suppose X mistakenly believes that his salary has doubled. On the basis of that belief X voluntarily doubles his mortgage repayments. X then discovers that his salary is the same as it always was. Can X *demand* that his bank repay him the difference between his old and new repayments? The answer must be no. 74 X owed a debt and he repaid it. This rationale was the basis of Lord Mansfield’s decision over 200 years ago in *Bize v Dickason*. 75 A man who pays a debt, even a legally unenforceable one, cannot recover it despite the fact that the debt was paid by mistake. 76 Similarly, in *Kerrison v Glyn, Mills, Currie & Co* 77 the House of Lords

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73 *Aiken v Short* (1856) 1 H & N 210.
75 (1786) 1 TR 285.
76 Ibid 287 (Lord Mansfield CJ).
77 (1911) 81 LJKB 465 (HL). Discusses in Chapter 2, 104.
would have denied recovery of a mistaken payment if it had found that the plaintiff was ‘merely paying a debt he owed’. Again, in *Barclays v Simms* itself Goff J said in the context of mistaken payments generally that:

> ‘if the money was due under a contract between the payer and the payee, there can be no recovery on this ground unless the contract is itself void for mistake … or is rescinded by the plaintiff.’

Finally, Lord Hope recently said in *Kleinwort Benson Ltd v Lincoln City Council* that ‘the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him’. The result is that it makes no difference that X repaid part of his debt sooner than he would have because of some unilateral mistake. The bank received from X what X owed it, and there can be no recovery.

The same conclusion must follow if X makes the payment through an agent. If the agent is authorised by X to make a payment to X’s creditor, the creditor’s position must be the same as it would be if X had made the payment directly. That means that the agent can be in no better position than X is even if he would not have paid but for his mistake, as long as he is not mistaken as to his authority from X to make the payment. The creditor still received from X what he owed, and his right to keep the payment cannot be any less simply because X made the payment via X’s agent. Hence, a bank cannot recover from the payee of a cheque

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78 P Birks, *Laundering and Tracing* 335.
81 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 408B.
82 *Coutts and Co v Stock* [2000] 2 All ER 56 (Ch D), discussed below 328.
even though the cheque would not have been met but for the bank overlooking the 
account holder’s lack of funds. That mistake does not alter the fact that a debt 
was paid by the debtor.

This explanation justifies the finding that there was no defence in *R E Jones 
Ltd v Waring and Gillow Ltd*, a case which has been suggested to be inconsistent 
with *Aiken v Short* and therefore wrong. In *Jones v Waring* a person (B) owed 
money to the defendant. B fraudulently induced the plaintiff to make a payment to 
the defendant which it accepted in discharge of B’s debt. The House of Lords held 
that the plaintiff was entitled to recover that payment. At the time the plaintiff 
made the payment it was not acting as B’s agent. Indeed, the payment was only 
made to the defendant because the plaintiff thought that B was the defendant’s 
agent. Consequently, the defendant did not receive a payment from its debtor’s 
authorised agent. For this reason *Aiken v Short* did not apply.

**Application to donees**

The explanation just described will turn out to be wrong if it is found that the 
principle underlying *Aiken v Short* and *Barclays v Simms* applies when the 
defendant is a donee. Professor Birks thinks that the same principle which 
determined *Aiken v Short* also precludes recovery in this situation:

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83 *Barclays Bank v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 700A (Goff J); 
84 [1926] AC 670 (HL).
‘A borrows [£]100 from B and tells B to give £50 directly to C, as a present from A. The performance of B is there made to A, payment for A’s convenience to C, to A’s order.’

If B cannot recover from C in unjust enrichment, it cannot be because C was entitled to receive the money paid. Nor, of course, would the suggested ‘good consideration’ defence explain that result. The true principle would have to be put in terms of the ‘true payee’ or the ‘contractual restricter’ explanations. But this assumes that there is no recovery in the situation just described, and that is something which is still uncertain.

**Handling of the qualifications**

The ‘debt discharged’ principle runs into exactly the same difficulty as the contractual restriction explanation in coping with the *Barclays v Simms* qualifications. One could accept that a defence in terms of the debt discharged principle is excluded where the defendant is at fault, in particular by contributing to the mistake in question. But where a recipient neither contributes to the mistake in question, nor commits the tort of deceit, it is difficult to see why a creditor should not be able to rely on that principle.

**3. Conclusion**

This lengthy discussion of *Aiken v Short* has been necessary in order to determine whether there is a general ‘good consideration’ defence on which a bank can rely

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86 P Birks, *Laundering and Tracing* 335.
Restitution From Banks

to defeat claims in unjust enrichment. Although two explanations of *Aiken v Short* remain open, a defence of ‘good consideration’ is not one of them. Neither in the context of claims to recover a payment made by mistake, nor in the context of claims in unjust enrichment generally, does such a defence exist. Whether it is the contractual restriction principle or the debt discharged principle which turns out to be correct, it seems clear that the principle underlying *Aiken v Short* operates only within a narrow compass. Only rarely will a claim against a bank contain the right circumstances for the application of one of those explanations.

Neither of those two explanations covers the factual scenario with which this section began. When X deposits £100 into Y’s overdrawn account by mistake, X is not restricted from enforcing his right to restitution from Y’s bank by the contractual restricter principle. X’s payment was not made pursuant to any contract with Y or anyone else. He is therefore not bound to bear the risk of his contractual partner’s insolvency. In addition, X is not a debtor (or an authorised agent of a debtor) seeking to recover a payment made in discharge of a debt. Although it may be true to say that Y’s debt to the bank is discharged in the time between the mistaken payment and the time the bank is required to make restitution, the ‘debt discharged’ principle is not brought into play. That principle applies only when it is the payer or his principal whose debt is discharged.
C. BONA FIDE PURCHASE

This section addresses one issue concerning bona fide purchase particularly important to the position of banks. Can a bank plead bona fide purchase in relation to money deposited into an account in credit? Both Lord Goff and Lord Templeman in *Lipkin Gorman v Karpnale Ltd*\(^87\) said that the answer was no. But doubts have recently been expressed whether that is right, and those doubts are explored below. Before considering that issue it is first necessary to outline briefly the circumstances in which the defence of bona fide purchase will defeat a claim in unjust enrichment.

1. BONA FIDE PURCHASE GENERALLY

It is clear that bona fide purchase is a defence to claims in unjust enrichment. *Lipkin Gorman v Karpnale Ltd*\(^88\) is authority for that proposition. The solicitors’ claim for money had and received in that case was expressly classified by the House of Lords as lying in unjust enrichment. Had the casino provided value to the gambler Cass it would have had a complete defence of bona fide purchase. But the Gaming Act 1845 rendered gambling contracts void. That meant that the casino did not provide value to a gambler when a bet was placed. There was no purchase of the money wagered, only ‘gifts’ when the gambler won. The casino was thus forced to fall back on the general defence of change of position. This

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\(^87\) *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 577 (Lord Goff), 562 (Lord Templeman).

\(^88\) [1991] 2 AC 548.
provided only a limited defence to the extent that the casino had paid out winnings to Cass.

