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Case No: A4/2020/1148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
MR JUSTICE FOXTON
[2020] EWHC 1118 (COMM)
[2020] EWHC 1477 (COMM)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 12/07/2021

Before :

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE DINGEMANS

Between :

(1) SCHOOL FACILITY MANAGEMENT LIMITED
(2) BOSHIRE LIMITED
(3) GCP ASSET 1 FINANCE LIMITED

**Claimants/
Respondents**

- and -

GOVERNING BODY OF CHRIST THE KING
COLLEGE

**Defendant/
Appellant**

Michael Watkins (instructed by Stone King LLP) for the Defendant/Appellant
Simon Salzedo QC and Pia Dutton (instructed by Stephenson Harwood LLP) for the
Claimants/Respondents

Hearing dates : 22 and 23 June 2021

Approved Judgment

Lord Justice Popplewell:

Introduction

1. This appeal raises a short point as to whether in a claim for restitution of benefits conferred under a contract which was void as *ultra vires* one of the parties, the provider of the benefits must give credit for all benefits it received under the contract notwithstanding that it has a change of position defence to any restitutionary claim for those benefits it received. The Judge held not.
2. This was only one of many issues which arose at the trial, and it emerged in less than satisfactory form before the Judge. The point was briefly identified in one paragraph of lengthy written submissions but not developed at all in those submissions or oral argument. It was addressed by the Judge in three concluding paragraphs in his judgment without any assistance or citation of authority from the parties on the point. When seeking permission to appeal, the appellant developed the argument more fully and referred to relevant authorities. The issue was then addressed by the Judge more fully in a further judgment dealing with that application for permission to appeal, in which he amplified his reasons for the conclusion which he had reached. In this court we have had the benefit of fuller argument over the course of two days focussing on this single issue, for which we are very grateful.

The facts

3. The Appellant (“the College”) was formed in 2008 from the merger of two middle schools, one Anglican and one Roman Catholic, with a mission to provide Christian secondary education on the Isle of Wight. It is a voluntary aided school maintained by the Isle of Wight Council (“the Council”), the unitary local authority for the island. On 10 February 2009, the Council approved a request by the College to expand its age range and open a sixth form. The Council is not responsible for the funding of sixth form education.
4. The College did not have the capital to purchase the buildings necessary for the sixth form teaching. The solution which the College ultimately adopted was to enter into what was described as a hire contract (“the Contract”) for the construction and hire of a modular building and associated equipment (“the Building”). The Building was provided and assembled by a company called Built Offsite Limited (“BOS”), a specialist in modular construction. The transaction was structured so that BOS sold the Building to BOSHire Limited (“BOSHire”), which was a 50/50 joint venture company between BOS and a finance company. BOSHire in turn entered into the Contract to lease the building to the College. Subsequent assignments led to School Facility Management Limited (“SFM”), a wholly owned subsidiary of BOSHire created for the purpose of raising finance for the Contract, effectively becoming party to the Contract with the College as if novated, with a subsequent assignment to GCP Asset Finance One Limited (“GCP”) of the right to payments made by the College under the Contract in order to service the financing.
5. On 30 April 2013 BOS entered into a contract (“the Build Contract”) with SFM pursuant to which BOS agreed to provide and assemble the Building, and SFM agreed to pay a price of £6,660,000, which was later increased to £7,147,039 in order to take

account of further modifications required by the College. SFM made a net payment to BOS under the Build Contract of in excess of £5.8 million plus VAT pursuant to invoices dated between 30 April 2013 and 20 November 2013, which enabled the Building to be constructed and installed at the College on 5 September 2013. In addition to providing pre-fabricated modules, external cladding, roofing, electrics and plumbing, the Contract also covered the internal finish and certain fixtures and fittings as detailed in the Technical Specification in evidence before the court at trial.

6. On the same day as the Build Contract was concluded, 30 April 2013, BOSHire entered into the Contract with the College. It was headed “Hire Contract” and had the following features. It provided on its face that the College requested BOSHire to purchase the Building (referred to as “the Equipment”) from BOS and that the College was agreeing to take the Building on hire from BOSHire on the terms and conditions of the Contract. Clause 1.1.1 identified the Commencement Date as being the date of signature by the College of a delivery certificate evidencing that the Equipment had been delivered and installed at the College, which in the event was 5 September 2013. Clause 2.1 identified that the hire was for a minimum period of 15 years (continuing thereafter subject to three months’ notice on either side), unless terminated earlier for repudiation by the College or by reason of loss or destruction of the Building. Clause 2.2.1 provided that hire accrued from the Commencement Date and was payable in advance commencing on the Commencement Date and thereafter on each annual anniversary for the duration of the Contract. The annual hire payments were fixed at £610,000 plus VAT payable on the anniversary date each year for the 15 years, save that there was an adjustment to frontload the payment due on the Commencement Date by adding 50% of the hire due for the second year, payable on the first anniversary date, to the hire payable for the first year, payable on the Commencement Date, and reducing the second year’s hire commensurately. The periodic hire charges were therefore: £915,000 plus VAT payable in advance on the Commencement Date; £305,000 plus VAT payable in advance on the first anniversary of the Commencement Date; and £610,000 plus VAT payable in advance on each annual payment date thereafter. At the end of the minimum 15 year term, BOSHire was entitled to increase the hire but not by more than the increase in the retail price index over the period since the date of the Contract.
7. By two supplemental agreements, one of 5 June 2013 and one on the Commencement Date itself, 5 September 2013 the annual hire charges were increased to £667,841 plus VAT per annum, with the same 50% loading of the second year’s hire on to the amount payable at the Commencement Date in respect of the first year’s hire.
8. Clause 2.3.1 provided that the College would be entitled to possession and use of the Building until termination “provided that it performs all of its obligations under this Contract”.
9. It was the College’s responsibility to ensure that the Building complied with applicable statutes and regulations in relation to its use, and to maintain the building in good and substantial repair and condition (fair wear and tear excepted). The College bore all risk of loss and damage, and was obliged to insure the Building for £6,953,000. On termination, for any reason, it was the College’s responsibility to return the Building to BOSHire, with the College being liable for all costs of inspection, loading, unloading and transportation. The Building was to be returned in good condition and failing redelivery in this condition, the College was liable to pay BOSHire the costs of restoration with hire continuing to be payable until contractual redelivery took place.

10. Clause 2.6 identified a number of events of default by the College which were to be treated as repudiatory, which included non-payment of hire. Upon termination for any of the events of default, the entire hire charges for the unexpired minimum period of the contract became payable, subject to discount for accelerated payment.
11. During the course of negotiation of the Contract there was discussion of an option for the College to purchase the Building at the end of its minimum term. This could not be formalised without jeopardising the legal status or tax treatment of the transaction. However in a letter dated 17 January 2013 to the College from Mr Pierce, the Chairman of BOS and signatory of the Contract on behalf of BOS Hire, he said that should the College wish to purchase after a period of time, that was an option which would be considered and not unreasonably rejected. He explained that a purchase price could not practically be determined at that stage because it would depend upon funding costs, replacement value and the length of time for which the College had had the use of the Building at the time of any purchase. The vagueness of the price at which the College might be able to purchase the Building at the end of the minimum 15 year term of the Contract was not resolved in subsequent communications during the life of the Contract. Nevertheless the Judge said at [428(ii)] of the Judgment that the College had a strong expectation of purchasing the Building at the end of the 15 year minimum.
12. On 17 May 2013 BOS Hire assigned the benefit of the contract to SFM and the College acknowledged the assignment in writing on 5 June 2013. The Contract itself provided that in the event of such assignment the College would owe the assignee all the obligations and liabilities to be performed or discharged under the Contract, such that the assignment operated in effect as a novation. The notice of assignment provided that SFM would be or become the legal owner of the Building in due course, and the Judge held that this had happened by 4 July 2013 at the latest.
13. SFM procured financing, in part, of its obligations to BOS under the Build Contract from GCP. Pursuant to a Receivable Sales Agreement (“the RSA”) dated 4 July 2013, GCP made an upfront payment to SFM of about £5 million in return for which SFM assigned the benefit of the rental income to GCP and gave a series of warranties.
14. The College took possession of the Building on 5 September 2013 which was the Commencement Date under the Contract. It made the hire payments due on that date and those due on 5 September 2014, 5 September 2015 and 5 September 2016. These hire payments totalled £3,205,636.80. The Judge held that notwithstanding the terms of the RSA, these payments were all made to SFM, either directly, or to BOS Hire as agent for SFM.
15. The payments made by the College under the Contract led to a substantial increase in the level of the College’s budget deficit, which for that period was approved by the Council. However in 2017 the deficit was not approved, and the College failed to make the annual payment due on 5 September 2017. It made no further payments thereafter, although it continued to use the Building.
16. On 22 November 2017 SFM sent the College a formal notice of default under the Contract. On 9 April 2018 the College made it clear that it had no intention of paying any further amounts and articulated for the first time its argument that the Contract was *ultra vires*. On 11 April 2018 SFM sent a letter terminating the Contract and informed

the College that it was no longer in lawful possession of the Building and should cease using it.

17. The claim form in these proceedings was issued by SFM on 8 November 2018 with BOSHire and GCP being added as claimants by later amendments.
18. The following claims and counterclaims arose:
 - (1) The Claimants each claimed (in the alternative) against the College and/or the Council for the balance of the hire payments due under the Contract which they said had become due and payable as a result of the College's repudiatory breach. The total amount claimed was in excess of £7 million.
 - (2) The College and Council denied the claim on the basis the contract was *ultra vires* and therefore void, such that no sums were due and payable thereunder. The Council also defended the claim on the basis that it was not a party to the Contract.
 - (3) In the event that the Contract were held to be void, the Claimants advanced alternative claims comprising:
 - (a) a claim for damages for misrepresentation against both the College and the Council alleging, in summary, that both the College and the Council had made actionable misrepresentations in relation to the nature and the enforceability of the Contract; the College and the Council advanced various defences to this claim;
 - (b) a claim against the College, but not the Council, in unjust enrichment, seeking restitution of the benefit rendered under the Contract, that is to say the use of the Building.
 - (4) The College counterclaimed in unjust enrichment for the return of the payments made under the Contract, agreeing to make counter-restitution by giving credit for the value of the use of the Building.
19. Following a trial in March 2020, at which the Judge heard factual and expert witness evidence, and post-hearing written submissions, the Judge reached the following conclusions in his Judgment dated 7 May 2020:
 - (1) The Contract was *ultra vires* and void. This was because, having heard the expert evidence from accountants and valuers, the Judge concluded that the contract was properly characterised in accounting terms, under IAS17, as a finance lease not an operating lease, and as such was a form of borrowing. By paragraph 3(4) of Schedule 1 to the Education Act 2002, the College had no power to enter into any form of borrowing without the consent of the Secretary of State, which was neither sought nor obtained. The Judge's conclusion that the Contract was a finance lease was based on three of the five factors identified in paragraph 10 of IAS17 namely (c) that the term of the Contract was for the major part of the economic life of the asset; (d) that at the inception of the lease the present value of the minimum lease payments amounted to at least substantially all of the fair value of the asset; and (e) that the leased assets were

of such a specialised nature that only the lessee could use them without substantial modifications. He also relied upon the fact that “substantially all of the risks and rewards of ownership were assumed by the College” ([428(iii)]). In reaching the conclusion that the Contract was a finance lease, he had to address the initial value and residual value of the Building at the beginning and end of the minimum 15 year term. His conclusion was that at the outset it had a value of less than £6m *in situ* at the College, but a very much lesser value *ex situ* if removed; at the end of the period its residual value *in situ* was £1,540,000 and its *ex situ* value insignificant. The dismantling, refurbishment, reconfiguration and reinstallation which would be necessary before the Building could be used by a third party involved major modifications and rendered any profitable disposal of the Building to a third party at the end of the 15 year minimum term unlikely.

