

A Common Law Perspective on the Concurrence of Claims in Contract and Unjust Enrichment

NIAMH CONNOLLY*

1. Introduction

The claim made in the French case under discussion would raise a number of issues in the common law. This note will consider these issues in light of English and Irish laws, which are reasonably closely aligned, although there is not much Irish case law on the boundaries between contract and unjust enrichment. Australian law seems to apply a slightly different approach and may be more willing to allow restitutionary claims where there is a valid contract in existence. The key issues are (1) whether the claimant can bring a claim in unjust enrichment when his dealings with the defendant are governed by contract and (2) whether the defendant is enriched at the expense of the claimant by receiving payment from a third party. In the scenario outlined, both of these issues would pose obstacles to the claimant bringing an action in unjust enrichment. A third problem, which would equally block its claim, is that the claimant seems to lack grounds for showing the enrichment to be unjust by proving a recognized ‘unjust factor’.

Before engaging with these highly interesting theoretical questions, I will outline the law governing franchises in the United Kingdom and Ireland. General principles of contract law apply, and the cases consistently emphasize that every case must be determined by a careful interpretation of the specific contract between the parties. The core of the note will address the significant difficulties that the case presents for the common law of unjust enrichment. Lastly, having explored the possibility of a claim in unjust enrichment, I will briefly consider the different types of damages that contract law could offer, which include compensation and, in exceptional cases, disgorgement. If the defendants had breached their contract with the claimants and this enabled them to take over their sales, these might be alternative conceivable routes to a remedy within contract law.

* Assistant Professor, Trinity College Dublin School of Law.

2. Franchises in Ireland and the United Kingdom

Franchise arrangements are governed by ordinary common law principles. There is no specific statutory regulation of franchises in Irish or English law.¹ There is no perceived need for such regulation; general contract principles seem to operate satisfactorily.² Under general contract law, the principle of freedom of contract guides the courts' approach to franchises. In addition, much of the case law that has developed in the area of franchises scrutinizes post-termination non-compete clauses or restrictive covenants on public policy grounds.

In principle, the contract will be freely negotiated by the parties, although in practice, the franchiser normally drafts a standard form agreement. Its desire to protect its interests and goodwill is partially balanced by the concern not to deter prospective franchisees. Typically, more obligations are imposed on the franchisee.³ Given that franchisees invest in their business in reliance on the relationship with the franchiser, the franchise term should be long enough to allow franchisees to recoup their investment.⁴ Most master franchises provide for automatic renewal, although this provision may be left out of simple franchise agreements.⁵ Franchise agreements also identify grounds for termination, such as failure to meet targets, and set notice periods.⁶ If the contract does not require notice of termination, the courts are willing to imply such a term. In *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.*, the court implied a reasonable notice term of one year, given the 'expensive spadework' that the defendant concessionaire was expected to perform before seeing a profit.⁷ Sachs L.J. considered that no reasonable businessman would have expected a prospective concessionaire to enter the agreement without such a safeguard. Franchise contracts usually also provide for the consequences of termination. Non-compete clauses and confidentiality clauses are common. Occasionally, these contracts may provide for compensation.⁸

Sometimes when the contract expires, the parties simply continue their commercial relationship, as in the French doctrine of *tacite reconduction*. This has raised the question of which terms of the original contract continue in effect. Do

1 E. KEAVNEY, 'Ireland - Termination of Master Franchise Agreements', 6. *International Journal of Franchising Law* 2008, p. 19 at 19.

2 M. MENDELSON, 'The Law and Franchising in the United Kingdom', *Entrepreneurial Business Law Journal* 2009, p. 177 at 180-181.

3 *O'Brien's Irish Sandwich Bars Limited v. Byrne* [2008] IEHC 466.

4 *Ghanem Al-Thani Holdings WLL v. Jaguar Cars Exports Ltd.* [2012] EWHC 856 (Comm) para. 65.

5 KEAVNEY, *supra* n. 173, p. 21.

6 *Ibid.*, p. 20.

7 *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 WLR 361 (EWCA).

8 *Hickey v. Roches Stores* [1980] ILRM 107 (IEHC); *Mertrux Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2013] EWCA Civ 821.

the agreed notice provisions remain in force or will it be for the courts to imply a term of reasonable notice? There are divergent solutions in the case law.⁹ *The Flat Roof Company Limited v. Bowden*¹⁰ decided that the parties were no longer trading under the expired contract, so that there was no longer a restrictive covenant in force.¹¹ Other authorities, such as *SJD Group Ltd. v. KJM (Scotland) Ltd.*¹² and *Paperlight Ltd. v. Swinton Group Ltd.*, propose that the original terms continue except that the agreement is henceforth for an indeterminate period and terminable upon reasonable notice, whose length depends on the circumstances.¹³

Franchising creates a ‘symbiotic’ relationship,¹⁴ and the courts are aware that both sides benefit commercially from the deal. The franchisee typically benefits from the franchiser’s goodwill and from training.¹⁵ In this commercial light, it is not unfair or unreasonable that the arrangement should come to an end. Franchising has been described in the English courts as:

a form of lease of goodwill for a term of years, with an obligation on the tenant, as it were, to retransfer the subject matter of the lease at the end of the lease in whatever state it is.¹⁶

This implies that it is normal for a lease to come to an end, without the need for the landlord to compensate the lessee. It is ‘all part of a wider commercial deal in which profits and losses pass between both sides’.¹⁷ Yet, the position of the franchisee is not very far removed from that of a commercial agent, who, under the Commercial Agents Directive, is entitled to compensation.¹⁸ Franchisees are not normally considered commercial agents, but an inventive lawyer might try the unlikely approach of characterizing a franchisee as a commercial agent.¹⁹

9 *Compensation Specialists Limited v. Compensation Claims Service Limited* [2003] EWCA Civ 1108.

10 *The Flat Roof Company Limited v. Bowden* [2009] EWHC 2894 (Ch).

11 *Ibid.*

12 *SJD Group Ltd. v. KJM (Scotland) Ltd.* [2010] CSOH 13.

13 *Ibid.*, para. 22; *PSG Franchising Ltd v. Lydia Darby Ltd* [2012] EWHC 3707 (QB); *Paperlight Ltd. v. Swinton Group Ltd.* [1998] CLC 1667 (EWHC).

14 *Dyno-Rod Plc. v. Reeve* [1999] F.S.R. 148 (EWHC), para. 153.

15 *Chipsaway International Ltd. v. Kerr* [2009] EWCA Civ 320; P. MCGOVERN, ‘Franchising - Some Drafting Considerations’, 4. *Commercial Law Practitioner* 1995, p. 82 at 87.

16 *Kall-Kwik Printing (U.K.) Limited v. Rush* [1996] F.S.R. 114, 119 (EWHC).

17 *Ibid.*

18 The European Communities (Commercial Agents) Regulations, 1994 (S.I. No. 33 of 1994); The European Communities (Commercial Agents) Regulations, 1997 (SI No. 31 of 1997) (Ireland); Commercial Agents (Council Directive) Regulations 1993 (UK); *Kenny v. Ireland ROC Ltd.* [2005] 1 IEHC 241; *Parks v. Esso Petroleum Company Limited* [2000] EU LR 25 (EWCA).

19 MENDELSON, *supra* n. 174, p. 180.

Against this backdrop, the claimant's action in the scenario at issue would be governed by ordinary common law principles. Its argument that the defendant has been unjustly enriched at its expense by benefiting from customers' business after termination raises important questions of principle that go to the heart of the common law of unjust enrichment.