**Purchase from third party required**

It is also clear that the only claims (in unjust enrichment or otherwise) liable to be defeated by the defence of bona fide purchase are those based on a transaction in which the defendant received property or value from someone other than the plaintiff. In other words, bona fide purchase applies only in three-party cases.\(^{89}\)

The reason lies in the rationale of the defence. In *Barclays Bank Plc v Boulter*\(^ {90}\)

Lord Hoffman said:

> ‘Prima facie, a purchaser cannot obtain a better title than his vendor was able to convey. The defence of purchaser in good faith for value without notice enables the purchaser to defeat a prior interest which burdened the title.’\(^ {91}\)

Thus the defence operates by giving a recipient a better title than his transferor was able to give. The defence is of no relevance if the extent of the transferor’s title is not in issue. And the extent of the transferor’s title is only in issue when someone other than the transferor raises a question as to what title the transferor was able to transfer. In other words, the defence defeats ‘a *prior* interest which burdened the title’ transferred to the defendant. It cannot do that unless the holder of that prior interest claims that the defendant took subject to it. Such a contest necessarily requires three parties.

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\(^{90}\) [1999] 1 WLR 1919 (HL).

\(^{91}\) Ibid 1924H.
The converse proposition is that the defence is not available where it is the plaintiff himself who was the direct provider of the asset in question.\(^\text{92}\) In such a case, it is only the efficacy of the transfer which is in question. The plaintiff seeks to undo the transfer by claiming that he or she was (say) mistaken at the time it was made. The plaintiff does not seek to claw back an interest on the basis that he never conveyed it, and that only an unauthorised third party had purported to do so. Instead, the plaintiff says that his interest must be given back either because he did not really mean the transfer to happen or because there is some public policy which requires restitution.

There is another reason why bona fide purchase is not available in the two-party situation. That reason has already been encountered when discussing the concept of ‘good consideration’. To allow the defence of bona fide purchase in such a case would be equivalent to allowing a defendant to plead that non-existent defence.\(^\text{93}\) Where the defendant gave value to the plaintiff in exchange for the benefit in question, the defendant’s interests in the security of that transaction are protected by two principles:

(1) restitutionary relief must not subvert the risks inherent in the bargain which exists between the plaintiff and the defendant,\(^\text{94}\) and

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\(^{93}\) Above 299.

\(^{94}\) Above 61.
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(2) a plaintiff who demands restitution must make counter-restitution of value transferred to him by the defendant in the same transaction.

There is neither need nor utility in permitting the defence of bona fide purchase in a two-party situation. For this reason, the attempt to explain some two-party cases such as *Barclays Bank plc v O’Brien*[^95] in terms of bona fide purchase[^96] will not work, for the defence is irrelevant when there has been a direct transfer from plaintiff to defendant. In the *Barclays v O’Brien* scenario a surety transfers a mortgage or a guarantee directly to the bank to support the debt of a third person. There is no question of the surety passing a defective title to any property. The property was hers to give and she gave it. Bona fide purchase is therefore irrelevant,[^97] as the House of Lords has recently confirmed.[^98]

*Constructive third party purchase*

It is possible that the requirement of a transfer from someone other than the plaintiff can be established constructively. It has been contended that the defence of bona fide purchase is brought into play by a payment of money by mistake to an agent who is owed money by his principal. Professor Cohen adopted that position 70 years ago in the Harvard Law Review:[^99]

[^95]: [1994] 1 AC 180 (HL).
[^97]: *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 (CA) 717-718.
'This presents an obvious case of purchase for value: the agent buying the money with his claim; the principal selling it for the claim…. It does not seem important that there is no manual tradition and redelivery of the money.'

It was seen above that there is some support in the cases for the notion of a constructive payment over in this situation. Of course the availability of bona fide purchase depends on whether agents are to remain prima facie liable at common law in unjust enrichment, or whether, as this thesis contends, they should drop out. If they do not drop out, then a payment from the plaintiff to an agent owed money by his principal should be treated as giving rise to the defence of bona fide purchase for the agent. The ‘purchase’ in question is the constructive redelivery of the money from the principal to the agent in discharge of the principal’s debt. Although there is authority to the contrary, the position remains open to review. In other parts of the law a single payment by a bank is analysed as two separate transactions. In *Coutts and Co v Stock* Lightman J was asked to consider whether there had been a disposition of a company’s property after the commencement of the company’s winding up contrary to s 127 of the Insolvency Act 1986. The circumstances giving rise to that question were these. The company held an account at the plaintiff bank. The bank had agreed to allow the company to overdraw on that account up to £200,000. At the time when the winding up petition was advertised, the company’s account was about £120,000

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101 See Chapter 2, 131.
102 *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84 (PC), considered above 95.
103 [2000] 2 All ER 56 (Ch D).
104 Strictly speaking, dispositions made after the petition has been presented are void under s 127 of the Insolvency Act 1986. But if the payee does not have notice that the petition has
overdrawn. By the time the winding up order was made the account was about £190,000 overdrawn. The increase had come about because the company had continued to write cheques on the account during that period, and the bank had met those cheques.

Lightman J held that the bank had not disposed of the company’s property by meeting the cheques. That was because:

‘… the acts of the bank in honouring cheques drawn on a company’s overdrawn account constitute (i) loans of the sums in question by the bank to the company and (ii) payment by the bank as agent of the company of the sums loaned as monies of the company to the party in whose favour the cheques are drawn.’

The first payment was a disposition of the bank’s property, not the company’s. And the second payment was not a payment by the bank, but a payment by the company. Thus where a bank acts as paying agent, at least where the account is overdrawn, the payment must be treated for the purposes of s 127 of the Insolvency Act 1986 as involving two transactions. The same two-transaction analysis ought to apply to determine whether a bank receives as bona fide purchaser when money is deposited by the plaintiff to an overdrawn bank account.

been presented, dispositions between that time and the advertisement of the petition are always validated by the courts: *In re Leslie (J) Engineers Co Ltd* [1976] 1 WLR 292, 304 (Oliver J); *Hollycourt (Contracts) Ltd v Bank of Ireland* [2000] 2 All ER 45, 47 (Blackburne J).

105 *Coutts and Co v Stock* [2000] 2 All ER 56, 60.

106 There are *dicta* in Lightman J’s judgment (60-62) that suggest that his Honour would apply the same analysis to payments made from a company’s bank account when in credit, though there is authority to the contrary: *Hollycourt (Contracts) Ltd v Bank of Ireland* [2000] 2 All ER 45, 50 (Blackburne J); *In re Gray’s Inn Construction Co Ltd* [1980] 1 WLR 711 (CA). Other Commonwealth authority strongly supports Lightman J’s *dicta*: *Re Mal Bower’s Macquarie Electrical Centre Pty Ltd* [1974] 1 NSWLR 254; *Re Loteka* [1990] 1 Qd R 322; *Tasmanian Primary Distributors Pty Ltd* (1994) 13 ACSR 92 (SC Tasmania).
**Personal claims**

The defence of bona fide purchase concerns transfers of defective title. It does not concern defective transfers between the plaintiff and the defendant. But this does not mean that the defence is only relevant when the plaintiff asserts a proprietary claim. Bona fide purchase defeats personal claims as well.\(^{107}\) It will do so when the establishment of a personal claim against the defendant would undermine the protection which the defence gives to bona fide purchasers. There is no point in saying to a bona fide purchaser that the defence will let him keep the property purchased from a third party, but that he must pay the plaintiff its value in money. The defeat of the prior interest holder’s title is a true defeat, and not a Pyrrhic victory. The position of a person who acquires property from a third party in good faith and for value must be the same as it would be had the transferor been entitled to make the disposition.\(^{108}\)

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2. **When Can a Bank Plead Bona Fide Purchase?**

*Accounts in debit*

Value sufficient to support a plea of bona fide purchase exists when property is taken in discharge of a debt.\(^{109}\) Consequently, a bank can plead the defence of bona fide purchase where misdirected trust money is deposited by the trustee into an overdrawn account.\(^{110}\) Of course the success of that plea depends on the bank not having the required degree of knowledge\(^{111}\) of the trust and its breach at the time when the deposit was made. In *JR Thomson v Clydesdale Bank Ltd*\(^{112}\) a stockbroker sold some of his client’s shares and received a cheque representing the proceeds. He was supposed to deposit the cheque in his client’s bank account, but instead the broker deposited it into his own overdrawn bank account. The House of Lords held that the bank was not liable to give up the value of the deposit to the stockbroker’s client. It seems clear that this was an application of the defence of bona fide purchase.\(^{113}\) Similarly, the absence of a claim against the bank in *Bishopsgate Investment Management Ltd v Homan*\(^{114}\) is explicable on one of two bases, one of which is bona fide purchase. In that case pension money held by one company on trust was improperly paid into another company’s overdrawn bank

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\(^{109}\) *Taylor v Blakelock* (1886) 32 Ch D 560 (CA).