- (2) Neither the College nor the Council was liable to any of the Claimants in relation to the alleged misrepresentations.
- (3) In relation to the claims for unjust enrichment, the Judge held that the College had been enriched because it had received the benefit of the use of the Building for the period from 5 September 2013 to trial. The Judge assessed the value of that benefit at a market rate as dictated by *Benedetti v Sawiris* [2014] AC 938 at [34], a sum which was much lower than the hire charge under the Contract. He measured that value by reference to the market rate which would have been paid under an operating lease. On the basis of the College’s expert evidence, he assessed it to be £250,000 per year at the start of the period and £270,000 at the end of it. That enrichment was obtained at the expense of SFM as the legal owner of the Building. The total value of that benefit from 5 September 2013 to the date of judgment was £1,735,323.88. That reflected a benefit over two periods: in relation to the period for which the College had made the advance payments of hire, namely 5 September 2013 to 5 September 2017, the benefit to the College was £1,024,000. In relation to the period from 5 September 2017 to judgment on 7 May 2020, in respect of which the College made no hire payments, the value of the benefit to the College was £711,323.88. In reaching these conclusions, the Judge rejected the College’s argument that SFM’s restitutionary claim should be defeated by SFM having assumed the risk of the Contract being void.
- (4) In relation to the College’s unjust enrichment claim against SFM, the Judge held that the benefit obtained by SFM at the College’s expense, comprising the £3,205,606.80 paid in hire charges by the College, fell within a recognised category giving rise to a claim in unjust enrichment, whether expressed as being under a mistake of law, or being subject to a condition which failed, or under the principle in *Auckland Harbour Board v The King* [1924] AC 318 that *ultra vires* payments by a public body are recoverable in unjust enrichment. The Judge went on to find, however, that SFM had a complete defence to the College’s claim in restitution because the payments which had been made by SFM to BOS under the Build Contract, of in excess of £5.8 million, amounted to a change of position. He rejected the argument on behalf of the College that they were incapable of doing so because they had been made prior to, albeit in

anticipation of, the provision of the benefit of the use of the Building to the College.

20. In relation to the cross-claims in restitution, the Judge did not simply net off all the payments which the College had made against the value of the use of the Building which the College had received over the entire period prior to Judgment. Had he done so, there would have been a net balance in favour of the College, whose claim for that balance would then be defeated by the change of position defence, leaving the losses to lie where they fell. That is the result for which the College contends on this appeal. The Judge's conclusion was that the position should be looked at distinctly by reference to the two separate periods before and after the point of time in respect of which the College paid hire, namely 5 September 2017. The Judge held that in relation to the first period, the College's restitutionary claim for return of the hire charges was defeated in its entirety by the change of position defence. In respect of that period, SFM's restitutionary claim for the value of the use of the Building could not succeed, because the College had paid hire for the Building in circumstances where it was unable to recover it: the hire paid exceeded the value of the Building to the College. In relation to the second period, the Judge held that the College had been enriched by the value of the Building for the period in respect of which it had ceased to pay hire, in the sum of £711,323.88. The earlier payments of hire in respect of the use of the Building prior to 5 September 2017 were not to be taken into account in relation to this claim, and accordingly SFM's restitutionary claim succeeded in that sum.

21. His reasoning was expressed in the following paragraphs:

“502. In relation to the period from September 2013 to September 2017, SFM can make no further recovery beyond the amounts which the College has already paid and which I have held it cannot recover. This result can be rationalised in a number of ways. It might be said that SFM has received the anticipated counter-performance in circumstances in which the College cannot recover it (because of SFM's change of position defence), and so there has been no failure of condition. Alternatively, it might be said that any enrichment has not come at SFM's expense because SFM had been paid for it. In the further alternative, it might be said that in circumstances in which the College cannot recover back the amounts paid by way of rent for this period because of SFM's change of position, the College has its own change of position defence to any claim in unjust enrichment by SFM for that period.

503. In respect of the period from September 2017 to trial, I have concluded that SFM can recover in unjust enrichment at the market rate I have set out above. It is no answer to such a claim that, in respect of the preceding three years, the College will have paid in excess of the market rate. In circumstances in which the College cannot recover the rent paid during the preceding period because SFM has changed its position, it would not be appropriate to allow the College nonetheless to rely upon those payments as, in effect, creating a credit which can be used to

answer SFM's claim in unjust enrichment in respect of later years for which no payment has been made.

504. It will be apparent that my analysis treats the unjust enrichment claim for each year's hire as, in effect, severable for the purposes of analysing the claims and defences to claims in unjust enrichment. In my view, this analysis best represents the nature of the benefit transferred – the possession or use of property over a period of time – and the market valuation of that benefit (which involved a period-dependent payment). It is for this reason that the amounts paid by the College for the period from September 2013 to September 2017, and which I have found to be irrecoverable, do not provide a complete answer to SFM's claim in unjust enrichment for the entire period of use of the Building (cf. the rule that a failure of basis must be total unless the benefit conferred is severable analysed in *Goff and Jones* paras. 12-26 to 12- 28).”

22. In his judgment dealing with consequential matters (“the Consequentials Judgment”), including in particular the College’s application for permission to appeal which now advanced detailed argument on the point and reference to the authorities to which we have been referred, the Judge considered the authorities and expanded on his grounds for rejecting the arguments advanced in support of permission to appeal. He gave three further reasons. The first, at [22]-[24], was that the market value of the benefits enjoyed by the College was to be determined by reference to particular periods, and the rent instalment payments were referable to and conditional on the enjoyment of the use of the Building for the periods in respect of which they were paid. The different periods of the exchange transaction, before and after the cessation of payment of rent, were sufficiently distinct to make it appropriate to treat them separately.
23. Secondly, at [25] of the Consequentials Judgment, the Judge emphasised that the change of position in this case was anticipatory, so that there was never a point of time at which the College was entitled to recover the payments it made, being less than the amounts SFM had paid BOS in anticipation of receiving the College’s payments. In those circumstances he said that it was particularly unattractive to apply the change of position defence separately and only after a netting off. If the College had realised its mistake the day after payment it would have been unable to recover any part of it. On that basis it was difficult to see why the College should nonetheless be entitled to use those payments as some form of “restitution voucher” to net off against any subsequent enrichments it received at SFM’s expense. If the payments were not repayable when made, the College should not be permitted to treat the use of the building, in the words of Hobhouse J in *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 at p.929, as “pro tanto a repayment of the earlier sum paid by the other party”.
24. Thirdly, at [26] of the Consequentials Judgment, the Judge said that the change of position in this case, unlike the example given in the context of discussions of *Saldo* theory in German law of an exchange of Old Master paintings, did not arise from matters wholly extraneous to the College. The purchase of the Building by SFM was what the College anticipated and intended should happen in order to provide the College with the use of the Building. Whilst it would be unconscionable for SFM to assert a claim in respect of a period for which the College had already made an irrecoverable

payment of rent, there is nothing unconscionable in refusing to give further credit to the extent that SFM had changed its position in anticipation of the payment when SFM had done so for the purpose of providing the College with the benefit.

Submissions

25. It was common ground that there is a principle by which in certain circumstances a party seeking a restitutionary remedy for unjust enrichment must give credit for benefits received from the other party. This is now commonly referred to as a principle of counter-restitution, reflecting the concept previously referred to in the authorities as *restitutio in integrum*. The parties in this case differed, however, as to the content of the principle, its juridical basis, at what stage of the analysis it fell to be applied, and how it related to the facts of this case. The rival submissions can be summarised as follows.
26. On behalf of the College, Mr Watkins argued that the principle is that where benefits have been conferred in both directions pursuant to an exchange transaction which has failed, each party cannot generally recover benefits provided without giving credit for the value of that which it has received in return. This is a general rule, which falls to be applied in all cases where benefits are conferred under a single transaction unless the transaction can be treated as in truth a series of separate and severable transactions in accordance with the principles applicable to partial rescission of a contract (see e.g. per Lord Atkinson in *United Shoe machinery Co v Brunet* [1909] AC 330 (PC) at p. 340); this is subject only to exceptions of no relevance to the facts of the case, such as considerations of public policy. It is a rule which is to be applied at the first stage of the analysis because it defines the relevant benefit: there must be a netting-off of benefits received pursuant to the transaction in order to identify the benefit for which a claim in unjust enrichment lies; a claim only lies for the net benefit received by the defendant after this netting off process has occurred. The netting-off must occur before any defences fall to be considered, and in particular before applying a change of position defence to the net benefit. The Contract in this case was, as the Judge held, a finance lease in which the payments of hire were not akin to rent for the use of the Building, but capital payments for the Building over its economic lifetime. The Judge ought therefore to have netted off all payments by the College and SFM, which would have resulted in a net balance in favour of the College of £1,470,312.35. To this net balance SFM would have a complete defence of change of position, on the Judge's findings, resulting in each party's restitutionary claim failing. SFM's unjust enrichment claim should have been dismissed in full.
27. In Mr Watkins' submission the Judge therefore made four errors of law. He was wrong to hold that there is no immutable principle or rule as to the sequence in which the issues of the unjust factor, enrichment, counter-restitution and change of position must be considered (Consequential Judgment [20]). He was wrong to hold that the Contract was severable so as to treat the payments of Hire in the earlier period as unrelated to the subsequent periods of use and enjoyment of the Building in what was, as he held, a finance lease (Judgment [504] and Consequential Judgment [24]). He was wrong to treat as a relevant factor that the change of position in this case was anticipatory (Consequential Judgment [25]): there should be no difference in the application of the counter-restitution principle between anticipatory and subsequent changes of position. He was wrong to apply the change of position defence before considering the question of counter-restitution (Judgment [503]) and to support it by

the suggestion that the change of position defence arose from matters which were not wholly extraneous to the College because it resulted from the purchase of the Building which the College anticipated would occur in order to enable the Contract to be entered into and fulfilled (Consequential Judgment [26]).