3. The Elements of a Claim in Unjust Enrichment

The necessary elements for a claim in unjust enrichment in most common law jurisdictions are the enrichment of the defendant, at the claimant's expense, in a manner that can be characterized as unjust and absent any valid defences. English law channels the unjust question through recognized causes of action that are termed the 'unjust factors'. Most of these, such as mistake, duress, and failure of consideration, represent cases where the claimant's consent to the transfer was impaired.

Failure of consideration applies where the claimant has received nothing in return for a transfer that he did not intend as a gift. It is conceptualized as an impairment of the claimant's consent in circumstances where his consent was conditional on reciprocity and that condition has failed. The doctrine of failure of consideration is hedged in by the requirement that failure of consideration be total.²⁰ Consideration in this context is distinguished from the common law concept of contractual consideration, which is the promise to perform. Unjust enrichment law is concerned with performance itself, not the promise.

The English requirement to demonstrate a specific impairment contrasts with the law in Canada, which has taken the radical step of adopting absence of juristic reason as the test for unjust enrichment. The doctrine of failure of consideration has not been extended so far as to embrace failure of cause. English law refuses to adopt absence of basis as the rationale for unjust enrichment and so requires the claimant in every case to make out one of the established unjust factors.

4. Issue 1: The Boundary between Contract and Unjust Enrichment Law

4.1. *No Restitution Where the Contract is in Force*

In English law, it is a prerequisite to a claim for unjust enrichment that the claimant not be under a contractual obligation to make the transfer to the defendant.²¹ If there is a contract, then the courts must uphold it. Usually, unjust enrichment operates where there is no contract or a purported contract is void. In *The Evia Luck*, Lord Goff, the father of modern unjust enrichment law, stated

²⁰ *Guido van der Garde BV v. Force India Formula One Team Ltd.* [2010] EWHC 2373.

²¹ A.S. BURROWS, *A Restatement of the English Law of Unjust Enrichment* (Oxford: Oxford University Press, 2012), para. 3(6); *Fairfield Sentry Limited (in Liquidation) v. Migani* [2014] UKPC 9, para. 18.

that the contract, which was tainted by duress, must be avoided before the party could bring a claim in restitution.²²

The law of unjust enrichment cannot be used to seek the return of a benefit conferred on a party in performance of a valid contract.²³ The appropriate claim is for enforcement of the contract or contractual damages. *Goodman v. Pocock* is an old case in which an employee could not recover payment outside of contract for his services during a period when there was a contract in effect.²⁴ In *The Olanda*, an innocent mistake meant that performance by one side was, under the terms of the contract, due to be paid for at a much lower rate than expected. The claimants failed in their claim for payment outside of the contract for their unremunerated work. Where the claimant has done precisely the work required by the contract, it must be remunerated under the contract.²⁵

The point of departure for unjust enrichment analysis is that we can only consider restitution if the enrichment is not governed by a valid obligation.²⁶ Yet, to find definitive proof of this ‘article of faith’²⁷ is harder than it might appear.²⁸ *Obiter dicta* in various cases indicate that the existence of a valid contract is a bar to a remedy for unjust enrichment.²⁹ In *The Trident Beauty*,³⁰ the appellants sought to recover prepayments for their charter of a ship that was unavailable. The defendants had purchased from the shipowners the right to receive charter fees. The House of Lords ruled that the claim must be made under the contract against the shipowners rather than in unjust enrichment against the defendants. Lord Goff affirmed that since there was a contract governing recovery of overpayments:

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- 22 *Dimskal Shipping Co. S.A. v. International Transport Workers Federation* (*The Evia Luck*) [1992] 2 A.C. 152, 165 (UKHL).
- 23 J. BEATSON, ‘The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims’, in W. Swadling & G. Jones (eds), *The Search for Principle* (Oxford: Oxford University Press, 1999), p. 145; J. BEATSON, ‘Restitution and Contract: Non-Cumul?’, 1. *Theo Inq L* (*Theoretical Inquiries in Law*) 2000, p. 83 at 88 *et seq.*
- 24 *Goodman v. Pocock* (1850) 15 Queen’s Bench Reports 576; 117 E.R. 577.
- 25 G. MEAD, ‘Restitution within Contract?’, 11. *Legal Studies* 1991, p. 172 at 185.
- 26 A. BURROWS, *The Law of Restitution* (2nd edn, London: Butterworths, 2002), p. 323; G. VIRGO & J. BEATSON, ‘Contract, Unjust Enrichment and Unconscionability’, *LQR* (*Law Quarterly Review*) 2002, p. 352 at 355-356.
- 27 S.A. SMITH, ‘Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement’, 115. *LQR* 1999, p. 245 at 253.
- 28 BURROWS, *supra* n. 198, p. 323.
- 29 *Taylor v. Bhail* [1996] C.L.C. 377, at 383 (EWCA).
- 30 *Pan Ocean Shipping Co Ltd. v. Creditcorp Ltd.* (*The Trident Beauty*) [1994] 1 All ER 470 (UKHL).

as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.³¹

This echoes Deane J.'s statement in the influential Australian case of *Pavey & Matthews Pty. Ltd. v. Paul*, that:

if there was a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration.³²

The rule that unjust enrichment cannot be considered where the enrichment occurred under a valid contract continues regularly to be applied.³³ In *Taylor v. Motability Finance Limited*, the claimant failed in his argument that the work for which he sought compensation was outside of his normal contracted performance.³⁴ In *Madoff Securities International Ltd. v. Raven*, the claimant company ran a notorious fraudulent ponzi scheme. The defendant was paid to provide the company with research and other services. The court refused to require her to return the money she received from the company to its liquidators. Popplewell J. affirmed the general rule that 'there can be no unjust enrichment where payments are made pursuant to a valid contract which is fully or partly performed'.³⁵

4.2. Discharged Contracts and Restitution

However, it is not required that there never has been a valid contract between the parties. The termination of a contract raises questions as to how performance tendered before termination will be treated. Termination means that the parties are absolved from future performance but not that the contract was invalid from the beginning.³⁶ It can occur when a grave breach leads the other party to repudiate the contract or when the contract is frustrated by impossibility. Historically, the common law let losses lie where they fell.³⁷ Sometimes, however,

31 *Ibid.*, pp. 473-474.

32 *Pavey & Matthews Pty. Ltd. v. Paul* [1987] HCA 5; (1987) 162 CLR 221, at 256 (HCA).

33 *Mowlem plc. (Trading as Mowlem Marine) v. Stena Line Ports Limited* [2004] EWHC 2206 (TCC).

34 *Taylor v. Motability Finance Limited* [2004] EWHC 2619 (Comm), para. 22 (EWHC).

35 *Madoff Securities International Ltd (in liquidation) v. Raven* [2013] EWHC 3147 (Comm), para. 376.

36 *Johnson v. Agnew* [1980] AC 367 (UKHL).