\(^{110}\) *Cunningham v Northern Banking Co Ltd* [1928] NI 112 (CA).

\(^{111}\) Below 345.


\(^{113}\) *JR Thomson v Clydesdale Bank Ltd* [1893] AC 282 (HL) 287 (Lord Herschell), 289 (Lord Watson).

\(^{114}\) [1995] Ch 211 (CA).
account. No claim was brought against the bank, but only against the account holder. The bank was immune from liability for ‘knowing receipt’ either because it collected as agent, that fact not being altered by the reduction of the account holder’s overdraft,\(^{115}\) or on the basis that it was a bona fide purchaser of the money deposited.

It is difficult to extract an example from the common law of a bank being permitted the defence of bona fide purchase to defeat a claim in unjust enrichment. This is partly explained by reason of the fact, noted by Lord Goff in *Lipkin Gorman v Karpnale Ltd*,\(^{116}\) that at present three party common law claims are rare. Most claims at common law involve payments by the plaintiff directly to the defendant. As stated above, the defence of bona fide purchase is not relevant in that situation. The requirement that the defendant receive from a third hand is missing. But assuming that element was present, there is no reason why an overdrawn bank account would not give rise to the defence.

**Accounts in credit**

When a deposit is made to an account in credit, and a claim is then brought against the bank for the recovery of the sum deposited by someone other than the depositor, can the bank defeat the claim on the basis that it is a bona fide purchaser? This issue is a highly controversial one. The factual matrix is right for the

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\(^{115}\) As argued in Chapter 3, 210.

\(^{116}\) [1994] 1 AC 180 (HL) 572.
operation of that defence: there is a claim for the recovery of money received by
the bank from a third hand (that is, someone other than the plaintiff). The only
question is whether the bank gave value at the time the deposit was made. There
seem to be only two choices. Either the bank is a volunteer or it is a purchaser.
Intuitively, one would balk at the notion that the bank is a volunteer. When we use
that word we think of a person who receives a gift, the recipient being required to
give nothing in return to the gift-giver or to a third party. A bank hardly fits this
picture. The account holder fully expects, and is entitled at law, to demand from
the bank the repayment of any money deposited into his account. Our intuition
would tell us then that the bank is a bona fide purchaser of the money deposited,
the relevant value being the promise to repay the account holder an equivalent sum
plus interest.117

There is an alternative argument, ultimately unconvincing, as to why the
bank in this situation should be thought of as having given value. Professor Birks
initially argued that the bank did meet the requirements of bona fide purchase. His
reason, however, was not that the bank gave value by promising to repay the
account holder. Instead, Professor Birks argued that:

"In the normal case a bank cannot be regarded as a volunteer, since it receives the
money as its own in return for the usual banking services."118

117 FA Sheppard, ‘Liability of Third Persons for Breach of Trust’ (1936) 3 Can Bar Rev 203,
208; S Khurshid and P Mathews ‘Tracing Confusion’ (1979) 95 LQR 78, 94; R Chambers,
Resulting Trusts (1997) 117.

Though it is not clear from this passage whether or not the promise to repay was intended to be part of the ‘usual banking services’, Professor Birks later made clear\textsuperscript{119} that he had in mind something other than the promise to repay. Mr Gleeson also takes the view that the bank provides value in exchange for a deposit through the provision of banking services\textsuperscript{120}. Presumably then the banking services referred to were such things as cheque and direct debit facilities, the provision of automatic teller machines, and the like. It must be doubted whether these services really ought to count for the purposes of the bona fide purchase defence. The essence of banking is a debtor and creditor relationship with superadded aspects of agency. The consideration passing from the bank in exchange for the deposit by the customer of his or her money is the bank’s promise to repay an equivalent sum at a later date. The other services commonly offered by banks really play the part of inducing entry into the main contract, and / or providing the means by which the central consideration offered by the bank is to be performed. If these services were what counted as value for the purpose of the defence, it would mean that a ‘no-frills’ bank that offered none of these services would not have the benefit of a bona fide purchase defence. It seems strongly preferable to say that either all banks are able to plead the defence or none at all.

So one returns to the intuitive answer – that the bank is a bona fide purchaser through its promise to repay the value of the sum deposited to the account holder.

\textsuperscript{119} P Birks, \textit{Restitution and Banking Law} 215.

That answer seems to have a strong basis in authority. In *Miller v Race*\(^{121}\) Lord Mansfield held that the bona fide holder of banknotes obtained in the ordinary course of business was not liable to return them to the true owner.\(^{122}\) If there was any doubt as to whether a bank in receipt of a normal deposit received ‘in the ordinary course of business’, one might consider those doubts dispelled by Lord Abinger CB. In *Calland v Loyd*\(^{123}\) he said:

‘There is no doubt that, if I pay money to A, who pays it to his banker to his account, without notice, I cannot recover it from the banker.’\(^{124}\)

In that case the plaintiff did recover from the defendant bank the amount of money placed into a third party’s account by his estranged wife. But the important point which led to that conclusion was that the account was opened by the wife in the name of an infant who had no contractual capacity.

The view of Viscount Haldane LC in *Sinclair v Brougham*,\(^{125}\) is also important in the present context:

‘But Lord Ellenborough laid down [in *Taylor v Plumer* (1815) 3 MS 562, 105 ER 721], as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client, the broker, which precluded the notion of following the money.’\(^{126}\)

\(^{121}\) (1758) 1 Burr 452.

\(^{122}\) Ibid 477.

\(^{123}\) (1840) 6 M & W 26.

\(^{124}\) Ibid 31.


\(^{126}\) [1914] AC 398, 419.
This seems inconsistent with the notion that the bank cannot be a bona fide purchaser of all money lent to (ie deposited with) the bank. Tracing and following money into the hands of the bank was prevented not by the inability to identify the money in question. Rather, the claim was restricted because ‘a relation of debtor and creditor had arisen between the banker and his client’; that is, the bank had promised to repay the value deposited to the account holder.