28. Mr Salzedo QC, on behalf of SFM, disputed this analysis at almost every stage. He submitted the following, in summary. The principle is that a claimant who seeks restitution of an unjust enrichment must make counter-restitution of benefits received from the defendant *in exchange* (his emphasis). This is not a rule, but merely a principle which expresses the underlying rationale of all claims in unjust enrichment, namely whether recovery is just. As such it is a principle which must be applied flexibly in each case to achieve fairness. There is no immutable rule as to the stage at which the principle is to be applied. The preferable approach, where it matters, is that the correct stage at which to apply the principle is at the end of the analysis because counter-restitution is a condition for the grant of restitutionary relief in unjust enrichment, especially in cases in which one of the two benefits is not money but, as in this case, a benefit which has to be valued by the court by way of quantum meruit, which can only arise as a result of a court order. None of this, however, matters on the facts of this case, where the stage at which the principle applies makes no difference. That is because the Judge was entitled to conclude that the payments of hire in respect of the period prior to 5 September 2017 were not in exchange for the use of the Building thereafter. This was an evaluative exercise based on the evidence he heard at trial and an assessment of whether the enrichment was unjust, which brought it within the scope of the cases summarised in *Re Sprintroom Ltd* [2019] BCLC 617 at [68]-[78]: it is akin to the exercise of a discretion with the result that this Court should be slow to interfere and should only do so if the Judge's decision is outside the generous ambit within which reasonable disagreement is possible. It was not only within that ambit, he submitted, but plainly right on the Judge's findings.

The Law

Unjust enrichment

29. The elements of what has come to be recognised as a common law, not equitable, cause of action for unjust enrichment are identified by reference to the four factors set out by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1991] 1 AC 221, 227, namely (1) Has the defendant benefited in the sense of being enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences? See *Benedetti* per Lord Clarke of Stone-cum-Ebony at [10]; *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33 per Lord Burrows JSC at [18].
30. Mr Watkins submitted that Lord Steyn's four questions fell to be answered sequentially and in the order set out, in support of his argument that the counter-restitution principle falls to be applied at the outset of the analysis, and change of position only at the end. Seeking to derive support for such a rigid approach from Lord Steyn's formulation is, in my view, inconsistent with what Lord Reed JSC said about it in *Investment Trust Companies v Revenue & Customs Commissioners* [2018] AC 275 at [41]-[42]:

“41. Thirdly, as the judge observed in the present case, in remarks with which Lord Clarke JSC expressed agreement in the *Menelaou* case [2016] AC 176, para 19, Lord Steyn’s four questions are no more than broad headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words at the expense of do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute.

42 The structured approach provided by the four questions does not, therefore, dispense with the necessity for a careful legal analysis of individual cases. In carrying out that analysis, it is important to have at the forefront of one’s mind the purpose of the law of unjust enrichment. As was recognised in the *Menelaou* case, at para 23, it is designed to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions. It reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted. That is why restitution is usually the appropriate remedy.”

31. Mr Watkins laid emphasis on the second half of [42] and the underlying principle of restoring the parties to their pre-transfer positions where there is a normatively defective transaction, as there was in the present case. However, Lord Reed’s qualification that an Aristotelian conception of justice “usually” requires the restoration of the parties to their pre-transfer positions reflects the existence of defences to a claim in unjust enrichment, such as change of position. A question arises, which I consider below, whether the counter-restitution principle is to be regarded as one such defence. But however that may be, Lord Reed’s emphasis on Lord Steyn’s four factors being no more than signposts and broad headings for ease of exposition suggests that nothing said by Lord Steyn can support the submission that the counter-restitution principle trumps a change of position defence as a matter of a fixed and rigid rule.

32. In *Samsoodar* Lord Burrows, having referred to the four elements at [18], said at [19]:

“19. Moreover, as regards the third of those elements, the claimant must identify what was referred to by counsel for the claimant - using the term coined by Peter Birks (see, eg, “Unjust Enrichment - a Reply to Mr Hedley” (1985) 5 *Legal Studies* 67, 71; Page 9 *Restitution - the Future* (1992), p 41) - as the “unjust factor” and is sometimes alternatively referred to as the ground for restitution. See *Goff and Jones, The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-21). Examples of unjust factors are mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. For judicial acceptance of the need for, and terminology of, an unjust factor, see, eg, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 408-409 per Lord Hope; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; [2009] 1 WLR 1580, paras 50, 62 and 67; *Test Claimants in the*

FII Group Litigation v Revenue and Customs Comrs [2012] UKSC 19; [2012] 2 AC 337, para 81, per Lord Walker. In the Court of Appeal of Trinidad and Tobago in *Jaipersad v Shiraze Ahamad*, in a judgment delivered on 24 February 2015, Mendonca JA (with whom Bereaux JA and Narine JA agreed) said the following at para 23:

‘English law, which the parties agree is the law applicable in this context to this jurisdiction ... identifies specific grounds for restitution sometimes referred to as unjust factors. These factors are the trigger for the restitutionary remedy on the ground that it is unjust to retain the benefit.’ ”

33. Mr Watkins submitted that this was an articulation of the entire scope of the third question. In other words, providing the claim falls within one of the “unjust factors” which triggers the existence of a right to claim, the unjust element is conclusively determined in favour of a claimant; there is no room in answering the third question for any consideration of whether it would be unjust to grant restitution on the particular facts of any case which fell within any of the trigger categories. He drew support from what Lord Reed said at [39] of the *Investment Trust Companies* case, himself referring to Lord Goff of Chieveley in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578 rejecting a submission that when dealing with a claim to restitution based on unjust enrichment, it was for the court to consider the question of injustice or unfairness on broad grounds and should deny recovery if it thought it would be unjust or unfair to hold the defendant liable. Lord Reed emphasised that a claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by legal rules which are ascertainable and consistently applied. In oral argument, Mr Salzedo was content not to dispute this submission on the basis that it did not matter for his case.

Counter-restitution

34. There seem to me four ways in which the counter-restitution principle might conceptually be justified, where it applies, at least in the context of benefits conferred under a transaction which is void. They are:
- (1) **Enrichment:** benefits received by a claimant may prevent, or pro tanto reduce, the enrichment of the defendant, because the latter has paid or provided value to the claimant, in whole or in part, for the benefit he has received in exchange. Assume a void but executed contract under which A is to provide services worth £20,000 to B in return for a contract price of £15,000. The analysis may be that B has only been enriched by £5,000 representing the value of the services in excess of the price he has paid for them.
 - (2) **Unjust:** benefits provided by a defendant may make the enrichment not unjust, or only unjust in the net sum; they may be analysed not as preventing or reducing the enrichment of the defendant, but rather as making it unjust that he should make restitution to the extent that he has conferred a benefit in exchange. On this analysis, B in the above example has been enriched by the full £20,000 value of the services he has received, but it would be inequitable to make him pay more than £5,000 in restitution, having paid £15,000 already.

- (3) **Cross-claims:** the benefits may be treated as giving rise to cross-claims in unjust enrichment at the suit of each party in relation to the gross benefits it has provided, which are set off against each other. In the above example A is entitled to £20,000 for the value of the services received by B, and B is entitled to the £15,000 price he has paid to A. They are set off to result in a claim by A for £5,000.
- (4) **Condition of recovery:** it may be a condition of the claimant recovering in unjust enrichment for benefits conferred that he must give credit for benefits received in exchange. In the above example the court would not permit A to recover £20,000 without giving credit for the £15,000 received from B.
35. As will be seen there is support for each of these approaches in the authorities and academic writings, to which I now turn.

The authorities

The annuity cases

36. *Hicks v Hicks* (1802) 3 East 17, 102 ER 502, was one of a number of late 18th and early 19th Century cases in which the claimant sought to recover the lump sum paid for an annuity which was treated as void by the Grants of Life Annuities Act 1777 if not memorialised and enrolled in the Court of Chancery within 20 days of the transaction. The Courts had first held that a cause of action arose in such cases for money had and received in *Shove v Webb* (1878) 1 Term Rep 732, 99 ER 1348. In *Hicks*, the annuities paid out over the life of the instrument exceeded the lumpsum paid for its purchase, although those in the 6 years prior to commencement of the claim were less than that sum. It was held that since there was no pleading of the Statute of Limitations the annuity provider was entitled to rely on all the annuity payments he had made going back more than 6 years; and on that basis he could defeat the claim because all the annuity payments he had made had to be taken into account. Lord Ellenborough CJ said:
- “This was either an annuity or not an annuity. If not an annuity, the sums paid on either side were money had and received by the one party to the other's use. If the consideration of the annuity be money had and received, it must be money had and received with all its consequences; and therefore the defendant must be at liberty to set off his payments as such, on the same score.”
37. The principle was applied in a number of similar annuity cases: see *Holbrook v Sharpey* (1812) 19 Ves 131, 34 ER 467 and the cases there referred to.
38. Lord Ellenborough's formulation suggests a cross-claim and set-off basis for bringing into account benefits by way of counter-restitution.

Restitutio in integrum

39. Historically, restitution at common law was conditional on the claimant giving precise counter-restitution in specie of the benefits received by him pursuant to the transaction. If such *restitutio in integrum* were impossible, it was treated as a complete defence to a claim for rescission and restitution of benefits conferred.

Equity took a different approach by permitting a valuation of the exchange benefits to be taken into account. The development of the law involved an assimilation of the common law with equity in treating valuation of benefits as a method for ensuring that counter-restitution could be given effect to, to such an extent that Lord Burrows, then Professor Burrows, suggested in the 3rd edition of his book *The Law of Restitution* (2010) at p.250 that it is now a nonsense to talk of counter-restitution being impossible because it is always possible to value in money terms the benefit received by the claimant. It is not necessary here to detail the history of the development of this aspect of the law; see for example Goff & Jones *The Law of Restitution* 9th edn. [31-06]-[31-13]; and Edelman and Bant *Unjust Enrichment* 2nd edn. at pp. 368 to 371. Of interest for present purposes is the technique used by equity to give effect to the counter-restitution of benefits received by a claimant, and the juridical basis for it.