37 *Chandler v. Webster* [1904] 1 K.B. 493 (EWCA).

there can be restitution of prior performance on grounds of unjust enrichment. The visionary restitution case of *Fibrosa v. Fairbairn* concerned a contract frustrated by the outbreak of war, which made performance impossible.³⁸ The House of Lords emphatically ruled that there could be a restitutionary remedy on the ground of failure of consideration due to the frustration of the contract. Lord Wright said:

No doubt, when money is paid under a contract it can only be claimed back as for failure of consideration where the contract is terminated as to the future.³⁹

Fibrosa shows that a contract does not need to be ‘wiped out altogether’, or declared void, for there to be the possibility of restitution.⁴⁰ Once the contract is discharged or terminated, restitution may come into play.⁴¹ There is a rule that prepayments for the sale of land or goods can be recovered when the contract is terminated, even due to the purchaser’s breach. This coexists with the other party’s entitlement to contractual damages.⁴²

Yet, it is not obvious that, if performance was made under a contract that was valid at the time and was subsequently discharged, there should be a restitutionary remedy outside of contract. Jaffey emphasizes the distinction between a contract that is terminated and one that has always been void.⁴³ Where a valid contract is terminated, he points out, ‘the contract, including the contractual allocation of risk, continues to apply with respect to remedial matters’.⁴⁴ Indeed, some contractual clauses may expressly continue after termination, so that thereafter, some questions are governed by contract, but others may not be. Lord Wright said in *Fibrosa* that the principle against unjust enrichment can

only apply where the payment is not of such a character that by the express or implied terms of the contract it is irrecoverable even though the consideration fails. The contract may exclude the repayment.⁴⁵

38 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32, 52, 60 (UKHL).

39 *Ibid.*, p. 64.

40 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32, 52, 60 (UKHL).

41 BEATSON, in: *The Search for Principle*, p. 145; BEATSON, 1. *Theo Inq L* 2000, p. 83 at 85.

42 *Dies v. British and International Mining and Finance Co.* [1939] 1 KB 724; BEATSON, 1. *Theo Inq L* 2000, p. 83 at 85.

43 P. JAFFEY, ‘Restitutionary Remedies in the Contractual Context’, 76. *MLR (Modern Law Review)* 2013, p. 429 at 443.

44 *Ibid.*, p. 443.

45 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*, *supra* n. 212, p. 67.

4.3. *Is there Room for Exceptions to the Rule of Non-concurrence?*

Beatson and Tettenborn argue that it should sometimes be possible to bring a claim in unjust enrichment even though there is an effective contract in place.⁴⁶ They accept that in ‘nearly all cases’, including the paradigm cases, there should not be a claim in restitution while the contract is still extant but argue that there should be exceptions.⁴⁷ In contrast to its approach to contract and restitution, the common law permits concurrent claims in contract and tort, provided the existence of a duty in tort is not inconsistent with the contract.⁴⁸ Beatson argues that the approach taken to tort can inform a response concerning restitution. By focusing on the criteria of inconsistency with the contract and circularity (or contradiction of the contractual obligation), he argues that they may be cases in which a restitutionary claim is neither inconsistent with nor contradictory to a subsisting contract. Similarly, Tettenborn suggests that the case law may support narrower principles, such as not recovering outside the contract for contractual performance or where it is inconsistent with the contract rather than the blanket exclusion of concurrent claims.⁴⁹ The rationales for the general rule, and the different approaches that have been evoked to determine when a restitutionary remedy might be possible even though there is an effective contract in place, might therefore leave room for some concurrence of claims under the contract and outside of it.

4.4. *Reasons to Refuse Concurrent Liability*

4.4.1. *Sanctity of Contract*

In *The Olanda*, Lord Dunedin evoked implied contract thinking to affirm that restitution necessarily requires that the contract be annulled. He said, ‘in order to have a new contract you must get rid of the old contract’.⁵⁰ However, as Mason P. explained in *Trimis v. Mina*,⁵¹ excluding unjust enrichment where it is inconsistent with a contractual agreement is not a relic of the now-discarded implied contract theory but rather is explained by contemporary principle.⁵²

The core principle that shapes this area of law is that the contract must be respected. Upholding the contractual bargain and its allocation of risks are the principal and ubiquitous arguments against concurrent liability in contract and restitution. Birks regarded the rule of non-concurrence as necessary to prevent

46 BEATSON, *supra* n. 213, p. 83; A. TETTENBORN, ‘Subsisting Contracts and Failure of Consideration - A Little Scepticism’, *RLR (Restitution Law Review)* 2002, p. 1.

47 BEATSON, *supra* n. 213, p. 86.

48 *Henderson v. Merrett Syndicates Ltd. (No. 1)* [1995] 2 AC 145, at 193-194 (UKHL).

49 TETTENBORN, *supra* n. 218, p. 7.

50 *Stoomvaart Maatschappij Nederlandsche Lloyd v. General Mercantile Company, Limited (‘The Olanda’)* [1919] 2 K.B. 728, at 730 (UKHL).

51 *Trimis v. Mina* [1999] NSWCA 140; (2000) 2 TCLR 346 (NSWCA).

52 *Ibid.*, pp. 357-358.

unjust enrichment law subverting bargains.⁵³ The courts should not intervene to reassign the allocation of risk decided by the parties in their contract.⁵⁴ Birks wrote that this would amount to taking on the power ‘of regulating the whole business of economic exchange’.⁵⁵ In *Roxborough v. Rothmans*, Kirby J.’s dissent warned that liberalizing the rules on failure of consideration would involve the courts in disputes that are ‘substantially about economic disappointment’.⁵⁶ The case law also emphasizes the importance of commercial certainty.⁵⁷

Similar concerns are expressed in many judgments, such as *Trimis v. Mina*,⁵⁸ where Mason P. said:

Restitution respects the sanctity of the transaction, and the subsisting contractual regime chosen by the parties as the framework for settling disputes.⁵⁹

In *Taylor v. Motability Finance Limited*, Cooke J. described a claim for contractual damages as ‘the true measure of [the claimant’s] entitlement, because it is that which he bargained for’.⁶⁰ Allowing the claimant to choose an unjust enrichment claim instead of a contract claim would undermine the sanctity of contract at a fundamental level, as it would enable the claimant to revisit the deal he had freely made.⁶¹ Further, he added, even if a concurrent claim in unjust enrichment were permissible, the payment would have to be capped by reference to the contract. Allowing the claimant to recover more outside the contract than the parties had agreed would be unjust.⁶²

The cases repeatedly evoke the importance of respecting the contractual allocation of risks.⁶³ In *The Trident Beauty*, Lord Goff warned that:

53 P.B.H. BIRKS, *An Introduction to the Law of Restitution* (2nd edn, Oxford: Clarendon, 1989), p. 46.

54 JAFFEY, *supra* n. 215, pp. 438–439.

55 BIRKS, *supra* n. 225, p. 47.

56 *Roxborough v. Rothmans of Pall Mall Australia Ltd.* [2001] HCA 68, para. 173 (HCA).

57 *PCE Investors Ltd. v. Cancer Research UK* [2012] EWHC 884 (Ch), para. 29.

58 *Trimis v. Mina*, *supra* n. 223, p. 346.

59 *Ibid.*, pp. 357–358.

60 *Taylor v. Motability Finance Limited* [2004] EWHC 2619 (Comm), para. 25.

61 *Ibid.*, para. 25.

62 *Ibid.*, para. 26.