Moreover, there are some cases which seemingly cannot be explained other than as the application of bona fide purchase in relation to money deposited to an account in credit. In *Fontaine-Besson v Parr’s Banking Company and Alliance Bank Ltd*\(^\text{127}\) the plaintiff’s wife was alleged to have stolen certain of the plaintiff’s bonds. The plaintiff said that his wife had converted the bonds to cash and then deposited the cash with the defendant bank. The plaintiff brought a claim seeking an injunction against the bank restraining it from honouring drafts of his wife. The Court of Appeal held that such an injunction would be ‘altogether wrong’.\(^\text{128}\) Kay LJ added that:

‘Even if the plaintiff’s wife were before the Court, the only order that could be made would be to restraining her from drawing drafts, and not to restrain the bank’.\(^\text{129}\)

Implicit in this is the notion that the plaintiff’s claim should be brought against the customer, and not against the bank, unless one were to say that though a claim for

\(^{127}\) (1895) 12 TLR 121 (CA).
\(^{128}\) Ibid 122 (Kay LJ).
\(^{129}\) Ibid.
damages lay against the bank no injunction could be sought. If a claim did lay against the bank, it is surprising that the Court did not mention it. It seems preferable to conclude that in the Court’s view no claim at all could be brought against the bank. If that is right, then it can only be because the bank was a bona fide purchaser. Without the benefit of that defence, the bank would clearly have been liable as the recipient of property which was traceably the plaintiff’s.

Finally, when *Barclays Bank Ltd v Quistclose Investments*[^130] was before the Court of Appeal, it was taken as given that the bank would have a defence if it had no notice of the trust affecting Quistclose at the time the company deposited the relevant sums with the bank. According to Harman LJ this was because at the time of the deposit the bank had given consideration, ‘the consideration being the promise to repay’.[^131]

Despite all of this, Lord Goff and Lord Templeman both suggested in *Lipkin Gorman v Karpnale Ltd*[^132] that a bank does not give value for the purposes of the defence of bona fide purchase merely by promising to pay an equivalent sum to the account holder at some future time. Lord Templeman said:

‘If a thief deposits stolen money in a building society, the victim is entitled to recover the money from the building society without producing the pass book issued to the thief. As against the victim, the building society cannot pretend that the building society gave good consideration for the acceptance of the deposit. The building


[^131]: [1968] 1 Ch 540 (CA) 555D. That view was implicitly doubted (but not overruled or discussed in detail) in the House of Lords by Lord Reid (at 578) and Lord Wilberforce (582).

society has been unjustly enriched at the expense of the victim.\textsuperscript{133}

Using a slightly different example, Lord Goff said that it was obviously incorrect to assert that:

'a bank with which money was deposited by an innocent donee from a thief could claim to be a bona fide purchaser of the money simply by virtue of the fact of the deposit.'\textsuperscript{134}

It is not clear why Lord Goff interposed in his example an innocent donee between the thief and the bank, whereas Lord Templeman’s simpler example involved a deposit by the thief to his own bank account. That point aside, it seems certain that both their Lordships thought that the promise by the bank to repay the sum deposited to the account holder could not count as the giving of value for the purposes of the defence of bona fide purchase. Some earlier cases seemed to have adopted the same approach.\textsuperscript{135}

Dr Smith has challenged that view. He argues that if the bank is not a bona fide purchaser of (say) a £50 note deposited into a bank account by someone who has no right to the note in question, then the bank would be liable to the true owner of the note in conversion.\textsuperscript{136} Moreover, as neither change of position nor the agent’s defence of payment over is available to defeat a claim in conversion, the bank’s liability would remain even after the account holder had withdrawn the £50 from the account. That cannot be right.

\textsuperscript{133} Ibid 562.
\textsuperscript{134} Ibid 577.
\textsuperscript{135} Banque Belge pour l'Étranger v Hambrouck [1921] 1 KB 321 (CA) 336 (Atkin LJ).
There seem to be only two ways in which it is possible to avoid the result that the bank is liable in conversion. The first is to say that conversion does not lie in respect of money. It has been suggested that *dicta* of Lord Templeman in *Lipkin Gorman* is to this effect. But that is perhaps a misinterpretation. Lord Templeman said:

‘Conversion will not lie for money, taken and received as currency.’

As discussed below, money is taken as currency when it is received by a bona fide purchaser, and that defence naturally defeats the claim for conversion. Still, Lord Templeman’s subsequent remarks are strange. Immediately after the sentence just quoted his Lordship said:

‘the law imposes an obligation on the recipient of stolen money to pay an equivalent sum to the victim if the recipient has been “unjustly enriched” at the expense of the true owner’.

A claim for unjust enrichment will not lie against a bona fide purchaser of stolen money. As established above, the defence of bona fide purchase defeats personal claims as well as proprietary ones. In any event, it is well established that conversion will lie for money. In *Miller v Race* for example Lord Mansfield

139 Ibid.
140 *Hall v Dean and Wood* (1601) Cro Eliz 841; *Jackson v Anderson* (1811) 4 Taunt 24; *Thomas v Whip* (1741) Buller NP 130a; *Sinclair v Brougham* [1914] AC 398 (HL) 411 (Lord Parker); *Banque Belge pour l’Etranger v Hambrouck* [1921] 1 KB 321 (CA) 329 (Scrutton LJ).
141 (1758) 1 Burr 452.
found the defendant recipient of a bank note liable in trover.

The only other way to avoid classifying the bank as a converter is to say, *pace* Lords Goff and Templeman, that the bank can be a bona fide purchaser of money deposited into an account in credit.

**Common law defence of bona fide purchase**

If it does transpire that Lords Goff and Templeman were wrong to say that the bank is not a bona fide purchaser, it will be because they overlooked a distinction between the common law and the equitable versions of the defence of bona fide purchase. The equitable version is more fully described as the defence of bona fide purchase of a legal interest for value without notice of a pre-existing equitable interest. The equitable defence applies generally to defeat a prior equitable interest in favour of the purchaser of a legal interest without notice. It may also possibly defeat a ‘mere equity’ (such as a right to rescind) in favour of the purchaser of an equitable interest. In contrast, the common law defence of bona fide purchase is a special rule for money and rights to rescind. As to money, Lord Mansfield said:

142 LD Smith, ‘Property’ n 90.
143 *Pilcher v Rawlins* (1872) LR 7 Ch App 259.
144 *Twinsectra Ltd v Yardley* (1999) Lloyd’s Rep Bank 438 (CA) para 99 (Potter LJ)
146 *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA).
‘Where money or notes are paid bona fide, and upon a valuable consideration they shall never be brought back by the true owner.’

Similarly, Holroyd J said in *Wookey v Pole* that:

‘It has been long and fully settled, that bank notes … when taken bona fide, and for a valuable consideration, pass by delivery, and vest a right thereto in the transferee, without regard to the title or want of title in the person transferring them. This was decided, as to a bank note, in the case of *Miller v Race* [(1758) 1 Burr 452, 97 ER 398].’

Thus the transferee must give value in exchange for the money in question if the bona fide purchase rule is brought into play. What, then, counts as value for the purpose of the common law rule?

‘Value’

At least in the case of negotiable instruments, the common law version of the defence of bona fide purchase has been codified within the Bills of Exchange Act 1882. Under s 38 a holder in due course of a bill of exchange has an absolute right to enforce payment of the bill. Section 29 defines the holder in due course to be a person who takes a bill complete and regular on its face before it has become due in good faith and for value. Most importantly, s 27(1) states that valuable consideration for a bill includes ‘any consideration sufficient to support a simple contract’ and ‘an antecedent debt or liability’. Finally, s 90 says:

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147 *Clarke v Shee* (1774) 1 Cowp 197, 200.
148 (1820) 4 B & Ald 1.
149 Ibid 9.
'A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.'

Thus the statutory version of the defence of bona fide purchase differs in two important respects from the equitable version. First, it defines value widely to incorporate anything which the law would consider sufficient consideration supporting the making of a contract. A promise to perform some act will therefore support the common law version. In equity, on the other hand, executory consideration does not support bona fide purchase. Secondly, it effectively removes ‘without notice’ as a requirement of the defence. The purchaser need only act bona fide; that is, honestly. In equity, notice will defeat the defence, even where the defendant was not dishonest.