40. The juridical basis was that the court was doing what was “practically just”: see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 per Lord Blackburn at p. 1279. The technique used was to require the return of the benefit by the claimant as a condition for the grant of the claimant’s claim to restitution. So in *Erlanger*, a case in which the claimant had purchased a mine which had a residual value having been part-worked, the order of the Court of Appeal, upheld by the House of Lords, was for repayment of the price upon condition that the mine was then returned to the defendant together with the claimant’s profits from working it: see p. 1266.
41. In *Dunbar Bank Ltd v Nadeem* [1988] 3 All ER 876 a husband and wife had executed a charge on the matrimonial home as security for lending by the bank. The wife, Mrs Nadeem, was seeking to set aside the charge for undue influence. The Judge had made an order that the charge be set aside on condition that the wife repay half of the money advanced by the bank secured by the charge. The wife appealed contending that the setting aside of the charge should have been unconditional. The bank cross-appealed, successfully, on the grounds that there was no undue influence. In addressing the wife’s appeal, the majority rejected the submission that there should not be imposed any condition to an order setting aside the charge (if the cross-appeal by the bank had not succeeded). Morritt LJ, with whom Potter LJ agreed, said at p. 875:

“The applicant for an order for a transaction to be set aside on the ground of undue influence or for any other invalidating tendency, as they were described by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien* [1993] 4 All ER 417 at 424; [1994] 1 AC at 190, must as a condition for relief give back all he obtained from the transaction. See *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at pp 1278-1279. The matter was put clearly by Bowen LJ in *Newbigging v Adam* (1886) 34 Ch D 582 at pp 592 where he said:

“. . . when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission. It is said that the injured party is entitled to be replaced in status quo. It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced in statu quo with this limitation - that he is not to be replaced in exactly the same position in all respects, otherwise he would be

entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine, and I think it is put in the neatest way in *Redgrave v Hurd* ((1881) 20 Ch D 1).”

In the later passage to which I referred, Bowen LJ added:

“There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantages.””

42. Millett LJ would have rejected the need for a condition, for practical reasons on the particular facts of the case, but reaffirmed the principle at p. 884:

“(2) The remedy of rescission is an equitable remedy. It is well established that it is a condition of relief that the party obtaining rescission should make restitutio in integrum or, in modern terminology, counter restitution to the other party. If counter restitution cannot be made the claim to rescission fails: see *Erlanger v New Sombrero Phosphate Co* (1873) 3 App Cas 1218, [1874-80] All ER Rep 271. I reject Mr Price's submission that, had the cross-appeal not succeeded, Mrs Nadeem would have had an unqualified, unconditional right to rescission. She never had any such right. Her right to rescission was conditional on her making counter restitution.”

43. This historical basis for the principle of counter-restitution, therefore, supports Mr Salzedo's contention that it is a condition of recovery. This may be the most appropriate basis where restitution in specie is possible and justice requires it. If in straitened circumstances a person sells a piece of jewellery of great sentimental but little personal value in a void transaction, the purchaser ought not to be able to recover the price without return of the jewellery as a condition of recovery; merely giving credit for its monetary value would not put the parties in the same position as if the contract had not been entered into.

Lipkin Gorman

44. Change of position was confirmed as a defence to a claim for unjust enrichment in the landmark decision of the House of Lords in *Lipkin Gorman*. It is of relevance to the present appeal not only for what it says about the juridical basis for the defence, but also for its treatment of net benefits in that context.
45. In that case Cass, a partner at Lipkin Gorman, a firm of solicitors, stole £229,908.48 (net) from the firm. He gambled at the defendant's Playboy Club some £561,000 which included the stolen £229,908.48. He had wins and losses in his many visits to the gambling tables over a period of about 10 months, the net effect of which was that he lost, and the club won, £154,965. The solicitors' restitutionary claim for the net sum of £154,965 succeeded. The Judicial Committee recognised the existence of a change of position defence to restitutionary claims, but rejected the club's reliance on it on the facts of the case: the club argued that it had given consideration for the money received by Cass (a) in a contract for exchange of betting chips and (b) in fulfilling

the gaming contracts, despite their illegality under the Gaming Act 1845. That was held to be insufficient to amount to a change of position because the contracts were void wagering contracts such that the Club was not bound to pay winnings, with the result that it had given no consideration; and there was no separate contract in the exchange of money for chips. The two leading speeches were given by Lord Templeman and Lord Goff.

46. In addressing the existence of change of position as a defence, Lord Templeman said at p. 559A-560E:

“In my opinion in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched. 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. But an innocent recipient of stolen money will be enriched if the recipient has not given full consideration. If Cass had given £20,000 of the solicitors' money to a friend as a gift, the friend would have been enriched and unjustly enriched because a donee of stolen money cannot in good conscience rely on the bounty of the thief to deny restitution to the victim of the theft. Complications arise if the donee innocently expends the stolen money in reliance on the validity of the gift before the donee receives notice of the victim's claim for restitution. Thus if the donee spent £20,000 in the purchase of a motor car which he would not have purchased but for the gift, it seems to me that the donee has altered his position on the faith of the gift and has only been unjustly enriched to the extent of the secondhand value of the motor car at the date when the victim of the theft seeks restitution. If the donee spends the £20,000 in a trip round the world, which he would not have undertaken without the gift, it seems to me that the donee has altered his position on the faith of the gift and that he is not unjustly enriched when the victim of the theft seeks restitution. In the present case Cass stole and the club received £229,908.48 of the solicitors' money. If the club was in the same position as a donee, the club nevertheless in good faith allowed Cass to gamble with the solicitors' money and paid his winnings from time to time so that when the solicitors sought restitution, the club only retained £154,695 derived from the solicitors. The question is whether the club which was enriched by £154,695 at the date when the solicitors sought restitution was unjustly enriched.”

47. Lord Templeman went on to explain why the club was in the position of a donee because it had given no consideration for the receipts due to the illegality of the gaming contracts. A number of things emerge from this passage. First, in Lord Templeman's view, a contract under which one benefit is exchanged for another does not involve an enrichment at all if the benefits are of the same value. The car dealer who receives £20,000 for a car worth £20,000 “is not enriched”. He is not to be treated, in Lord Templeman's view, as having provided enrichment of £20,000 in the form of the value of the car and having received a benefit of £20,000 in cash. The benefits are netted off in determining whether there is any enrichment at all. This implies that the counter-restitution principle is applied to determine the extent of net benefit at the outset in the example given of a simple exchange transaction. Secondly

he also treats a change of position defence as based on the effect it has on the extent of enrichment. The donee who buys a car with the £20,000 given to him by the thief, which retains a lesser second hand value at the date of the claim to restitution, is described as liable for the second hand value of the car at that time because “he has only been enriched to the extent of the secondhand value of the motor car” at that date. His change of position in buying a car he would not otherwise have bought is not a complete defence. It operates in so far as he has been left with a car worth less than the £20,000 he received. This is an enrichment based approach to change of position as a defence.

48. Lord Templeman applied that enrichment based approach for the defence of change of position to the facts of the case. The club had received £229,908 and allowed Cass to gamble with it in good faith, so that the club only retained winnings of £154,695 derived from the solicitors. Lord Templeman treated the claim as a net claim based on the net benefit to the club, netting off all winnings and losses against each other. He did so on the basis that the club had changed its position in good faith so as only to retain a benefit to this extent: “If the club was in the same position as a donee, the club nevertheless in good faith allowed Cass to gamble with the solicitors' money and paid his winnings from time to time so that when the solicitors sought restitution, the club only retained £154,695 derived from the solicitors.” The change of position defence succeeded to this extent because the club’s good faith change of position reduced the extent of its enrichment.
49. Lord Goff took a different approach both as to the juridical basis for a defence of change of position and to the basis for netting off Cass’ winnings and losses at the gambling tables. He identified the club’s change of position argument as dependent upon whether the enrichment was unjust (see p. 571B and pp. 577H-578C), and he addressed it in these conceptual terms. At p. 579E-G he said:

“In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these.”

and at p. 580 F he concluded:

“At present I do not wish to state the principle any less broadly than this: that 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.”

50. It was through this prism that he accepted that mere spending of money received, in good faith, would not amount to an absolute defence, and that the question was whether it was inequitable to require restitution *in full*: the defence might operate pro tanto, on the basis that it only resulted in the enrichment being unjust in part. It would only avail a defendant “to the extent that his position has been changed” (p. 581A) depending on the subsequent use of the money. It might only be inequitable in all the circumstances to require the defendant to make restitution *in full*.
51. Lord Goff gave much fuller consideration than had Lord Templeman to the question why the claim against the club should be for the £154,695 net winnings (or £150,960 if one excluded a bankers draft which gave rise to separate arguments) rather than the gross £229,908.48 of the solicitors’ money it had received in bets placed by Cass, in a passage at pp. 581E-583A which merits citation in full:

“In the course of argument before your Lordships, attention was focused upon the overall position of the respondents. From this it emerged, that, on the basis I have indicated (but excluding the banker's draft), at least £150,960 derived from money stolen by Cass from the solicitors was won by the club and lost by Cass. On this approach, the possibility arose that the effect of change of position should be to limit the amount recoverable by the solicitors to that sum. But there are difficulties in the way of this approach. Let us suppose that a gambler places two bets with a casino, using money stolen from a third party. The gambler wins the first bet and loses the second. So far as the winning bet is concerned, it is readily understandable that the casino should be able to say that it is not liable to the true owner for money had and received, on the ground that it has changed its position in good faith. But at first sight it is not easy to see how it can aggregate the two bets together and say that, by paying winnings on the first bet in excess of both, it should be able to deny liability in respect of the money received in respect of the second.

There are other ways in which the problem might be approached, the first narrower and the second broader than that which I have just described. The narrower approach is to limit the impact of the winnings to the winning bet itself, so that the amount of all other bets placed with the plaintiffs money would be recoverable by him regardless of the substantial winnings paid by the casino to the gambler on the winning bet. On the broader approach, it could be said that, each time a bet is accepted by the casino, with the money up front, the casino, by accepting the bet, so changes its position in good faith that it would be inequitable to require it to pay the money back to the true owner. This would be because, by accepting the bet, the casino has committed itself, in business terms, to pay the gambler his winnings if successful. In such circumstances, the bookmaker could say that, acting in good faith, he had changed his position, by incurring the risk of having to pay a sum of money substantially larger than the amount of the stake. On this basis, it would be irrelevant whether the gambler won the bet or not, or, if he did win the bet, how much he won.