63 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*, *supra* n. 212, at 67; *Lancore Services Ltd. v. Barclays Bank plc.* [2008] EWHC 1264 (Ch).

serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract.⁶⁴

In *Lancore Services Ltd. v. Barclays Bank plc.*,⁶⁵ the parties contracted for the defendant to process credit card payments from third parties to the claimant. The defendant suspended their dealings and retained a large sum of money when it discovered the claimant was engaged in unauthorized and illegitimate business. The Court of Appeal concluded that the contract did not impose on the defendant an obligation to pay to the claimant credit card payments that it received other than for selling goods and services directly itself.⁶⁶ Rimer L.J. held that the claimant, in signing the agreement, had assumed the risk that if it undertook the unauthorized transactions it would not be paid and that it is not the function of the courts to interfere with the allocation of risk.⁶⁷

If a party has foolishly agreed to a bad bargain, he must still be held to respect the contract. It is entirely a matter for contract law to determine the validity of the bargain.⁶⁸ If the interpretation of the contract leads to an unfair result or a 'less than perfect bargain', the courts incline to the view that the parties should have been aware of this at the time they entered the contract.⁶⁹ In *In Re Richmond Gate Property Company*, the Managing Director of a company in liquidation failed to obtain payment for the work he had done, because, under the terms of the contract, the board of directors was entitled not to set his pay.⁷⁰ The claimants in *Miscela Limited v. Coffee Republic Retail Limited* were franchisees who lost their business when the company, related to the franchiser, which had the lease on its premises, went into administration. Coulson J. concluded that the contract exposed them to that risk and that it would be impossible to imply a term into the contract that did not reflect their agreement.⁷¹ These cases all show the courts firmly upholding the contractual bargain.

64 *Pan Ocean Shipping Co. Ltd. v. Creditcorp Ltd., The Trident Beauty* [1994] 1 All ER 470, at 475 (UKHL).

65 *Lancore Services Ltd. v. Barclays Bank plc.* [2009] EWCA Civ 752.

66 *Ibid.*, para. 22.

67 *Ibid.*, para. 31.

68 BEATSON, *supra* n. 213, p. 89.

69 *In Re Richmond Gate Property Co. Ltd.* [1965] 1 W.L.R. 335 (EWHC); *Miscela Limited v. Coffee Republic Retail Limited* [2011] EWHC 1637.

70 *In Re Richmond Gate Property Co. Ltd.*, *supra* n. 241.

71 *Miscela Limited v. Coffee Republic Retail Limited*, *supra* n. 241.

4.4.2. *The Need to Avoid Circularity in the Law*

The circularity concern is that the law cannot create a vicious cycle whereby one branch imposes an obligation, which another branch insists on reversing.⁷² This reason, articulated by Friedmann, is attractive because it explains why restitution becomes permissible when a contract is discharged and why a restitutionary claim for an amount less than the contract amount is still inappropriate.⁷³ It provides a strong justification for the principle that there cannot be a claim to reverse the performance of a legal obligation.

4.4.3. *The Criterion of Inconsistency*

It flows from the courts' general concern to uphold contractual bargains that they cannot allow restitutionary claims that are inconsistent with a valid contract. The criterion of inconsistency is a tool for evaluating whether a proposed non-contractual right trespasses on the territory ruled by the contract. Inconsistency mandates a careful analysis of the contract in the interests of maintaining the contractual allocation of risk. If the rights are inconsistent, the contractual rights must win. This criterion is used to determine whether there can be concurrent claims in tort and contract.

Tettenborn explains *The Trident Beauty* on this basis: 'where the terms of a contract are inconsistent with a right to restitution, then they must be given effect'.⁷⁴ Modern authorities take the old rule of no compensation outside of contract for contractual performance and explain it by reference to inconsistency.⁷⁵ It is necessarily inconsistent with the contract to seek payment outside the contract for performing contractual duties.⁷⁶ In *Taylor v. Motability Finance Limited*, Cooke J. endorsed the inconsistency test in this context. Evoking the tort model, he held that the inconsistency approach rules out unjust enrichment for contractual performance, because the parties intended their contract to apply.⁷⁷ Where the contract expressly or impliedly allocates a risk or benefit to one party, it would be inconsistent for unjust enrichment law to defeat this.⁷⁸

72 D. FRIEDMANN, 'Valid, Voidable, Qualified, and Non-Existing Obligations: An Alternative Perspective on the Law of Restitution', in A.S. Burrows (ed.), *Essays on the Law of Restitution* (Oxford: Clarendon, 1991), pp. 247-248.

73 BEATSON, *supra* n. 213, p. 93.

74 TETTENBORN, *supra* n. 218, p. 7.

75 *Trimis v. Mina*, *supra* n. 223, pp. 357-358.

76 TETTENBORN, *supra* n. 218, p. 7.

77 *Taylor v. Motability Finance Limited*, *supra* n. 206, para. 23.

78 BEATSON, *supra* n. 213, p. 86.

4.5. *Possible Gaps in the Bargain*

In *Coshott v. Lenin*, Mason P. said that ‘around contract restitution operates in a gap-filling role’.⁷⁹ The facts underlying the claim may fall entirely outside the scope of a contract that exists between the parties or in a gap in the scheme created by that contract. Beatson counsels against assuming ‘that all risks have been distributed to one side or the other’.⁸⁰ In some cases, there will be risks that have not been allocated by the contract and that the resulting ‘gap in the contractual allocation’ leaves ‘room for adjustment’.⁸¹ Faced with gaps, the courts may imply a contractual term, if it reflects the parties’ presumed intention, or they may legitimately resort to restitution law.⁸² Whether the contract allocates the risk or leaves a gap must be determined in each case by careful interpretation of the contract in its commercial context. The Australian courts have adopted the distinction between work done ‘inside’ the contract and work done ‘outside’ the contract (and for which restitution may be available).⁸³ This is in line with the gap theory, as work done outside of the contract was not part of the bargain.

BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2) illustrates a gap in risk allocation. The parties contracted together to develop oil fields in Libya, but the Libyan government expropriated their interests. The plaintiff sought relief under statute from the defendant, who argued that the contract allocated the risk of the frustrating event.⁸⁴ Goff J. scrutinized the terms of the contract to determine whether they were intended to survive the frustration of the contract and allocate resulting losses. Even though the parties might have been aware of political risks, there was no indication of how they intended their rights to be determined in the event of expropriation.⁸⁵ The contract did not show that the risk of frustration was imposed on the plaintiff.⁸⁶

4.6. *Terminated Contracts and Restoring Performance*

Where there is a subsisting contract, a claimed restitutionary right that is inconsistent with the contract must yield to contract, but if the restitutionary right falls outside the scope of the contract, then it can be considered. Terminated contracts pose another question: how do we determine which transfers should be returned and which may be retained? As ever, careful interpretation of the contract should be the first resort to determine whether it provides for the

79 *Coshott v. Lenin* [2007] NSWCA 153, para. 10.

80 BEATSON, *supra* n. 213, p. 94.

81 *Ibid.*, p. 94.

82 *Ibid.*, p. 98.

83 *Al Atabi v. Zaidi* [2009] NSWCA 433, para. 65; *Trimis v. Mina*, *supra* n. 223; *Update Constructions Pty. Ltd. v. Rozelle Child Care Centre Ltd.* [1990] 20 NSWLR 251.

84 *BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1982] 1 All ER 925, at 960 (UKHL).

85 *Ibid.*, p. 962.