Does this statutory bona fide purchase rule apply to money in the sense of notes and coins? The answer appears to be yes, though this has been overlooked by some commentators. The provisions in the Bills of Exchange Act 1882 expressly apply to promissory notes. A bank note is a promissory note. Dr Smith says that s 3 of the Currency and Bank Notes Act 1954 establishes that

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151 Story v Windsor (Lord) (1743) 2 Atk 630; Hardingham v Nicholls (1745) 3 Atk 304. There is an argument that the position should be otherwise even in equity: AW Scott and WF Fratcher, The Law of Trusts, (4th edn, 1989) para 302.

152 Nelson v Larholt [1948] 1 KB 139.

153 LD Smith, ‘Property’ n 90.


155 Bills of Exchange Act 1882 s 89(1).
point.\textsuperscript{156} This may not be right. That section merely defines ‘bank notes’ for the purposes of that Act as ‘notes of the Bank of England payable to bearer on demand’. Nevertheless, it seems clear that a bank note is a promissory note.\textsuperscript{157} Since bank notes became legal tender,\textsuperscript{158} the promise printed on each bank note of the Chief Cashier of the Bank of England to pay the bearer on demand the face value of the note has become meaningless. But that does not mean that bank notes are not still promissory notes. If they were not, bills of exchange and other promissory notes would be more negotiable than cash, and that cannot be right.

Is there yet a way to conclude that Lord Goff and Lord Templeman were right to say in \textit{Lipkin Gorman v Karpnale Ltd}\textsuperscript{159} that a bank does not give value for the purposes of the bona fide purchase defence merely by promising to pay an equivalent sum to the account holder at some future time? The only way would be to say that ‘value requires not just a promise to pay but an actual payment’.\textsuperscript{160} But that would directly contradict the terms of the Bills of Exchange Act 1882. Value means ‘any consideration sufficient to support a simple contract’, and it has ‘long been settled’ that a promise is sufficient consideration to support the making of a contract.\textsuperscript{161} Moreover, it has always been clear that a bank does become a holder for value of a cheque if the bank credits the cheque to the relevant account before collecting the proceeds. That will be so unless a term of the agreement between

\begin{flushleft}
\textsuperscript{156} LD Smith, ‘Property’ n 90.
\textsuperscript{157} R Goode, \textit{Commercial Law} (2nd edn, 1997) 491 n 5, 519 n 15.
\textsuperscript{158} Currency and Bank Notes Act 1954 s 1(2).
\textsuperscript{159} [1991] 2 AC 548.
\textsuperscript{160} P Birks, \textit{Restitution and Banking Law} 215.
\end{flushleft}
the bank and the customer prevents the latter from having access to the proceeds of
the cheque before they have been actually collected by the bank.\footnote{Ex parte Richdale, Re Palmer (1882) 19 Ch D 409 (CA); Capital and Counties Bank v Gordon (1903) AC 240, 245 (Lord Macnaughton), 248-249 (Lord Lindley); AL Underwood Ltd v Bank of Liverpool Martins [1924] 1 KB 775 (CA) 804-805; National Australia Bank v KDS Construction Pty Ltd (1987) 163 CLR 668, 676; AG Guest, Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes (15th edn, 1998) 228-229. The same rule applies in America under the Uniform Commercial Code, Article 4 as to which see GE Palmer, The Law of Restitution (1978) Vol 1 513-514 n11.}

Mr Barker refers to \textit{Re Diplock}\footnote{Re Diplock [1948] Ch 465 (CA).} as authority for the proposition that a promise made by the transferee of money which would be sufficient consideration for the purposes of contract is not sufficient to support the common law defence of bona fide purchase.\footnote{K Barker ‘Bona Fide Purchase as a Defence to Unjust Enrichment Claims: A Concise Restatement’ [1999] RLR 75, 83.} That is doubtful. It is true that certain donee charities in \textit{Re Diplock} promised Diplock’s executors to use the money donated in a certain way. Some of the charities had actually used the money in the way promised by the time the claims of Diplock’s next of kin surfaced. On the basis of that promise and performance counsel for the charities did indeed argue that were bona fide purchasers of the money donated.\footnote{Re Diplock [1948] Ch 465 (CA)544-545.} That submission was rejected by both Wynn-Parry J at trial\footnote{Ibid 781-785.} and the Court of Appeal\footnote{Above n 165.} on the basis that what was to be done with the money was not a ‘detriment’ to the charities but a benefit. More simply, a conditional gift is still a gift and the recipient still a donee. The bona fide purchase defence is designed to protect a class of transactions: purchases. A gift is not
within that class.

‘Notice’

It was noted above that there were two differences between the common law and the equitable versions of the defence of bona fide purchase. The wider treatment of what counts as value by the common law has just been illustrated. The other difference is that the fault element of the defence at common law requires only an absence of dishonesty. In equity, constructive knowledge (that is, notice) will defeat the defence. The cases seem to support this aspect of the common law defence. Before the codification of the law in relation to negotiable instruments, the rule was that title to bank notes would pass ‘when taken bona fide, and for a valuable consideration’. After the introduction of the Bills of Exchange Act 1882 courts seemed to have continued to apply a standard of honesty in relation to the acceptance of money by banks. In *J R Thomson v Clydesdale Bank Ltd* Lord Shand said:

‘It would be impossible that such business could be carried on if it were held to be obligatory on a banker, in order to save himself from the consequences of a possible breach of duty or obligation, or of the fraud of an agent to his principal, that the banker should examine into the particulars of the various transactions resulting in the payments by brokers or agents to the credit of their accounts, on each occasion on which such payments are made; and that the only rule that can be applied in practice, and which, as I think, rests on sound principle, is that liability for repayment of funds which can be traced or followed into the banker's hands, and which has been applied in payment of the agent's debt, shall arise only where it can be shewn that there was knowledge, on the banker's part, not merely that the fund was received from the broker's principal, but knowledge also that the payment was a misapplication of the

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168 *Wookey v Pole* (1820) 4 B & Ald 1, 9 (Holroyd J).

169 [1893] AC 282 (HL).
fund, made in violation of the agent's duty and obligation.\(^{170}\)

There have, however, been a number of cases in which a bank has been held liable to make restitution of money received from someone other than the plaintiff where the court expressly found that the bank was not dishonest.\(^{171}\) But in many such cases the courts appear to have been too reluctant to characterise the bank’s conduct in that way. *Stephens Travel Services International v Qantas Airways*,\(^{172}\) discussed in Chapter 3,\(^{173}\) is a good example. In that case a travel agency paid trust money into its overdrawn bank account. Although the bank knew of the trust, it was not found to be dishonest. It must be doubted whether that finding was correct. The use of trust money to pay the trustee’s personal debt is a glaring breach of trust. A creditor acts dishonestly when he accepts money in discharge of a debt knowing that the trustee is doing just that. The Privy Council said exactly that in *British North American Elevator Co v Bank of British North America*.\(^{174}\)

**Bona fide purchase of intangible money**

Does the common law bona fide purchase rule go further than the facilitation of exchanges of actual notes and coins? Some commentators accept that the common law version of the defence applies to all forms of money.\(^{175}\) Professor Goode,
however, appears to be of a different view:

‘A proprietary claim to money is defeated where the defendant can show that he has acquired an overriding title as a bona fide purchaser for value without notice of the plaintiff’s rights. The defendant’s priority is frequently ascribed to the fact that the innocent recipient has acquired legal title to the money by virtue of its status as currency. This cannot be the case, for as pointed out earlier, a bank deposit or other intangible money is not currency, legal title to which passes by delivery, but arises from debits and credits in the banking system which do not even involve the transfer of a claim to the recipient. The true position would seem to be that the bona fide purchaser of intangible money is protected not because he has legal title (which he does not) but because he has not been enriched.’\(^\text{176}\)

Although the recipient of an electronic transfer of funds does acquire a claim against his bank, Professor Goode is correct in saying that this claim is not one passed to the recipient by the transferor of the money in question. The transferor’s claim against his bank is not actually transferred to the recipient.\(^\text{177}\) This means that, if the bona fide purchaser rule applies, it cannot be based on the need for the operation of an exception to the \textit{nemo dat} rule for the passing of property. But another justification inherent in the common law version of bona fide purchase – to facilitate economic transactions and the free transfer of wealth – applies equally to electronic as to paper money. It would, in any event, be incongruous if the bona fide purchase rule applied only when the transfer of wealth took the form of the delivery of notes and coins. The modern commercial practice is to treat payment by electronic means in the same way as payment by cash.\(^\text{178}\) In a well-known


dictum Denning J said:

‘A man's money is property which is protected by law. It may exist in various forms, such as coins, treasury notes, cash at bank, or cheques, or bills of exchange of which he is “the holder” but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority.’ 179

Professor Goode gives a different reason for concluding that when the transfer is of intangible money, the same effect is achieved as if the bona fide purchase rule applied. He says that the ‘bona fide purchaser of intangible money … has not been enriched.’ 180 That seems doubtful. The suggestion appears to be based on the notion that there is no net gain to one who receives an electronic transfer of money in satisfaction of a debt. The ‘no net benefit’ approach to enrichment was encountered and rejected in Chapter 3. 181 If the rejection there is correct, then the same rejection must apply to the bona fide purchaser of money. If a recipient of money wishes to rely on value given to purchase that money in order to defeat a claim for restitution he must establish a defence. He cannot trump the claim by saying that he was never enriched, for he was.

The conclusion must be that a bank is a bona fide purchaser of money deposited into an account in credit whatever form that money takes. Consequently, the bank is able to resist a claim for restitution in relation to that...
Restitution From Banks

money even if it turns out that the depositor had no title at all to the money deposited. That does not mean that the true owner of the money has no claim. All it means is that the claim must be brought against the account holder.

D. ‘Set-Off’

It is not unusual for a customer to have two or more accounts with the same bank. In normal circumstances, the bank is happy and / or bound by contract to treat each of these accounts separately from the others. Circumstances may arise, however, where the bank wishes to treat the relationship between it and the customer as if all his accounts were combined into one. This will often be the case where the customer is insolvent. The bank’s right to do this may be resisted by some person or persons making a restitutionary claim to the balance of one account. For example, suppose in breach of trust a trustee deposits trust money in a bank account in his own name. The trustee’s bank permits the trustee to overdraw on another account. When the trustee becomes insolvent the beneficiary of the trust claims that, rather than being entitled to treat the two accounts as one, the bank must pay the sum in the first account to the beneficiary to be held in a designated trust account. What rules of law govern such a competition and why?

The main difficulty here arises because two leading experts on the law of set-off, Mr Wood and Dr Derham, take opposite positions on a closely related issue of fundamental importance. When two accounts are being operated in the name of one customer, is there one overall debt between the bank and the
customer, or do the accounts represent two legally separate debts? That question is tackled below.\textsuperscript{182}

It is first necessary to clear away some uncontroversial matters. The first is that in general, the bank has a right to combine two or more current accounts previously operated separately.\textsuperscript{183} Secondly, it is inaccurate to describe this right as the exercise of a lien over the money ‘in’ one account until the debt owed on the other is repaid. Some earlier authorities supported this view,\textsuperscript{184} but it was rejected by the House of Lords in \textit{National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd.}\textsuperscript{185} Money deposited with a bank becomes the bank’s money. The account holder thereafter has only a personal right to demand repayment from the bank.\textsuperscript{186} It is a ‘misuse of language’ therefore to say that someone can have a lien over their own property.\textsuperscript{187}

The third uncontroversial matter is that the bank’s right to combine accounts can be restricted by agreement.\textsuperscript{188} It is sometimes a matter of dispute between banker and customer as to whether an express or implied agreement not to combine accounts exists,\textsuperscript{189} but such disputes are not relevant here. Fourthly, the

\begin{flushleft}
\textsuperscript{182} Below 351
\textsuperscript{183} \textit{Garnett v M’Kewan} (1872) LR 8 Exch 10.
\textsuperscript{184} For example, \textit{Misa v Currie} (1876) 1 App Cas 554, 569 (Lord Hatherley); \textit{Roxburghe v Cox} (1881) 17 Ch D 520 (CA); \textit{Re Keever (a bankrupt)} [1967] Ch 182.
\textsuperscript{185} [1972] AC 785.
\textsuperscript{186} \textit{Foley v Hill} (1848) 2 HLC 28 (HL).
\textsuperscript{187} \textit{National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd} [1972] AC 785 (HL) 810 (Lord Cross).
\textsuperscript{188} \textit{Paget} 531 et seq.
\textsuperscript{189} See for example \textit{Paget} 532-537.
\end{flushleft}
bank and its customer cannot contract out of the insolvency regime pursuant to which ‘mutual dealings’ between the two are automatically netted at the date of the customer’s insolvency. In effect, this means that the bank’s right to combine a customer’s accounts is automatically taken to have been exercised on the date that pursuant to the law of insolvency the customer became bankrupt or commenced to be wound-up.

There are two crucial matters that are the subject of doubt. The first is the dispute between Dr Derham and Mr Wood referred to above. Does there exist at any particular point in time only one debt between a bank and its customer regardless of the number of accounts operated in the name of that customer? The answer to that issue will both determine the legal nature of the bank’s right in this context, and help explain the second area of doubt – whether the right to combine accounts can be exercised in relation to an account which turns out to have been held by the customer on trust for another.

1. **ONE DEBT OR TWO?**

One leading commentator on rights of set-off, Mr Wood, suggests that there are two distinct debts owed by the bank to a customer when the latter holds two accounts in credit. The author of another leading work on set-off, Dr Derham,
rejects that approach. Relying on a number of judicial statements, he says that:

‘the explanation [of the right to combine accounts] found in the cases is that, unless a particular account is separated out by agreement (express or implied) or it is separate as a matter of law, the debt owing by either party to the other at any particular time can only be ascertained by looking at the balance of all the accounts together. In other words, it is not so much a right to combine accounts, as a recognition that the balance of all the accounts represents the debt. Expressed more concisely, combination is a matter of account rather than of set-off.’\(^{192}\)

For the purpose of the banker’s right to combine accounts, the view of Dr Derham should be preferred to that of Mr Wood. The latter’s view is not consistent with what the courts have said. In *Halesowen Presswork Assemblies Ltd v National Westminster Bank Ltd*,\(^{193}\) for example, Buckley LJ stated:

‘Where the relationship of the banker and customer is a single relationship such as I have already mentioned, albeit embodied in a number of accounts, the situation is not, in my judgment … a set-off situation, which postulates mutual but independent obligations between the two parties. It is an accounting situation, in which the existence and amount of one party’s liability to the other can only be ascertained by discovering the ultimate balance of their mutual dealings.’\(^{194}\)

This view was cited with approval by Millett J in *Re Charge Card Services Ltd*.\(^{195}\) Similar statements have been made in many other cases.\(^{196}\) Although some judges

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\(^{193}\) [1971] 1 QB 1 (CA). The issue was not discussed when the case came before the House of Lords: *National Westminster Bank Ltd v Halesowen Pressworks & Assemblies Ltd* [1972] AC 785 (HL).