I must confess that I have not found the point an easy one. But in the end I have come to the conclusion that on the facts of the present case the first of these three solutions is appropriate. Let us suppose that only one bet was placed by a gambler at a casino with the plaintiffs money, and that he lost it. In that simple case, although it is true that the casino will have changed its position to the extent

that it has incurred the risk, it will in the result have paid out nothing to the gambler, and so prima facie it would not be inequitable to require it to repay the amount of the bet to the plaintiff. The same would, of course, be equally true if the gambler placed a hundred bets with the plaintiff's money and lost them all; the plaintiff should be entitled to recover the amount of all the bets. This conclusion has the merit of consistency with the decision of the Court of King's Bench in *Clarke v. Shee and Johnson* 1 Cowp. 197. But then, let us suppose that the gambler has won one or more out of one hundred bets placed by him with the plaintiff's money at a casino over a certain period of time, and that the casino has paid him a substantial sum in winnings, equal, let us assume, to one half of the amount of all the bets. Given that it is not inequitable to require the casino to repay to the plaintiff the amount of the bets in full where no winnings have been paid, it would, in the circumstances I have just described, be inequitable, in my opinion, to require the casino to repay to the plaintiff more than one half of his money. The inequity, as I perceive it, arises from the nature of gambling itself. In gambling only an occasional bet is won, but when the gambler wins he will receive much more than the stake placed for his winning bet. True, there may be no immediate connection between the bets. They may be placed on different occasions, and each one is a separate gaming contract. But the point is that there has been a series of transactions under which all the bets have been placed by paying the plaintiff's money to the casino, and on each occasion the casino has incurred the risk that the gambler will win. It is the totality of the bets which yields, by the laws of chance, the occasional winning bet; and the occasional winning bet is therefore, in practical terms, the result of the casino changing its position by incurring the risk of losing on each occasion when a bet is placed with it by the gambler. So, when in such circumstances the plaintiff seeks to recover from the casino the amount of several bets placed with it by a gambler with his money, it would be inequitable to require the casino to repay in full without bringing into account winnings paid by it to the gambler on any one or more of the bets so placed with it. The result may not be entirely logical; but it is surely just.”

52. The wins and losses by Cass occurred through many transactions over a lengthy period. Lord Goff's rationale for netting them all off was driven by what he described as producing a just result. The justice of doing so in the gaming context was that there was a close connection between bets on one occasion and those on a separate occasion, and between winnings and losses occurring over numerous transactions. That connection arose from the nature of gambling at casinos, which was that numerous smaller sums are generally wagered in the expectation of multiple small losses but one or more infrequent but greater gains. Lord Goff's reasoning suggests that the counter-restitution principle here applied must focus carefully on the nature of the transaction or transactions, and the link between the benefits on each side, so as ultimately to apply a test of whether it is just that the one should be netted off against the other.
53. Lord Bridge of Harwich agreed with Lord Goff in relation to the existence and broad scope of the change of position defence but specifically agreed with Lord Templeman's reasoning as to why the claim was limited to the club's net winnings (p. 559A). Lord Griffiths and Lord Ackner agreed with both Lord Templeman and Lord Goff (pp. 567H-568A, 568B-C).

54. *Lipkin Gorman* can therefore be seen as supportive of either an enrichment basis for the counter-restitution principle (Lord Templeman) or an unjust basis (Lord Goff).
55. It is convenient at this point to consider the Judge's reliance on the change of position in SFM's case being "anticipatory". It is well established that a change of position defence may arise where the recipient has changed its position in reliance upon an anticipated receipt as much as if it has done so subsequently, if the same causative connection is established: *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 194 at [38]; *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ at [38],[47]. This presents no conceptual difficulty if the basis for the defence is inequity, as articulated by Lord Goff. If, however, it is an enrichment based defence affecting the extent of enrichment, it raises the question whether a recipient who has made an anticipatory payment away can be said to be enriched at all by its reimbursement. Whilst a netting-off of a receipt and a subsequent payment away can easily be analysed as an enrichment followed by a disenrichment, it is less obvious that in the case of an anticipatory payment away there has been any enrichment at all. If I arrange for a direct debit from my bank account to go out on the last day of the month in reliance on an entitlement to a receipt under what turns out to be a void contract coming in the next day on the first of each month, can my receipt really be described as an enrichment? My bank statements would suggest not. I am never in credit for the amount of the receipt, which merely reverses the payment away. If enrichment is the basis for a change of position defence, a party who has made a qualifying change of position by paying money away to a third party in anticipation of receipt from the claimant may not properly be described as being enriched at all when he receives the payment.
56. I see the force in Mr Watkins' submission that the application of the counter-restitution principle should not depend upon a distinction of timing as to when the transfer constituting a change of position takes place, whether before or after the receipt; it may be a short period before or after receipt, and whether it is one or the other may be a matter of happenstance in any given case. To my mind that lends force to a recognition that a change of position defence is better understood as based on principles of what is just and equitable. But however that may be, I do not regard either basis for the defence of change of position, whether enrichment or what is just, as supporting Mr Watkins' submission that there is some rigid rule that it must only ever be applied at the end of the exercise after netting off has occurred at the outset in order to identify the benefit. If change of position is benefit based, then there is no reason why the counter-restitution principle, if benefit based, should trump it. That is all the more so if the counter-restitution principle is justified on one of the other three bases. If, on the other hand a change of position defence is based on the concept of whether and to what extent a change of position makes recovery inequitable, then it must surely be capable of being applied at whatever stage of the analysis is dictated by the justice of the particular facts of any given case.

The swaps litigation

57. As is well known, in the 1980s local authorities increasingly came to enter into interest rate swaps with banks in what became a sophisticated derivatives market. The Divisional Court held in 1989 that they were ultra vires local authorities' powers (*Hazell v Hamersmith and Fulham LBC* [1990] 2 QB 697), a decision upheld by the House of Lords ([1992] 2 AC 1). Many claims ensued in which local authorities

sought repayments from banks or vice-versa, both in relation to closed swaps, that is to say those which had been completely executed, and open swaps, that is to say those only part executed either because they had not yet run their course or because the parties had stopped paying after the Divisional Court decision in *Hazell*. Two such cases came before Hobhouse J by way of lead cases, one for trial and the other for the determination of preliminary issues, in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890.

58. An interest rate swap can take many forms but those with which the *Islington* and *Sandwell* cases were concerned took one of the simpler forms in which one party agrees to pay interest on a notional sum at a fixed rate and the other at a floating rate over a defined period of years. At the end of the period one or other party will be seen to have procured a benefit, depending on the movement of interest rates. In the meantime each party agrees to make payments periodically, in those cases, every three or six months, to reflect the movement of interest rates over the previous period. The contract provides for the sums calculated by reference to the fixed and floating rates to be netted off against each other both for the periodic payments and the final one. The party who at any given time has suffered a market movement against it, such that overall it has had to make net payments, is described as being “out of the money”. The party who has enjoyed net receipts is said to be “in the money”. It is only at the conclusion of the fixed period, however, that it is possible to tell who has made money from the transaction and in what amount, although the winner may be predictable, absent cataclysmic market events, towards the end of the period.
59. In the *Islington* action the Court was concerned with a single open swap under which the notional sum was £25 million and the period 10 years. Westdeutsche was the fixed rate payer at 7.5% and made an upfront payment of £2.5m at the outset, which enabled the fixed rate to be reduced from one of more than 9% which would otherwise have represented the appropriate rate. Islington was the floating rate payer at LIBOR. Westdeutsche had entered into a back to back swap with Morgan Grenfell under which it was the floating rate payer at LIBOR and Morgan Grenfell was the fixed rate payer at 7.74%. If both swaps transaction were fully executed, therefore, Westdeutsche was making a turn of 0.24% with no financial risk as to the movement of interest rates. Islington made three of the semi-annual payments due under the swap, totalling £1,354,474.07, before payments ceased as a result of the decision in *Hazell*. Each of these was the net difference between interest calculated at the fixed rate and the floating rate. Westdeutsche claimed for the gross floating rate sums plus the £2.5m initial payment (£6,260,273.98) and Islington counterclaimed for the gross fixed rate sums (£5,114,748.05). In terms of actual payments Westdeutsche had paid £2.5m at the outset and Islington had paid £1,354,474.07 in the three periodic payments, resulting in a net payment of Westdeutsche to Islington of £1,145,525.93. Hobhouse J held that the claim by Westdeutsche was for the £1,145,525.93 and its claim succeeded to that extent, netting off the payments by each side to identify that balance in favour of Westdeutsche. The change of position defence of each party was rejected.
60. In relation to netting off he said at p. 905j-906b:

“The claims and counterclaims in the action have been formulated in a number of ways. Each side has at one time put its case on the basis of treating its claim as being for the full amount of the ‘fixed interest’ or ‘floating interest’

sums notwithstanding that the contract only imposes a liability to pay net sums and that was all that was actually paid. Thus Westdeutsche has claimed a total of £6,260,273.98 and Islington has counterclaimed a total of £5,114,748.05. This approach cannot be supported. It is contrary to the facts and the express contract; it has no basis in any principle of unjust enrichment. The figures which can properly form the subject matter of the claim and counterclaim are respectively £2,500,000 and £1,354,474.07, being the aggregate of the actual payments made. By the conclusion of the trial this was the case of both parties and I will have to deal with it on that basis although it cannot seriously be disputed that on any principle of unjust enrichment these figures must be netted off against each other and that the reality of the case is an alleged enrichment of Islington at the expense of Westdeutsche in the sum of £1,145,525.93.”

61. Having reviewed the authorities in favour of the existence of the cause of action in unjust enrichment on the facts of the case, which was in issue, he said at p. 929f-h:

“Where payments both ways have been made the correct view is to treat the later payment as, pro tanto, a repayment of the earlier sum paid by the other party. The character of the remedy, both in law and equity, is restitution, that is to say putting the parties back into the position in which they were before. Accordingly, the remedy is only available to a party on the basis that he gives credit for any benefit which he has received. He must give credit for any payments which have been made by the opposite party to him and, where the court thinks appropriate, pay a quantum meruit or quantum valebat. The same conclusion follows from the application of the principle of unjust enrichment: in so far as the recipient has made cross-payments to the payer, the recipient has ceased to be enriched.”