86 *Ibid.*, p. 963.

consequences of termination. In *Fibrosa*, Lord Wright warned that ‘a particular contract may effectively make a prepayment irrecoverable’.⁸⁷

If the parties have not agreed a contractual solution, there are divergent views as to which acts of performance might be amenable to unjust enrichment law. Burrows offers a relatively generous test of allowing a claim outside the contract if it is not inconsistent with, or more onerous than, the contractual duty.⁸⁸ Beatson argues that the rights that arose while the contract was in operation are governed by contract law. He distinguishes between rights that have already accrued under the contract before it came to an end and those that had not yet so accrued. Beatson’s logic can accommodate the reasoning in cases such as *Fibrosa*, which permitted unjust enrichment after frustration, on the basis that the defendant’s accrued right to the enrichment may be ‘conditional or qualified and thus defeasible’.⁸⁹ After termination, the contract will only continue to govern accrued obligations.⁹⁰

There is support in the recent case law for the ‘unconditionally accrued’ test. In *QuirkCo. Investments Ltd. v. Aspray Transport Ltd.*,⁹¹ the defendant lessee purported to end the lease. The claimant argued that the termination was not valid because the defendant was in breach of contract. The defendant sought to recover overpaid rent. The common law rule is that rent is unconditionally due on the due date, regardless of whether the lease subsequently ends early. Keyser Q.C. evoked the ‘accrual’ test, stating:

the contractual obligation to pay the rent had accrued before termination and that the law of unjust enrichment does not operate to circumvent the scheme of obligations and entitlements contained in a valid contract.⁹²

Taylor v. Motability Finance Limited employs similar reasoning. The claimant employee was denied an expected bonus and had his contract terminated. He argued that from the date the contract was terminated, he was entitled to bring ‘a claim in restitution [...] outside the terms of the contract’.⁹³ However, Cooke J. held that, at the time the contract was terminated, the claimant had already done the work for which he sought to be paid, and all rights had vested in him

87 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*, *supra* n. 212, p. 67.

88 BEATSON, in: *The Search for Principle*, p. 158.

89 *Ibid.*, p. 156.

90 *Ibid.*, p. 157.

91 *QuirkCo Investments Ltd. v. Aspray Transport Ltd.* [2011] EWHC 3060 (Ch), cited in *Canonical UK Ltd. v. TST Millbank LLC* [2012] EWHC 3710 (Ch) and *PCE Investors Ltd. v. Cancer Research UK*, *supra* n. 229.

92 *QuirkCo Investments Ltd v. Aspray Transport Ltd.*, *supra* n. 263, para. 63.

93 *Taylor v. Motability Finance Limited*, *supra* n. 206, para. 19.

according to contract law.⁹⁴ *Howes Percival LLP v. Page*⁹⁵ applied *Taylor v. Motability Finance*. A contract was terminated for anticipatory breach. It provided that the claimants' fees were conditional. At the time of breach, the conditions for payment had not yet been fulfilled, so payment was not due under the terms of the deal. The court refused the claimants' demand for reasonable remuneration in unjust enrichment. It would contradict the terms of the contract, if, on termination, the victim of the breach could claim payment to which it was not entitled under the terms of the deal and so avoid the term that made payment conditional.

The accrual test also explains the decision reached in *Cadogan Petroleum Holdings Ltd. v. Global Process Systems LLC*.⁹⁶ In *Cadogan*, the defendant constructed two gas plants. By agreement between the parties, the claimant acquired ownership of the plants and the defendant was required to purchase them by instalments. After several large payments, it stopped paying and the claimant rescinded the contract. The defendant asked to recover the money it had paid to the claimant, while the claimant sought the full amount outstanding under the contract. The claimant won: it was entitled to all sums that were due under the contract at the time it was rescinded, both paid and unpaid. This was apparent from the terms of the contract and was supported by commercial considerations. Eder J. found that at the time of the rescission of the contract, the claimant had already accrued the right to be paid all the instalments of the purchase price.⁹⁷

5. The Centrality of Interpreting the Individual Contract

In almost every case, the court insists that the answer depends on the terms of the specific contract before it and devote its attention to interpreting that document.⁹⁸ Whether the court is focusing on whether a claimed non-contractual right is inconsistent with the contract or fits in a contractual gap, these are not questions that can be answered in the abstract.⁹⁹ The question is whether the claimed right to restitution is incompatible with the contract in such a way that the parties must be deemed to have agreed to exclude it. It is not just about individual clauses in isolation but the full scope of the deal 'as a whole'.¹⁰⁰ In

94 *Ibid.*, para. 22.

95 *Howes Percival LLP v. Page* [2013] EWHC 4104 (Ch).

96 *Cadogan Petroleum Holdings Ltd. v. Global Process Systems LLC* [2013] EWHC 214 (Comm).

97 *Ibid.*, para. 16.

98 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*, *supra* n. 212, at 42; *BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, *supra* n. 256, at 961; *Cadogan Petroleum Holdings Ltd. v. Global Process Systems LLC*, *supra* n. 268, para. 16.

99 BEATSON, *supra* n. 260, p. 146; TETTENBORN, *supra* n. 218, p. 4; G.J. TOLHURST, 'Assignment, Equities, The Trident Beauty and Restitution', 58. *CLJ (Cambridge Law Journal)* 1999, p. 546 at 550.

100 *BP Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, *supra* n. 256, at 961.

ADM Londis plc. v. Ranzett Limited,¹⁰¹ Hogan J. found that the detailed termination rules in the contract constituted an exhaustive scheme, displacing common law rules. Tettenborn says, ‘if it is a clear inference that an agreed scheme of contractual rights is intended to be exhaustive, then effect must be given to it’.¹⁰² Silence as to the consequences of termination could point to a gap in risk allocation or, conversely, indicate an agreement that there will be no compensation.

When the court is interpreting a commercial contract, its goal is to determine what the parties meant by the language they used, by taking account of what a reasonable person, with the appropriate background knowledge, would have understood them to mean. If there are two alternative meanings, the court may prefer the interpretation that accords with business common sense and the commercial purpose of the agreement. However, the judge may not change the balance of the agreement, as he cannot second-guess why the parties agreed to the terms they did.¹⁰³

5.1. *Implying Contract Terms*

The doctrine of implied terms allows the court to add to a contract a term that is not expressly stated, having perhaps been overlooked, but which the court is certain reflects the parties’ original intention. Two ways of expressing the criterion for implying a term are the ‘business efficacy’ and ‘officious bystander’ tests.¹⁰⁴ The former asks whether the proposed insertion would ‘give such business efficacy to the transaction as must have been intended at all events by both parties’.¹⁰⁵ The latter is an ancillary guide, which asks whether the proposed term is something so obvious that it goes without saying.¹⁰⁶ In *Attorney General of Belize v. Belize Telecom Limited*,¹⁰⁷ Lord Hoffmann said that it is not enough that a proposed addition be reasonable; the court ‘must be satisfied that it is what the contract actually means’.¹⁰⁸

101 *ADM Londis plc. v. Ranzett Limited* [2013] IEHC 63 (IEHC).

102 TETTENBORN, *supra* n. 218, p. 1.

103 *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50; *PCE Investors Ltd. v. Cancer Research UK*, *supra* n. 229, para. 27.

104 *Sweeney v. Duggan* [1997] 2 I.R. 531, at 539–540 (IESC); *Dunne v. Mahon* [2012] IEHC 412; UKPC 18 Mar. 2009, *Attorney General of Belize v. Belize Telecom Limited* [2009] UKPC 10.

105 *The Moorcock* [1889] 14 PD 64 (EWCA); *Tradax (Ireland) Ltd. v. Irish Grain Board* [1984] IR 1 (IESC); M. BRYAN & M.P. ELLINGHAUS, ‘Fault Lines in the Law of Obligations: Roxborough v Rothmans of Pall Mall Australia Ltd’, 22. *SLR (Sydney Law Review)* 2000, p. 636 at 642.

106 *Shirlaw v. Southern Foundries Ltd.* [1939] 2 K.B. 206 (EWCA).

107 *Attorney General of Belize v. Belize Telecom Limited*, *supra* n. 276.

108 *Ibid.*, para. 22.