\(^{194}\) [1971] 1 QB 1 (CA) 46.


\(^{196}\) *In re European Bank, Agra Bank Claim* (1872) LR 8 Ch App 41, 44 (James LJ); *Clark v Ulster Bank Ltd* [1950] NI 132, 143 (Black LJ); *Ex parte Morier, in re Willis, Percival & Co* (1879) 12 Ch D 491; *Matton v Peat* [1900] 2 Ch 79 (CA) 85; *Bailey v Finch* (1971) LR 7
speak of the bank’s right of ‘set-off’ in this situation, this is most likely because some act is required on the part of the bank in order for the parties to be able (or forced) to treat each other as if there were only one account.\textsuperscript{197} Normally, the contractual relationship between bank and customer requires the bank to treat each account separately for some purposes (such as the calculation of interest) until the right to combine the accounts is exercised. But that does not alter the fact that ‘in truth, as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account’.\textsuperscript{198} The words of the cases are clear: ‘in point of law there was but one account’.\textsuperscript{199} The application of the right to combine accounts is merely an accounting process to ascertain the extent of one party’s liability to another.\textsuperscript{200}

2. **Combination of Trust Accounts**

The factual context of the issue here is this. A trustee holds a bank account on trust, and that account is in credit. The trustee also has another account which he uses for his own personal affairs. The latter account is overdrawn. When can the bank say that the beneficiary’s rights are to be determined according to the net balance of the two accounts? A basic rule found in some text books requires qualification. The authors of *Encyclopaedia of Banking Law* state that:

\begin{itemize}
  \item QB 34, 40 (Blackburn J). Other cases are discussed in R Derham, *Set-off* (2\textsuperscript{nd} edn, 1996) 489-496.
  \item R Derham, *Set-off* (2\textsuperscript{nd} edn, 1996) 495.
  \item *In re European Bank, Agra Bank Claim* (1872) LR 8 Ch App 41, 44 (James LJ).
  \item *Ex parte Morier, in re Willis, Percival & Co* (1879) 12 Ch D 491, 498-499 (James LJ).
  \item Re K [1990] 2 WLR 1224, 1230B (Otton J).
\end{itemize}
‘A customer’s accounts can only be set off against each other provided that the accounts are held in the same right.’

Similarly, Paget states:

‘The right to combine does not exist where the accounts are not held in the same right, as where one is a trust account.’

In fact in some circumstances an account held on trust can be combined with an account held beneficially by the bank’s customer. The qualification comes immediately after the above passages in both texts. But for reasons soon to be discussed the qualification there stated is not completely correct:

‘Thus the bank cannot set off a debit balance against a credit balance held to the bank’s knowledge by the customer in a fiduciary or representative capacity or for a special purpose.’

‘Knowledge of the fiduciary nature of account, however acquired, will preclude the banker from utilising the account for his own benefit, as by combining it with the customer’s overdrawn private account’.

The authors here acknowledge, correctly, that if the bank does not know that the account in credit is held on trust, the normal right to combine accounts applies.

But the passages may be wrong to suggest that the bank cannot exercise its right to combine accounts if it is aware at the time it actually combines the accounts that the account with a positive balance is held on trust.

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202 Paget 537.


204 Paget 537 (emphasis added).

When is the bank’s knowledge assessed?

The better view is that the relevant time for the assessment of the bank’s knowledge as to the existence of the trust is the time when the money held on trust is used to reduce the overall debt owed by the trustee to the bank. In other words, any right to combine accounts which has already accrued prior to the bank discovering that an account is held on trust may be exercised after that knowledge is acquired. This flows naturally from the proposition that there is as a matter of law but one true debt at any particular time. The relevant time will often be when the money in question is deposited. But this will not always be the case. Trust money in one account may be used to reduce an overall debt at some later time. The following example illustrates this proposition. Imagine that a trustee holds two accounts labelled ‘Account 1’ and ‘Account 2’. Account 1 is held on trust. Account 2 is the trustee’s personal account. The following transactions take place:

<table>
<thead>
<tr>
<th>Day</th>
<th>Transactions</th>
<th>Bal A/C 1</th>
<th>Bal A/C 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Personal Account opened</td>
<td>-</td>
<td>£4,000</td>
</tr>
<tr>
<td>2.</td>
<td>Trust Account opened</td>
<td>£5,000</td>
<td>£4,000</td>
</tr>
<tr>
<td>3.</td>
<td>Withdrawal of £4,000 from personal a/c</td>
<td>£5,000</td>
<td>£0</td>
</tr>
<tr>
<td>4.</td>
<td>Withdrawal of £6,000 from personal a/c</td>
<td>£5,000</td>
<td>(£6,000)</td>
</tr>
</tbody>
</table>

On Day 5 the trustee is dismissed from office and a new trustee informs the bank that Account 1 is held on trust. In that case the bank will be able to combine the
accounts. By that stage, the right to combine the accounts has already accrued to the bank. That is because as a matter of both fact and law the trustee owed one overall debt of £1,000 to the bank at the start of Day 5. In that sense, the trust money has already been dissipated by the time knowledge intervenes. If, on the other hand, the bank had acquired knowledge of the trust on Day 3, it would not be able to combine the accounts. That is because it was not until day 4 that the trust money was ‘used’ by the bank to reduce the overall debt of the trustee. This example illustrates two points. First, the relevant time for the assessment of knowledge is not necessarily when the trust money is deposited with the bank. Second, knowledge acquired by the bank before the accounts have been actually combined does not necessarily affect the bank’s right to do so.

Do the cases support this analysis? It is not clear. The authorities are inconsistent. The question was expressly considered in *Grigg v Cocks*. Sir Lancelot Shadwell held that notice of the trust acquired after the money in question was deposited did not defeat the bank’s right to combine the accounts. And in *Barclays Bank Ltd v Quistclose Investments*, Russell LJ stated that the relevant time was the moment the funds were deposited. However, there are judicial suggestions (but no more) that later notice can be relevant. For example, when *Quistclose* reached the House of Lords, Lord Reid strongly doubted whether Russell LJ was correct on this point, but did not find it necessary to decide

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206 (1831) 4 Sim 438.
208 [1970] AC 567 (HL) 578B.
the issue.\(^{209}\)

After noting the inconsistency in the cases, Dr Derham says that:

‘the better view is that notice of a trust received after the money has been credited to the trust account does not affect the position in relation to combination.’\(^{210}\)

Whilst this may often be right, as noted above there may be occasions when later notice will prevent the bank from combining the accounts. Such a situation will arise when the bank is an overall debtor at the time the trust funds are deposited.

That situation aside, why is it that the relevant time is when the trust funds are deposited? The reason follows naturally from the true basis of the bank’s right to combine; when the bank has a right to combine accounts it is ‘protected on the ground that it was a bona fide purchaser for value’.\(^{211}\) The situation is the same at law whether

(a) there is one overdrawn account to which trust money is deposited, or

(b) there are two accounts held by one person in relation to which the bank can exercise a right of combination and the effect of the deposit of trust money is to reduce the overall debt to the bank.

\(^{209}\) Lord Wilberforce was prepared to assume, without deciding, that Russell LJ was correct. See too *Union Bank of Australia Ltd v Murray-Aynsley* [1898] AC 693 (PC) 698.