62. It was only after this conclusion that Hobhouse J went on to consider, and reject, the change of position defences.

63. In the *Sandwell* case there were five swaps. The first was a closed swap with a notional principal of £5m and a period of 5 years. Kleinwort Benson was the fixed rate payer at 11³/₈ % and Sandwell the floating rate payer at LIBOR. The quarterly payments showed a pattern of the net payer one quarter being the net receiver in the next quarter. The total paid by Kleinwort Benson was £1,551,237.10 and the total paid by Sandwell £1,354,914.38. The net result was that Kleinwort Benson paid £196,322.72 more than it received. Six of the payments, three by each side had been made in the period more than 6 years before the issue of the writ. The three Kleinwort Benson payments in this period totalled £494,845.90, to which a limitation defence was advanced by Sandwell. The Judge addressed it in these terms at pp. 940h-942b:

“The argument under the Limitation Acts depends upon the premise that each cause of action in money had and received, or analogous equitable claim, must be treated as having accrued at the date when the relevant sum was paid. As appears from the table on p 907 of this judgment, three payments were made by Kleinwort Benson and three by Sandwell outside the six-year period preceding the issue of the writ. The three payments paid by Kleinwort Benson totalled £494,845.90 and the three by Sandwell totalled £396,755.14. Therefore as at six years before the issue of the writ Kleinwort Benson had

paid £98,090.76 more to Sandwell than Sandwell had paid to Kleinwort Benson. By the time the first swap had run its full course in July 1988 Kleinwort Benson had paid to Sandwell £196,322.72 more than Sandwell had paid to it. For the reasons that I have given earlier in this judgment I consider that the claim of Kleinwort Benson, whether put in money had and received or in equity, is in truth only for the net sum of £196,322.72. Its claim has to give credit for the payments that it has received. As is implicit in the action for money had and received on the ground of unjust enrichment and as was expressly held in *Hicks v Hicks* (1802) 3 East 16, 102 ER 502, the claim cannot be asserted without at the same time giving credit for any payments received. As a matter of the principle of unjust enrichment, the defendant has only been enriched in the net sum and the enrichment has only been at the expense of the plaintiff in the net sum.

Following this analysis through, and looking again at the table on p 907, it can be seen that the enrichment of the parties fluctuated. After the first payment made on 17 October 1983 it was Kleinwort Benson which was enriched to the tune of £127,962.33. After the second payment on 16 January 1984, it was Sandwell that was enriched in the sum of £42,662.67. On 15 January 1985 Kleinwort Benson was the party which was enriched but by 15 April of that year it had become Sandwell. The position oscillated back and forth and it was not until 1988 that Kleinwort Benson ceased to be at any time enriched at the expense of Sandwell and the position emerged as being one where Sandwell was enriched at the expense of Kleinwort Benson. The last payment made by Sandwell, £112,191.78, paid on 15 April 1988, merely served to reduce the amount by which Sandwell had been enriched; it did not result in any enrichment of Kleinwort Benson. Accordingly, the position was analogous to that of a running account between the two parties. Only one underlying transaction was involved—the first Sandwell swap contract. The successive payments merely altered the location and extent of the enrichment which existed from time to time. The earlier payments had long since ceased to give any cause of action to either party. They were merely part of the previous dealings between the parties which were relevant to ascertaining what, if any, cause of action either party had at a later date.

Although Mr Southwell for Kleinwort Benson refused to put his case in this way, it is legitimate to test the defence of limitation of actions by asking what would have been the position if Kleinwort Benson had in its points of claim solely asserted causes of action arising from the payments made on 15 January and 15 July 1988. These two payments totalled well over £300,000 and were more than sufficient to support a claim for £196,000. No defence of limitation of actions could be or has been raised in respect of the payments made by Kleinwort Benson to Sandwell in 1988. The only basis for a defence of limitation of actions would be if the last payment made by the plaintiff had been made over six years before the issue of the writ.

An argument was developed which submitted that a way in which Sandwell could rely upon the limitation period would be to say that in calculating the equitable defences, or set-off, to be taken into account one should go back to 3 April 1985 [the date 6 years before issue of the writ] and no further. What

would be the equity in such an approach escapes me. Where there have been a whole succession of payments one way and the other in respect of a single underlying transaction, both equity and justice require that one should have regard to the totality of those payments and the resultant overall benefit and detriment and not have regard to some arbitrary cut-off point unless there is some statutory provision which requires one to do so.

The argument actually advanced on behalf of Kleinwort Benson reached a similar destination but by a more complicated route. It said its claim was for the £1.435m, being the total of all the payments that it had made to Sandwell; Sandwell pleaded limitation in respect of the first three payments and counterclaimed for all the payments that it, Sandwell, had made totalling about £1.433m; in defence to the counterclaim Kleinwort Benson is entitled to set off all its own payments including the first three: the net result is an entitlement of Kleinwort Benson to recover the net sum of about £196,000. As will be appreciated, I consider that this analysis is over-complicated and wrong in principle. At no time during the history of this transaction has there been a cause of action for more than the net balance existing at any given time.

64. At p. 944a-b, still addressing the limitation defence, he said:

“As will be appreciated from what I said earlier, the principle of taking into account the net effect of payments both ways for the purpose of ascertaining what is the right of a plaintiff to a remedy of money had and received, or in equity, does not involve any claim by the opposite party: it is truly a qualification of the plaintiff's right to recover and, if it depends upon facts pleaded and proved by the defendant, the defendant has done no more than raise a defence.”

65. These passages support Mr Watkins' submission that Hobhouse J was treating the counter-restitution principle in that case as based on enrichment, and as defining the extent of unjust enrichment before applying any change of position defence. However, I would not accept that the case supports his submission that counter-restitution is always to be applied in that way and prior to consideration of change of position defences in every case. It must be remembered that the periodic payments under swaps of the type under consideration in that case are by way of provisional accounting for the final benefit which results in a net overall payment in one direction. They are, as Hobhouse J described them, a running account in the sense that they are payments on account by way of interim accounting which the transaction envisages may be reversed. As Lord Browne-Wilkinson put it in the appeal to the House of Lords on the issue of compound interest ([1996] AC 996) at p. 710H-711A: “The essence of the swap agreement is that, over the whole term of the agreement, each party thinks he will come out best: the consideration for one party making a payment is an obligation on the other party to make counter-payments over the whole term of the agreement.” A party may be in the money or out of the money at any stage of the period of the swap but that is only a provisional position. See also Robert Walker LJ in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 at p. 235H-236A. This is not so in every case of payments under a single transaction.

66. Before leaving Hobhouse J's decision I should mention Mr Salzedo's focus on the reference in the passage at p. 929g to the court awarding a quantum meruit or quantum valebat. He submitted that this reinforced a condition of recovery analysis for counter-restitution where the benefits in question, such as those in the current dispute, only arose on a quantum meruit basis and are, he submitted, a legal entitlement only upon being valued and awarded by the court. This, he argued, allowed them to be taken into account only at the final stage of the analysis.
67. In the Court of Appeal in *Islington* ([1994] 4 All ER 890; [1994] 1 WLR 938) the Court upheld the judgment below, without addressing Hobhouse J's reasoning for netting off. Leggatt LJ said at p. 967h-j:

“Where A has in his possession the money of B under a void transaction, B should be entitled to reimbursement unless some principle of law precludes it. If the transaction was a contract, initially valid, the question will arise whether it has been partially performed. If so, the failure of consideration will not be total. But if the transaction was entered into by both parties in the belief, which proves unfounded, that it was an enforceable contract, in principle the parties ought to be restored to the respective positions from which they started. To achieve that, where there have been mutual payments, the recipient of the larger payment has only to repay the net excess over the payment he has himself made.”

68. The argument in the Court of Appeal was principally concerned with whether there was a cause of action and the nature of it. *Islington* argued that the only recognised category which Westdeutsche could hope to invoke was money paid for a consideration which has wholly failed. In rejecting this argument Dillon LJ held that there was a cause of action for money had and received in accordance with the annuity cases and a cause of action in equity. He further said, at p. 961d, by analogy with cases referring to failure of consideration in part, where the part is severable, that:

“I do not see why a similar process of severance should not be applied where what has happened in a financial matter, is that there has been a payment of money one way and a payment of smaller sums the other way. The effect of severance is that there has been a total failure of consideration in respect of the balance of the money which has not come back.”

69. Mr Salzedo relied on this as supporting the proposition that even a series of payments under a single swap could be severed. I do not find the concept of severance helpful in the current context of a contract which is void, in which there cannot arise any question of partial failure of consideration. The *Guinness Mahon* case was another swaps case, in which in which it was argued that there could be no total failure of consideration for a closed swap because it had been fully performed. Morritt LJ explained at pp. 226A-227D that there is always a total failure of consideration in the case of a void contract, unlike a contract which is initially valid, because the consideration is the legal obligation on the counterparty to perform, not the performance itself. For these reasons he treated the claimant's reliance on the principle of severability or apportionment of consideration as of no relevance. However one severs a contract into constituent parts, each will involve a total failure of consideration if it is void because the consideration is the legal obligation, not its

performance: see pp. 227E-228A. In that case Robert Walker LJ said at p. 235H that he did not find the notion of severance helpful to the resolution of the appeal.

70. Hobhouse J applied a similar approach to that he had adopted in *Islington and Sandwell* in a subsequent swaps case, *Kleinwort Benson v South Tyneside BC* [1994] 4 All ER 972 in which there were five swaps. In *Islington and Sandwell* it had not mattered whether netting off took place before consideration of a change of position defence because the defence failed. In *South Tyneside*, however, the defence succeeded in relation to one of the swaps, KB5, and was applied to prevent recovery of the net balance of £123,675.62; see pp. 987h-990f. In this case a limitation defence succeeded in relation to swap KB1 because Kleinwort Benson, having been the net payer on most occasions, had to rely on its payments more than 6 years prior to issue of the writ to make up part of its net loss figure. It sought to escape this consequence by arguing for a netting off all sums paid under all 5 swap transactions. The Judge rejected this argument at p. 979j on the grounds that each swap was an independent transaction and no right of set-off or aggregation exists or existed as between one contract and another. Each contract, both in law and equity had to be looked at separately. This reference to set-off is consistent with a cross-claim basis for the counter-restitution principle.