Applying this test in *Miscela Limited v. Coffee Republic Retail Limited*,¹⁰⁹ Coulson J. asked whether the proposed terms were strictly necessary and whether they ran counter to the express terms of the franchise agreement. In *Paperlight Ltd. v. Swinton Group Ltd.*, Clarke J. refused to imply a term that would require the franchiser to continue forever in the franchise business, as that would be commercially unreasonable.¹¹⁰ Given these tests, it is highly improbable that a court would imply a term to pay a franchisee compensation. A term that cannot be considered to have been intended by the parties, or one on which they would not have agreed, cannot be implied.¹¹¹

5.2. *More Liberal Australian Approaches*

Australia applies ostensibly the same doctrines but seems to have taken a more liberal path than England in permitting restitution where there is a valid contract. The most notable example is *Roxborough v. Rothmans*, a well-known and unorthodox Australian restitution case, which allowed restitution for unjust enrichment despite the continuing existence of valid contracts.¹¹² Two aspects of the decision are unorthodox: first, allowing restitution outside of a subsisting contract, and second, basing this decision on the ground of a failure of consideration that was far from total.

The sale price of cigarettes included a tax that was later declared invalid. The court ruled that even though the contracts remained valid, having regard to the contracts, the payment to cover the tax was an itemized, severable payment.¹¹³ There was ‘a failure in respect of a discrete, clearly identified component of the consideration’.¹¹⁴ Accordingly, it employed the technique of severing the consideration to find that one part of the consideration had failed.

In a strong dissent, consistent with the orthodox approach here, Kirby J. ruled that restitution was not available because the payments were made under fully valid contracts.¹¹⁵ He found that the tests to imply a term were not fulfilled, as it could not be assumed that the seller would have agreed.¹¹⁶ He recalled that the courts should hesitate to impose on the parties terms that they had not agreed, given the importance of freedom of contract.¹¹⁷ The result was not unjust, as it flowed from the contract.¹¹⁸

109 *Miscela Limited v. Coffee Republic Retail Limited*, *supra* n. 243.

110 *Paperlight Ltd. v. Swinton Group Ltd.*, *supra* n. 185.

111 *Lancore Services Ltd. v. Barclays Bank plc.*, *supra* n. 235, para. 28.

112 *Roxborough v. Rothmans of Pall Mall Australia Ltd.*, *supra* n. 228.

113 *Ibid.*, para. 21.

114 *Ibid.*, para. 199.

115 *Ibid.*, paras 122 and 166.

116 *Ibid.*, paras 157 and 163.

117 *Ibid.*, para. 161.

118 *Ibid.*, para. 172.

Bryan and Ellinghaus argue that in *Roxborough*, the risk that the government levy was unconstitutional was not a part of the contractual bargain. This left a gap in the contractual allocation of risk, so that it was legitimate for restitution to intervene.¹¹⁹ However, Virgo and Beatson criticize the decision for permitting the ‘unnecessary, and unprincipled, usurpation of the law of contract by the law of restitution’.¹²⁰

The *Roxborough* approach of severing consideration to find total failure in respect of a portion of it has led to the contrary approach in some Australian cases to that evidenced in recent English cases. *Ocelota Ltd. v. Water Administration Ministerial Corporation* decided that there was failure of consideration in respect of rent prepaid before termination.¹²¹ Hodgson C.J. in Equity ruled that the intention in the lease was that the rent payment would be severable by reference to the period of occupation, so that there was failure of consideration in respect of rent paid for days that fell after termination.¹²² In the English *PCE Investors* decision, Smith J. emphatically rejected the correctness of the decision in *Ocelota* on the ground that it was not appropriate to sever the consideration to find that it had failed.¹²³ Smith J. described the contract as ‘a bundle of rights and obligations on both sides’, so that, looking at the ‘overall package’, the tenant received substantial consideration.¹²⁴

The Australian cases that grant restitution outside a valid contract also evince a willingness to imply contractual terms providing for repayment, in circumstances where English courts would most likely refuse to do so. In *Roxborough*, Callinan J. suggested that he might be willing to imply a term providing for repayment if the tax were invalid. He asserted that this was necessary in order to give business efficacy to the contract and only doubted whether the seller would have agreed to such a term if an officious bystander suggested it.¹²⁵ In *Ocelota*, Hodgson C.J. in Equity offered the following reasons why it would be proper to imply a term envisaging proportional repayments:

Such a term is plainly reasonable and equitable. In my opinion it would be necessary to give business efficacy to the contract, and so obvious that it goes without saying. It is capable of clear expression, and it does not contradict any express term of the lease.¹²⁶

119 BRYAN & ELLINGHAUS, *supra* n. 277, p. 663.

120 VIRGO & BEATSON, *supra* n. 198, p. 356.

121 *Ocelota Ltd. v. Water Administration Ministerial Corporation* [2000] NSWSC 370.

122 *Ibid.*, para. 79.

123 *PCE Investors Ltd. v. Cancer Research UK*, *supra* n. 229, para. 49.

124 *Ibid.*, para. 49.

125 *Roxborough v. Rothmans of Pall Mall Australia Ltd.*, *supra* n. 228, para. 204.

126 *Ocelota Ltd. v. Water Administration Ministerial Corporation*, *supra* n. 293, para. 80.

This reasoning falls short of establishing, as the tests usually require, that the implied term must necessarily be part of the bargain. Virgo and Beatson argue that the only legitimate way for the claim to succeed in *Roxborough* would have been if it were possible to imply a contractual term for repayment but that the tests for implied terms were not met.¹²⁷ The two routes to a favourable outcome advanced in *Roxborough* and *Ocelota* would most likely not succeed in England.

5.3. *Applying the Law to the Scenario*

As all the cases remind us, determining whether the franchise contract between the parties excludes a claim in unjust enrichment depends on the interpretation of the specific contract. However, we might provisionally assume that the contract is silent as to any compensation after termination. While this might theoretically be seen as leaving a gap in the risk allocation, the more likely inference is that the parties implicitly agreed that there would be no such compensation. This inference is supported by the observation that many franchise contracts include terms governing the consequences of termination. It would be bolstered if the contract contained a ‘complete code’ governing remedial measures between the parties, thereby suggesting that other restitutionary remedies were deliberately excluded.¹²⁸ It seems reasonably likely that an outside observer would, knowing the parties to be aware that benefits would continue to accrue to the franchiser following termination, interpret the contract’s silence as to any compensation mechanism as a decision to allow the franchiser to receive these without compensating the franchisee. This would be an inherent element of the bargain to which the claimant consented. If the contract decides the matter, then it is not open to the law of restitution to disturb the allocation of risk agreed by the parties.¹²⁹ For the same reasons, it would not be permissible to imply a compensation provision, because such a term is not necessary and it is not evident that the parties would have agreed to it.

Not only is there a valid and complete contract governing the parties’ relationship, but also, far from there being total failure of consideration, the claimant has received all the consideration bargained for.¹³⁰ The only forlorn hope for the claimant franchisee would be to argue for the severability of the part of the consideration, along *Roxborough* lines. It would presumably be very difficult for the franchisee to establish that the consideration, which comprised clients purchasing ancillary services and products from it, was a distinct and severable part of the contractual consideration. But were the benefits of customers buying accessories from the franchisee envisaged as part of the contractual

127 VIRGO & BEATSON, *supra* n. 198, p. 357.

128 BEATSON, *supra* n. 213, p. 101.

129 BEATSON, *supra* n. 260, p. 169.

130 *Fitt v. Cassanet* (1842) 4 M&G 898.

consideration at all? Far from there being any failure of consideration, the claimant received all the consideration that it was promised. Besides, the overall package between the parties was a bargain that clearly benefited both. There is no ground for separating out profits obtained by the defendant after termination and arguing that there was no specific reciprocation for these.