\(^{211}\) Ibid.
If the bank is a bona fide purchaser in the first situation, the same must be true in the second.

**What degree of knowledge?**

The defence of bona fide purchase for value is generally not made out where the defendant had notice of the competing interest in question at the time of purchase. But as discussed above, the rule in relation to money is the codified common law rule, and that applies a standard of dishonesty and not notice. The dishonesty standard ought therefore apply to the banker’s right to combine accounts. At one stage in the Privy Council’s opinion in *Union Bank of Australia Ltd v Murray-Aynsley* Lord Watson does indeed refer to that standard. But Lord Watson later suggested that the bank would lose if it had notice that the funds in question were trust funds. And in *Barclays Bank Ltd v Quistclose Investments Ltd* Lord Wilberforce spoke of the need to determine whether the bank had notice of the trust affecting the money in question. As the bank did have that notice, its claim to be able to set off the accounts was rejected. If the discussion above in relation to bona fide purchase of money is correct, then these *dicta* must be rejected as wrong.

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212 Above 331
213 [1898] AC 693 (PC).
214 Ibid 697.
215 Ibid 698.
A requirement of honesty makes sense when money is seen as a medium of exchange. The same rules should apply to money as those that apply to all negotiable instruments:

‘It is surely the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority.’\(^{218}\)

That does not mean that bankers, or any recipient for value, can turn a blind eye to the obvious.\(^{219}\) Wilful blindness is a species of dishonesty. But the honest bank should be free to let questions of liability be fought out between account holders.

**Onus of proof**

If the banker’s right to combine multiple accounts is, in truth, just a species of the general defence of bona fide purchase, one would expect to find that the onus lay upon the bank to show that it did not have the relevant degree of knowledge that the account in question is held on trust. In fact, however, some cases suggest the opposite. For example, in *Union Bank of Australia Ltd v Murray-Aynsley*\(^{220}\) the Privy Council suggested that the onus lay upon the claimants to show that the bank knew of the trust affecting the funds in question.\(^{221}\) That suggestion is criticised by Mr Barker.\(^{222}\) This criticism is justified. It is up to the bank to show that it did not

\(^{218}\) *London Joint Stock Bank v Simmons* [1892] AC 201 (PC) 217 per Lord Herschell.

\(^{219}\) Ibid 221.

\(^{220}\) [1898] AC 693 (PC).

\(^{221}\) Ibid 697.

have notice of the trust at the appropriate time. As the proper basis of the right to
combine is the establishment of the defence of bona fide purchase, the onus of proof must fall on the defendant.
Two central themes have emerged from this study. At a very general level, the first theme proposes that a stricter approach be taken than at present to the liability of banks to make restitution. When a bank receives from A property (including money) beneficially owned by B, the bank may have to take special precautions if A and B stand in a relationship of trust and confidence and the transfer operates for the personal benefit of A alone. If the bank knows all those facts, it must take steps to ensure that A is not acting in fraud of B. That theme emerged in Chapter 1. It was seen there that the equitable action traditionally labelled ‘knowing receipt’ can be either a wrong or a claim in unjust enrichment. When it is a claim in unjust enrichment, the recipient is strictly liable to make restitution, subject to defences such as change of position. When ‘knowing receipt’ is a wrong, the action is better named dishonest receipt. A bank receives money dishonestly where, for example, it knows that a trustee is using trust funds to repay his personal debt to the bank. That is an obvious breach of trust. The bank cannot accept that receipt without making enquiries as to the probity of what appears to be a clear breach of trust.

It was also seen in Chapter 1 that, even without acting dishonestly, a bank can be liable to make restitution when it takes a security interest over trust property. Though such a receipt can open up the bank to attack on the ground that it has been unjustly enriched at the expense of the beneficiaries, such a claim will usually be defeated by the bank’s defence of change of position. The beneficiaries
should, however, be entitled to bring a different action. The doctrine in *Barclays Bank plc v O'Brien*¹ is generally associated with mortgages over family homes. But the doctrine should equally apply to the situation where a trustee offers the bank a mortgage over trust property in support of a loan for the trustee’s personal benefit. In that situation, the bank must take special steps to ensure that the trustee is acting properly. In many situations, the bank will be required to ensure that the beneficiaries under the trust truly consent to the course proposed by the trustee. If the required steps are not taken, the bank’s mortgage is liable to be set aside in a claim for that relief by the beneficiaries. Change of position will not help the bank, for that defence does not lie in respect of a claim based on the principle in *Barclays Bank plc v O’Brien*.²

The same theme re-emerged in Chapter 5. The conclusion there was that the common law bona fide purchaser rule could be raised by a bank whenever it innocently received money from a third party (that is, someone other than the plaintiff), even when the account to which the money was deposited was in credit. Unlike its equitable counterpart, the common law defence of bona fide purchase does not require the defendant to have received without notice of a breach of trust or fiduciary duty owed to the plaintiff. Instead, the defendant need only have received the money honestly. As stated above, a bank does not act honestly when it knows that the person transferring money to the bank is probably acting in breach of trust. For example, when the bank knows that a travel agency holds

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¹ [1994] 1 AC 180 (HL).
² Ibid.
money on behalf of an airline on trust, the bank cannot use those funds at the
direction of the travel agency to reduce the agency’s overdraft. Even the less
strict version of bona fide purchase at common law will be unavailable to the bank
in that situation.

The second theme, again at a very general level, proposes that in a different
respect banks should not be liable to make restitution in some circumstances in
which, under the present law, prima facie liability exists. Where a bank acts
honestly as an agent it should drop out of transactions which give rise to claims in
unjust enrichment. In that situation any action for restitution of unjust enrichment
should be brought against the account holder alone. For example, where a
mistaken payment is made to a bank for the credit of an account holder, the
plaintiff’s action for restitution should lie only against the account holder. The
bank must drop out. In one part of our law, equity, agents already drop out from
transactions giving rise to liability in unjust enrichment. But in another part, the
common law, agents are subject to such liability. Germany and the Netherlands
take the same approach as equity. A bank is treated as a conduit pipe for the
transfer of value from the plaintiff to the account holder. The bank thus drops out
of the picture.

There are three main reasons why the approach of equity should be preferred
to that of the common law. The first reason is that as a matter of general principle

3 Stephens Travel Services International v Qantas Airways (1988) 13 NSWLR 331 (CA).
Conclusion

a receipt of money by an agent in his capacity as such is treated by the law as a payment to the principal and not to the agent. The law of unjust enrichment should respect that principle. The second reason is that an agent such as a bank is not enriched by a receipt of money from a third party for the credit of the bank’s customer. The third reason is that, even if it is correct to regard the bank as enriched by the receipt of a third party deposit, it is practically necessary for the bank to drop out. The necessity comes from the fact that, if the bank is prima facie liable in unjust enrichment when it receives as agent, the bank is potentially exposed to an insoluble dilemma. Moreover, if the claim in unjust enrichment is not brought against the account holder, he or she may be unfairly prejudiced if the bank is liable to make restitution to the plaintiff.

What is proposed in this thesis in relation to agents is not really a question of reform. Rather, it is that the law has to make a choice between two systems which already exist in English law. The common law and equity cannot take different positions in relation to the one matter of principle. That is what is chiefly intolerable about the present treatment of ministerial recipients. One rule must be chosen for the treatment of agents in respect of claims in unjust enrichment. For the reasons explored in Chapter 4, the position adopted in equity should be the rule for both parts of our law of unjust enrichment.