Goss v Chilcott

71. In *Goss v Chilcott* [1996] AC 788, the Privy Council was concerned with a claim by a finance company which had made an advance secured by a mortgage over the defendants' property. Two instalments of interest were paid but none thereafter. The finance company could not succeed in a claim to enforce the terms of the mortgage because it had been altered by its agent, without the defendants' knowledge or authority, which rendered it unenforceable at the suit of the finance company. However its claim in unjust enrichment for the capital advanced succeeded.
72. In giving the judgment of the Board, Lord Goff addressed the reasons for rejecting the argument, which had succeeded at first instance, that the claim was barred because the borrowers had paid two of the instalments and consequently there had been no total failure of consideration. He explained that failure of consideration in this context meant a failure of performance, not failure of the promise to perform. This is entirely consistent with the later analysis by Morritt LJ in the *Guinness Mahon* case that there is a total failure of consideration in cases which are void: the borrowing contract was not void but initially valid and merely unenforceable at the suit of the lenders. The distinction is that echoed in the passage in Leggatt LJ's judgment in *Islington* quoted above. At p. 797H-798F Lord Goff said:

“In the present case however, although no part of the principal sum had been repaid by the defendants, two instalments of interest had been paid; and the question arises whether these two payments of interest precluded recovery on the basis that in such circumstances the failure of consideration for the advance was not total. Their Lordships do not think so. The function of the interest payments was to pay for the use of the capital sum over the period for which the loan was outstanding, which was separate and distinct from the obligation to repay the capital sum itself. In these circumstances it is, in their Lordships' opinion, both legitimate and appropriate for present purposes to consider the two separately. In the present case, since it is unknown when the mortgage

instrument was altered, it cannot be known whether, in particular, the second interest instalment was due before the defendants were discharged from their obligations under the instrument. Let it be supposed however that both interest payments had fallen due before that event occurred. In such circumstances, there would have been no failure of consideration in respect of the interest payments rendering them recoverable by the defendants; but that would not affect the conclusion that there had been a total failure of consideration in respect of the capital sum, so that the latter would be recoverable by the company in full on that ground. Then let it be supposed instead that the second interest payment did not fall due until after the avoidance of the instrument. In such circumstances the consideration for that interest payment would have failed (at least if it was payable in advance), and it would prima facie be recoverable by the defendants on the ground of failure of consideration; but that would not affect the conclusion that the capital sum would be recoverable by the company also on that ground. In such a case, therefore, the capital sum would be recoverable by the lender, and the interest payment would be D recoverable by the borrower; and doubtless judgment would, in the event, be given for the balance with interest at the appropriate rate: see *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1994] 1 W.L.R. 938. In either event, therefore, the amount of the loan would be recoverable on the ground of failure of consideration. In the present case, since no part of the capital sum had been repaid, the failure of consideration for the capital sum would plainly have been total. But even if part of the capital sum had been repaid, the law would not hesitate to hold that the balance of the loan outstanding would be recoverable on the ground of failure of consideration; for at least in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on this ground: see *David Securities Pty. Ltd. v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353, 383.”

73. Both sides relied upon this decision. Mr Watkins submitted that the endorsement of the netting-off approach in *Westdeutsche v Islington* (the citation is of the report of the Court of Appeal decision), in the context of payments of instalments made after the contract had been avoided, supported his approach to the counter-restitution principle. However the language used by Lord Goff is more consistent with a cross-claim basis for awarding a net figure. Mr Salzedo submitted that the passage supported his argument that payments under a single transaction can be severed where it is just to do so. For reasons I have endeavoured to explain, I do not regard severance questions applied to cases of partial or total failure of performance of an initially valid contract, of which this case is an example, as of assistance in the context of a void transaction where there is always a total failure of consideration.

A Singapore case

74. In *Skandinaviska Enskilda Banken AB (Publ) Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540, an agent of the claimant bank had defrauded it in a way which involved many payments into, out of, and between two bank accounts held in the defendants name, one held at the claimant and one with another bank. The Singapore Court of Appeal held that where the victims of the same fraudster are suing each other in restitution the victim’s claims should be “tied together”, adopting the language of Professor Birks, so as to net them off by a running

account method, before applying change of position defences: see [129]. In doing so it likened the position to that of the cross-payments in *Islington*.

Academic writings

75. The cross-claim basis and/or condition of recovery basis for the counter-restitution principle derives strong support from academic writings. The late Professor Birks in the posthumously published 2nd edition of his book *Unjust Enrichment* (2005) p. 225 stated the counter-restitution principle to be that “where a benefit has been received by the claimant from the defendant in exchange for the enrichment which he is seeking to recover from the defendant, that exchange-benefit can be seen as a disenrichment of the defendant...”, but suggested that disenrichment did not provide a sufficient justification for the principle. He went on to express the view that the rationale was that each party was enriched at the expense of the other and had claims against the other. He then concluded that the cross-claim was not to be treated as a defence but was better recognised under the condition of recovery basis: “The law is not really that there is [a] defence but that it is a condition of restitution that the amount recovered be reduced to allow for benefits received by the claimant.” (p.228). He invoked support from German law and its application to an example much discussed by German jurists in which two parties exchange Old Master paintings, of different value, under a transaction whose basis fails, followed by the destruction of one of the paintings (see 31-19 to 31-20 of Goff & Jones for further details of the example). The obvious injustice of the owner of the remaining painting having to return it without credit for the value of the destroyed painting he had supplied would allow the value of the latter to be deducted, in the view of the majority of German commentators, by application of “*Saldotheorie*” (*saldo* being an old Italian banking expression for balance or difference) rather than *zweikonditionentheorie*, which German law also recognises, and sometimes applies, which treats the two claims as separate. The German approach and Professor Birks’ appeal to it must be treated with caution. English law does not recognise a unified theory of unjust enrichments; in this it differs from many systems of civil law, including German and Scottish law, which rest the remedy on the concept of *condictio indebiti*, which means a claim in respect of something which is not due, and is a general principle that to retain money paid without legal basis is unjust enrichment. Rather in English law, claims in unjust enrichment are limited to categories of case which have been recognised as involving an unjust factor. The categories are not closed and have been increasingly recognised by principled incremental extensions in the case law since the explosion of cases in the 1990s in which Lord Goff was such a dominant influence. Professor Birks, whose influence in this area was also considerable, proposed in the second edition of *Unjust Enrichment* that the trend of expanding categories was superfluous and that English law should adopt the civil law *condictio indebiti* concept of a payment for which there was no basis. Indeed he contended that such was the effect of the decisions in the swaps cases. Support for this direction of travel in English law is not limited to academic writings; it was, for example, a future development which appealed to Lord Walker of Gestingthorpe in *Deutsche Morgan Grenfell Group plc v IRC* [2017] 1 AC 558 (see [158]), albeit that he felt that the time to take that step had not yet come. It is, however, beyond dispute, that such is not yet the law of England: see for example *FII Group Test Claimants v Revenue and Customs Commissioners* [2012] 2 AC 402 at [162], *Patel v Mirza* [2016] 3 WLR 468 at [246]; *Sempre Metals Ltd v IRC* [2008] 1 AC 583 at [22]-[23]; and *Samsoondar* at [18]-[19]. Nevertheless there would be

obvious justice in the Old Master example in allowing recovery for only the difference in value between the paintings. A cross-claim basis for the counter-restitution principle would not permit it because the change of position defence would be an answer to the claim by the provider of the destroyed painting.

76. Lord Burrows, then Professor Burrows, whose influence on this area of the law is also considerable, at pp. 569-571 of his book *The Law of Restitution* 3rd edn. (2002), appears to favour the cross-claim analysis whereby counter-restitution is best regarded as an unjust related defence akin to set-off. He rejected the suggestion that it was an enrichment related defence, describing Hobhouse J's judgment in *Islington* and *Sandwell* as causing obfuscation in this respect. He nevertheless included a sentence in the middle of that analysis which said, "Indeed to avoid unnecessary confusion between the two [counter-restitution and change of position] and to enhance clarity, counter-restitution is best applied before going on to the change of position defence." I have not found this sentence easy to reconcile with the surrounding passages. In his later *Restatement of the English Law of Unjust Enrichment* (2012), in which he was assisted by an advisory group of academics, judges and practitioners of very considerable eminence, he was more unequivocal. Principle 26 (p. 128) was stated to be "(1) the defendant has a defence if it is impossible for there to be counter-restitution of reciprocal benefits conferred on the claimant by the defendant; (2) the defendant normally has a set-off defence for counter-restitution of reciprocal benefits on the claimant by the defendant." The ensuing discussion suggests a preference for treating counter-restitution as a distinctly recognised defence rather than merely an aspect of the general law of set-off.
77. In Chapter 31 of Goff & Jones *The Law of Unjust Enrichment* 9th edn. (2016) the learned editors favour the view that counter-restitution is best regarded as a condition of recovery. The learned authors of Edelman and Bant *Unjust Enrichment* 2nd edn. (2016) conclude that the cross-claim basis is the better one, and favour its logical conclusion that a change of position defence falls to be taken into account for each cross claim, there being "no obvious reason why the defendant's right to counter-restitution should trump the plaintiff's right to protection resulting from her change of position."

Conclusions on the nature and basis of the counter-restitution principle.

78. As I foreshadowed above, this journey through the case law and academic writings reveals support for each of the four conceptual bases for a counter-restitution principle. I have not thought it appropriate to express a concluded view which chooses between them, for two related reasons. First, it is not necessary in order to determine the outcome of the appeal. For the reasons explained below, I have concluded that the counter-restitution principle is simply not engaged on the facts of this case. Secondly, there may be more than one of these bases which justifies the application of the principle in a given case. Indeed in any given case an appeal to one or more of them may provide a valid justification. Where they compete, the facts of the case may render one more suitable than another. This is an area of the law which is developing incrementally and in which flexibility is desirable. The juridical basis for applying the principle in a given case is better determined by reference to facts which make it critical to the outcome.