6. Issue 2: The Problem of Indirect Enrichment

The valid contract is not the only problem for the claimant's case under the common law. To prove subtractive unjust enrichment, the claimant must show that the defendant has been enriched at its expense. There must be a 'movement of wealth' from the claimant to the defendant.¹³¹ Usually, a direct transfer from the claimant to the defendant is needed.¹³² In the hypothesis under consideration, the enrichment at the franchisee's expense is located in the payment by the clientèle to the franchiser of sums that would otherwise be paid to the franchisee. On a 'common-sense view of the movement of wealth', the diversion of an enrichment coming from a third party in this way might appear to be at the claimant's expense.¹³³ Birks has argued in favour of allowing restitution for interceptive enrichment as a matter of principle. However, Smith disputes Birks' argument, principally on the basis that it would mean that the same transfer could be described as simultaneously being at the expense of two separate parties: the claimant and the third party who paid it.¹³⁴ McInnes considers that the moral justification of the strict liability regime imposed under unjust enrichment law requires the paradigm of direct subtraction, with exceptional derogations where it is certain that the payment would, in the normal course of events, have been received by the claimant.¹³⁵

In cases arising from subtractive enrichment, English law only recognizes indirect enrichment in limited cases. Some uncertainty surrounds the circumstances in which English law will allow restitution for indirect enrichment.¹³⁶ One long-established case that is recognized concerns usurpation of office.¹³⁷ This applies where a person purports to occupy a position that in fact properly belongs to another and collects fees due to the proper occupant of that office from third parties.

131 L.D. SMITH, 'Three-Party Restitution: A Critique of Birks' Theory of Interceptive Subtraction', 11. *OJLS* 1991, p. 481 at 482.

132 BURROWS, *supra* n. 198, p. 32.

133 *Ibid.*, p. 484.

134 *Ibid.*, p. 481.

135 M. MCINNES, 'Interceptive Subtraction, Unjust Enrichment and Wrongs - A Reply to Professor Birks', 62. *CLJ* (*Cambridge Law Journal*) 2003, p. 697 at 708.

136 MCINNES, *supra* n. 307, p. 698.

137 *Arris v. Stukely* (1677) 2 Mod. Rep. 260, 86 E.R. 1060; *Jacob v. Allen* (1703) 1 Salk 27; *King v. Alston* (1848) 12 Q.B. 971, 116 E.R. 1134.

Certainty is essential to establishing indirect enrichment.¹³⁸ Even Birks, who advocated recognizing interceptive enrichment as giving rise to restitution, insisted on the condition that the enrichment ‘would certainly have arrived in the plaintiff if it had not been intercepted by the defendant en route from a third party’.¹³⁹ The example that Birks himself uses to illustrate the limits of interceptive subtraction comes close to the hypothesis derived from the French case. Birks posits that the defendant sells the claimant’s car to a third party without the claimant’s knowledge.¹⁴⁰ He answers that the claimant cannot connect himself to the purchase price without relying on the defendant’s wrong.¹⁴¹ The uncertainty as to whether the claimant would have sold the car, or at what price, establishes conclusively that the price is not subtracted from the claimant.

Other proposed tests are even more restrictive: Virgo has proposed limiting interceptive subtraction to cases where the third party discharges a legal obligation owed to the claimant.¹⁴² In *Official Custodian for Charities v. Mackey (No. 2)*, Nourse J. said that the recognized cases of interceptive subtraction shared two features: (1) a current obligation between the third party and the plaintiff on which the defendant intervenes, and (2) that the amount due from the third party to the claimant is precisely the amount received by the defendant.¹⁴³ The scenario in the case at issue would not meet either the certainty or legal obligation requirements.¹⁴⁴ Consequently, the claimant’s case in unjust enrichment has a second fatal defect because the defendant has not been enriched at his expense.

6.1. *The Contract between the Customer and the Defendant*

There is yet another obstacle to any unjust enrichment claim: the payments from the customers to the franchiser are made in performance of valid, unimpeachable contracts, in return for consideration. Without repeating the analysis set out above, suffice it to say that the existence of a valid contract is a bar to unravelling the transaction between the defendant and the customer.

Given that the defendant provided goods or services to the customers in return for the money it received from them, the law could not possibly simply require the defendant to pay to the claimant its gross receipts. Nor could it

138 SMITH, *supra* n. 303, p. 485.

139 BIRKS, *supra* n. 225, pp. 133-134.

140 *Ibid.*, p. 133.

141 *Ibid.*, p. 138.

142 MCINNES, *supra* n. 307, pp. 130-131.

143 *Official Custodian for Charities v. Mackey (No. 2)* [1985] 1 WLR 1308, at 1314-1315 (EWHC).

144 G. VIRGO, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 1999), pp. 109-113.

unwind the valid and executed transactions between the customers and the defendant. There is no suggestion of any defect in those contracts.

It follows that, if it were appropriate to require the defendant to account to the claimant for its profits from a certain category of customer, the only fair or practical way would be to calculate the defendant's net profit on those sales. We are entering highly speculative territory here. Would the defendant even have a record of which sales were made to former customers of the claimant? Besides, the defendant's profit cannot be assumed to be equal to the hypothetical profits which the claimant would have made on those same sales. More importantly, this is precisely the sort of calculation that the courts have refused to do, by upholding the rule that failure of consideration must be total to ground a claim in unjust enrichment. That is not to say that counter-restitution is never possible, but given the tripartite complexity of the present case, it is yet another reason why the courts would be most unlikely to countenance a claim for restitution from the defendant.

7. Issue 3: The Need for an Unjust Factor

A claimant must show that an enrichment is unjust by proving the existence of a recognized unjust factor. In the scenario we are considering, there is no suggestion of the required unjust factor. This alone is a decisive objection. In addition, it is likely that the court's view on the justness of the enrichment would be coloured by the considerations that it is the consequence of a voluntary agreement and that the claimant has received valuable consideration. Lord Dunedin said in *The Olanda* that since the freight had been 'quite properly paid under the contract', there was no room for unjust enrichment.¹⁴⁵ In *Madoff Securities International Ltd. v. Raven*, the restitution claim failed not just because there was a valid contract but equally because the claimant received good consideration and the enrichment of the defendant was not unjust.¹⁴⁶ Likewise, in *Stream Healthcare v. Pitman Education and Training Limited*,¹⁴⁷ the claim failed because the claimant had received consideration from the defendant. In the present scenario, where the claimant has received all of the agreed benefits from the defendant, and undoubtedly profited from the franchise arrangement, it is hard to see how he could show the enrichment to be unjust. The enrichment complained of is a natural commercial consequence of the terms of the deal. Barker points out that legitimate economic competition necessarily profits some

145 *Stoomvaart Maatschappij Nederlandsche Lloyd v. General Mercantile Company, Limited* ('*The Olanda*'), *supra* n. 222, at 730.

146 *Madoff Securities International Ltd. (in liquidation) v. Raven*, *supra* n. 207, para. 377.