79. I do find it necessary, however, to express a conclusion on the content of the counter-restitution principle, that is to say what test is to be applied in determining whether particular benefits enjoyed by the claimant must be taken into account in its claim against a defendant. What is the nature of the connection which is required between the benefits provided by the claimant and those provided by the defendant?
80. It is, in my view, too simplistic to say that all benefits provided in each direction under a void contract must generally be taken into account. Suppose A engages B as a labourer at a daily rate of £200 per day payable weekly in arrears, and the value of the labour is £150 per day; and suppose the contract to be void, and that B works for three days in the final week at the end of which A does not make any payment. Suppose also that B has a change of position defence to A's claim for return of the weekly payments of £200. Justice would seem to demand that B should be able to claim in unjust enrichment for £450 as the value of the last three days' work, without A being able to extinguish the claim by setting off his larger payments for previous work in the previous weeks. Why is this? The answer is not that the contract is severable into daily periods of hire, but rather because there is no relevant connection between the earlier weeks' payments and the labour provided in the last week. The earlier payments were exclusively referable to work in those earlier weeks. The fact that A has "overpaid" for the value of the services in those weeks is simply the result of his bargain. It does not affect the fact that the payments were for labour in those weeks.
81. Conversely, benefits under separate transactions may engage the principle of counter-restitution, as they did in *Lipkin Gorman*. This is analogous to equitable set-off, which is capable of applying to cross-claims under separate transactions. It is difficult to see why, if it is equitable for them to be taken into account for the purposes of set-off, so as to provide a defence, they should not equally provide a defence to a claim in unjust enrichment, whether or not the principle is properly to be regarded as founded on a cross-claim basis.
82. In *Lipkin Gorman*, Lord Goff decided that Cass' winnings and losses at the gambling tables should be netted off because there was a sufficient connection between them arising from the nature of those transactions to make it just to do so. In *Erlanger*, Lord Blackburn justified the counter-restitutionary condition of returning the mine, and accounting for profits from its working, as necessary to do practical justice. In *Islington, Sandwell and South Tyneside*, the nature of the swaps transactions themselves made it just to do so for payments under each single swap, but not payments under separate swaps; although Hobhouse J analysed the netting off under a single swap in terms of enrichment, the question of whether there is a relevant enrichment itself seems to me to depend on the degree of connection required: it is only if the counter-benefits are sufficiently closely connected with the benefits that it can be just to treat them as diminishing or extinguishing the enrichment. In the appeal to the House of Lords on the issue of compound interest in *Westdeutsche v Islington* ([1996] AC 669), Lord Goff referred at p. 683 to Hobhouse J's reliance on the annuity cases as justifying a cause of action in money had and received, and said:
- "they were concerned with cases in which payments had been made, so to speak, both ways; and the courts had to decide whether they could in the circumstances, do justice by restoring the parties to their previous positions. They did not hesitate to do so, by ascertaining the balance of the account between the parties, and ordering the repayment of the balance."

83. I would not state the counter-restitution principle any more narrowly than being that the benefits for which the claimant must give credit are those which are sufficiently closely connected with the benefits provided to the defendant that justice requires him to do so. This may seem an unhelpfully broad definition, but I am fortified in expressing it in this way by the similar breadth Lord Goff adopted for his articulation of a change of position defence in *Lipkin Gorman* at p. 580F. The formulations used by the editors of *Goff & Jones* of benefits “in exchange”, and by Lord Burrows in his *Restatement* of “reciprocal benefits”, capture the flavour of benefits which will be sufficiently closely connected, but cannot be an infallible guide: the payments by the club to Cass of his winning bets are not aptly described as having been in exchange for his earlier losing bets.
84. This formulation of the principle of counter-restitution, broad as it is, enables it to be applied consistently with the test for the defence of equitable set-off, which requires the claim and cross-claim to be so closely connected that it would be manifestly unjust to enforce one without taking into account the other: see *Geldoff Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2011] 1 Lloyd’s Rep 517. There will undoubtedly be many cases, if not all, in which a cross-claim analysis is available in claims for unjust enrichment, and it would be unsatisfactory for the tests to point to different results where that is so. Equitable set-off is a defence, not a procedural bar, and in my view the counter-restitution principle should be treated as a defence in the same way. Equitable set-off is subject to special rules excluding its application in particular cases, such as freight, and cheques. The scope of the defence of counter-restitution may also have to accommodate fact-specific exceptions.
85. That may give rise to acute difficulties of application in a case in which there is both a change of position defence and a counter-restitution defence, and the question arises which has to be applied first. The Old Master example highlights the issue. I am inclined to think that there can be no inflexible rule that one defence trumps the other, and that the defences can be applied on a case-by-case basis to produce a just outcome on particular facts, which may vary greatly. Some change of position defences may be capable of being analysed in terms of enrichment or disenrichment, others may not. It is, however, unnecessary to express any firm conclusion on that question in the light of the view I take of the facts of this case.

The law applied to the facts of this case

86. In this case the Contract provided for annual payments of hire in advance, and the effect of clause 2.3.1 was that the College was only entitled to use of the Building if such hire payments were made. If the Contract were a simple operating lease, I would regard it as beyond argument that payments were referable to each year’s use, and that there was no sufficient connection between the College’s payments of hire to SFM in 2013 to 2016, which were in respect of use of the Building for the period prior to 5 September 2017, and the benefit to the College for its use of the Building thereafter. The former could not be said to be referable to the latter or sufficiently closely connected that justice should require them to be taken into account. On the contrary the use of the Building after 5 September 2017 would not be something which the College could in any real sense be described as already having paid for. The position would be akin to that in the example I gave above of the hire of a labourer.

87. However, Mr Watkins places particular emphasis on the Judge’s finding that the Contract was in the nature of a finance lease. At [180] the Judge quoted the Notes to the Chartered Institute Of Public Finance and Accountancy (“CIPFA”) Code of Practice at F67 explaining why a finance lease is treated as borrowing:

“Where a lease is classified as a finance lease, then the substance of the transaction is considered to be the same as if the authority had purchased the asset and financed it through taking out a loan. The authority therefore recognises its interest in the asset together with a liability for the same amount. The lease payments are then split between repayments of the liability and a finance charge.”

Mr Watkins submits, therefore, that the Judge found that the Contract was one which in substance involved the College paying the capital cost of what was in effect acquisition of the Building over its entire economic life. The Contract, he submits, cannot therefore be severed into different periods of hire: all payments by the College, at any stage of the Contract, are referable to the use of the Building over the entire term of the Contract as if instalments of a purchase price.

88. I cannot accept that this is the correct analysis. In my view it wrongly conflates a capital payment, for acquisition, with a hire payment, for use; and is inconsistent with the restitutionary principle that the parties are to be restored to their pre-Contract positions, with the College returning the Building to SFM.
89. The Judge correctly held that in valuing the benefit to the College of the use of the Building, he had to ignore the contractual amount of the annual hire. The Contract was void and the benefit had to be assessed by reference to its market value, not contractual price. It was a time-dependent benefit. That meant, as the Judge correctly held, that the use of the Building by the College should be valued by reference to the cost of an operating lease, reflected in annual hire payments for periodic use. The value of the benefit was arrived at by findings on the evidence of that market rate of annual hire. As the Judge observed, the economics of the benefit being valued were fundamentally different from those inherent in the Contract. The hire payments under the Contract greatly exceeded the market rate for hire under an operating lease.
90. These findings, and the Judge’s determination that the Contract was in the nature of a finance lease, mean that the annual hire payments which the College made in 2013 to 2016 were in exchange for two benefits. In part they were for the use of the Building for the following year; in part they were for a capital acquisition cost and finance charge, reflecting the cost of acquiring the Building over its economic life with a financing benefit to the College as if SFM were lending the College the money to acquire the Building as a capital asset. To the extent that they were the latter, or analogous thereto, they were unrelated to use of the Building: they were capital acquisition costs. A capital acquisition cost element is irrelevant to an unjust enrichment claim for use of an asset because no part of it is in exchange for use of the asset.
91. Another reason why the capital acquisition cost element is irrelevant to such an unjust enrichment claim for use, based on the Contract being void, is because the claim is premised on the Contract being unwound. The consideration for the capital acquisition cost element is acquisition of the Building over its economic life, but in

the restitutionary world that acquisition does not occur. To put the parties in the position they would have been in had the Contract not been entered into, the College would have to return the Building, and it is the return of the Building which is the counter-restitution it must give for a claim for restitution of any part of its payments which were properly to be treated as acquisition costs. The acquisition cost element of prior payments was made in exchange for a capital benefit which falls to be unwound by retransfer of the asset. It was not made in exchange for a benefit in the form of use of the asset in subsequent years as a result of not retransferring it.

92. The result of the Judge's findings is that for the period in respect of which payments were made by the College, up to 5 September 2017, the payments were made for (1) use during that period and (2) a capital cost. In respect of the subsequent period no payments were made. In neither period were any payments made in respect of the use of the Building after 5 September 2017.
93. That conclusion is reinforced, in my view, by the terms of the Contract. The Contract terms disentitle the College from using the Building if it does not make the annual payments. That is the express effect of clause 2.3.1. If the College fails to make an annual payment, SFM is entitled to require redelivery of the Building. SFM is not contractually obliged, in such circumstances, to give credit for any payments previously made by the College; on the contrary, the College is liable for the hire payments for the remainder of the minimum term subject to a discount for accelerated payment. The Contract, if valid and subsisting, does not entitle the College under its terms to some credit to reflect the amount by which the hire exceeded the market value of its use, if it stops paying the annual hire. There is no reason in justice, therefore, why it should have that credit in the same factual circumstances when the Contract is unwound. Its characterisation as a finance lease does not affect the position: if the hire payments do not secure a right to use the Building after payments cease, on the assumption that the Contract is valid, it is hard to see how they can properly be categorised as referable to use in that subsequent period if the Contract is void. The Judge was right, in my judgement, to say that it is difficult see why the earlier payments should be treated as some form of "restitution voucher" to be set off against subsequent enrichments in the form of the use of the Building; they would not have amounted to such a credit voucher if the Contract had been valid.
94. For these reasons the characterisation of the lease as a finance lease does not provide a reason why in justice the College should avoid liability in unjust enrichment for a period in which they have had the use of the Building and have not paid for it.
95. I would dismiss the appeal.

Lord Justice Dingemans:

96. I agree that the appeal should be dismissed for the reasons given by Popplewell LJ in his judgment. There is a further reason why I would dismiss the appeal, which is related to but different from the reason set out in paragraph 93 above. It is apparent that, for the reasons given by the judge, the contract was void from the start. However the parties were purporting to act in accordance with its terms until September 2017, which was the date when the annual payment was due to be paid by the College and it was not paid, see paragraph 15 above. Thereafter, and before another annual payment was due, SFM purported to terminate the contract, see paragraph 16 above.

97. In my judgment the use of the Building, as defined in paragraph 4 above, by the College up to September 2017, when both parties had innocently (on the judge's findings) entered into a void contract and both parties were purporting to comply with the contract, was of a different nature to the College's use of the Building after that date. Before September 2017 the College's use of the Building by the College was under the void contract, and the benefit of that use had to be brought into account in the claims made by SFM and the College against each other.
98. After September 2017 there was no longer any purported performance of the void contract. SFM was entitled to the return of its modular units because it was the owner of the Building, regardless of the position under the void contract. In these circumstances the continuing use of them made by the College was "to the use of the" Respondents, for which the Respondents were entitled to payment. The judge was therefore right to order the College to make a payment for its use of the Building from September 2017, and not to give any credit against the sums due for the use of the Building after September 2017 for the earlier payments made by the College before September 2017. This is because those earlier payments were made in a different situation, namely purported performance of a void contract, and not for continuing use of the Building.

Lady Justice Nicola Davies:

99. I have read the judgments of Popplewell and Dingemans LJJ; I would dismiss the appeal for the reasons given.