147 *Stream Healthcare (London) Limited v. Pitman Education and Training Limited* [2010] EWHC 216 (Ch).

actors at the expense of others and that this is why the law rightly requires demonstration of a specific, positive reason why enrichment is unjust.¹⁴⁸

8. Damages in Contract and Disgorgement

For all of the reasons outlined above, the claimant could not succeed in an unjust enrichment claim at common law. Alternatively, the claimant might consider seeking contract damages or even disgorgement damages. These claims depend on a breach of contract by the defendant. Traditionally, damages for breach of contract at common law are expectation damages, designed to place the claimant in the position in which he would have been if the contract were performed.¹⁴⁹ The victim of a breach of contract can be compensated for the resulting loss of income. If he ceases to trade due to the breach, the court will consider the value of the company at the time of the breach as a proxy for lost profits.¹⁵⁰ However, the courts have historically refused to base the calculation of damages on the gain that the defendant obtained through breach of the contract.¹⁵¹ In recent times, leading cases in both England and Ireland have challenged this orthodoxy by ruling that disgorgement damages may be awarded for some breaches of contract, in exceptional circumstances. If this remedy were available, it could assist the claimants in the case at issue: the problem relating to indirect enrichment is relevant to claims for subtractive unjust enrichment and does not arise in cases of restitution for wrongs.

The famous English case of *Attorney General v. Blake* introduced the possibility of disgorgement for breach of contract to English law.¹⁵² The intervening period since *Blake* has not created clear rules for when the disgorgement of profits might be available.¹⁵³ Edelman has suggested that the remedy might sanction cynical, deliberate breaches.¹⁵⁴ Birks agreed, further limiting restitutionary damages to cases where compensatory damages would be

148 K. BARKER, 'Responsibility for Gain: Unjust Factors or Absence of Legal Ground', in C.E.F. Rickett & R. Grantham (eds), *Structure and Justification in Private Law* (Oxford: Hart, 2008), p. 50 at 56.

149 *Attorney General v. Blake* [2001] 1 A.C. 268, at 285 (UKHL); A.S. BURROWS, 'Damages for Breach of Contract: A Developing Hierarchy?', 35. *BLJ* (*Bracton Law Journal*) 2003, p. 28; A. TEMPLE, 'Disgorgement Damages for Breach of Contract', 20. *DLJ* (*Denning Law Journal*) 2008, pp. 87 at 102.

150 *Crehan v. Inntrepreneur Pub. Company (CPC)* [2004] EWCA Civ 637; *MMP GMBH v. Antal International Network Limited* [2011] EWHC 1120 (Comm), para. 83.

151 *Teacher v. Calder* [1899] AC 451 (UKHL); *Tito v. Waddell* [1977] Ch 106, at 332 (EWHC).

152 *Attorney General v. Blake*, *supra* n. 321; BURROWS, *supra* n. 321, pp. 39 *et seq.*

153 BURROWS, *supra* n. 198, p. 491.

154 J. EDELMAN, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart, 2002).

an inadequate remedy.¹⁵⁵ Disgorgement damages have very rarely been awarded post-*Blake*, but they were allowed in *Esso Petroleum Co. Ltd. v. Niad Ltd.*¹⁵⁶ The operators of a petrol station accepted price support from the petrol suppliers but refused to sell the product at the agreed price. Like *Blake*, this was an exceptional case, in which there was a compelling argument for disgorgement.

The leading Irish precedent on disgorgement in contract, *Hickey v. Roches Stores*, arose from a franchise-type relationship. The parties contracted for the plaintiffs to sell their drapery products in the defendants' store. The defendants terminated unlawfully and began selling their own drapery products, taking advantage of the goodwill that should have accrued to the plaintiffs. The High Court ruled that disgorgement damages can arise from both contractual and tortious wrongs, in cases where the defendant acted in bad faith by calculating and intending to achieve a gain by his wrongdoing.¹⁵⁷ However, there has never been a case in which this criterion for the award of disgorgement damages has been met. In *Hickey* itself, the defendants' *mala fides* were not established, as it was not shown that the defendants designed the breach in order to usurp the goodwill that should have benefited the plaintiffs. The court awarded compensatory damages, taking account of the defendant's profits following the breach in order to calculate the claimant's loss.¹⁵⁸ In *Vavasour v. O'Reilly*, the plaintiff was wrongfully excluded from a jointly-held franchise.¹⁵⁹ He sought 'additional damages' based on the defendant's *mala fides* as well as compensation. Clarke J. accepted that *Hickey* provides for disgorgement damages but found that they were only relevant where the defendant gains more from his breach than the plaintiff loses.

Despite the development of disgorgement damages, it is highly unlikely that there is an exceptional breach warranting disgorgement damages in the case at issue. In *O'Brien's Irish Sandwich Bars Limited v. Byrne*, the former franchisee breached the contractual non-compete clause after termination of the franchise.¹⁶⁰ Laffoy J. refused a claim for disgorgement of her profits, stating that normal contractual damages were the appropriate remedy. However, it is conceivable that, if there were a breach by the franchiser, the claimant's expectation damages might be evaluated taking into account the franchiser's wrongful profits.

155 P.B.H. BIRKS, 'Restitutory Damages for Breach of Contract: Snapp and the Fusion of Law and Equity', *LMCLQ (Lloyd's Maritime and Commercial Law Quarterly)* 1987, p. 330.

156 *Esso Petroleum Co. Ltd. v. Niad Ltd.* [2001] EWHC Ch 458.

157 *Hickey v. Roches Stores* (Unreported, Irish High Court, 14 Jul. 1976); [1993] 1. RLR (*Restitution Law Review*) 196 (IEHC).

158 *Hickey v. Roches Stores*, *supra* n. 180.

159 *Vavasour v. O'Reilly and Windsor Motors Ltd.* [2005] IEHC 16.

160 *O'Brien's Irish Sandwich Bars Limited v. Byrne*, *supra* n. 175.

9. Conclusion

There are several compelling reasons why the scenario at issue would not ground a successful claim in unjust enrichment at common law. First, the existence of a valid contract is a bar to a claim in unjust enrichment. The common law is strongly attached to the sanctity of contract and is reluctant to subvert contractual arrangements by imposing non-contractual remedies. While this determination turns on the interpretation of the specific contract, granting a compensatory remedy after termination would almost certainly be inconsistent with its terms. The contract's omission of provision for compensation is most likely not a gap in the contractual scheme but rather reflects the parties' agreement. Despite a number of unorthodox Australian authorities, there is no ground for severing consideration here, to find that there has been a total failure of consideration in respect of a part of the deal. Nor could a compensation term be implied, because it is not a necessary part of the parties' agreement. The parties probably did not intend such compensation to be an element of their deal, and the franchiser could not be assumed to have agreed to it.

Second, it is highly doubtful that the defendant franchiser is, according to the legal tests, enriched at the claimant's expense. It is far from certain that the payments from the third party customers to the franchiser would otherwise have been made to the claimant, and they were not legally due to the claimant. The conditions for interceptive subtraction are not clearly defined, but, whichever test is adopted, it is not met here. In addition, the valid and executed transaction between the customers and the defendant poses an obstacle to the claim. Third, it is not clear that there is any unjust factor, as is required to ground a claim for unjust enrichment in English or Irish law. The claimant received good consideration in the deal, and this has been cited in many cases as a further convincing reason not to allow restitution where there is a contract. Lastly, while a remedy of disgorgement of wrongful gains exists in English law, it is extremely circumscribed and unlikely to be available in the vast majority of cases.¹⁶¹ There is no evidence that it would arise in the case at issue.

¹⁶¹ *Attorney General v. Blake*, *supra* n. 321; BEATSON, *supra* n. 213, p. 86.