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Liability for work done where contract is denied: contractual and restitutionary approaches

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This paper explores the divide between the law of contract and the law of restitution in dealing with the different situations that arise from one party commencing work prior to the conclusion of a formal contract. It argues that contract and unjust enrichment each have a proper role to play in dealing with such cases. First, it argues against a purely contractarian view that such cases should be exclusively resolved by the law of contract, through an implied collateral contract. Such a technique, applied vigorously, would result in nullifying the concept of “essential terms” and an artificial construction of parties’ intentions. Second, it dispels the myths that the law of unjust enrichment is inadequate to deal with the problem, by clarifying the enrichment test and the unjust factor to be applied in such cases. It will be shown that the defendant’s assumption of the risk of financial responsibility for the benefit is key to establishing these two elements of the claim.

I. INTRODUCTION

It is not unusual for parties to commence work while negotiations on the contractual terms that are to govern their relationship are continuing. However, if negotiations break down and no formal contract is concluded, contractual, as well as restitutionary, disputes may well arise between the parties as to liability for the work already done. That different bases of liability are possible is not problematic in itself; problems arise when different courts come to different conclusions based on the same facts. Putting aside issues of evidence, this generates uncertainty in the law. Prominent commentators in this area generally advocate using principally one area of the law to deal with such disputes so as to avoid any uncertainty. Some of these commentators posit the expansion of doctrines which are

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We would like to thank Professor Tiong Min Yeo and Associate Professor Chee Ho Tham for their helpful comments on the earlier drafts of this paper. We are also grateful for the comments from the anonymous referee. All errors remain our own.

1. Way v Latilla [1927] 3 All ER 759.
alien to English law (as it currently stands) to deal with the problem. This paper, however, argues that contract and unjust enrichment each have a proper role to play and this requires bright doctrinal lines be drawn between these two areas of law.

II. CONTEMPORARY APPROACHES AND SOLUTIONS

There are at least three contemporary approaches. The first is an exclusively contractual solution, with no room or need for any restitutionary remedy. This approach rests on the key supposition that the situations involving “precontractual” liability invariably involve an agreement between the parties that the work would be paid for.

The second approach posits that unjust enrichment—which is commonly thought to be applicable only in the absence of a contract—can solve most of the problems of precontractual liability. On this thinking, since restitution can provide a solution, the scope of operation of the contractual approach may correspondingly be limited.

The third approach is to find a solution presently unrecognised by English law. One such solution is to extend the principle in the doctrine of proprietary estoppel to commercial cases for the protection of certain forms of precontractual reliance. Another solution is to develop a precontractual duty of good faith straddling tort and contract, akin to the civilian concept of culpa in contrahendo.

This paper will not deal with the third approach (and its associated solutions) for two reasons. First, it is obvious that these solutions cannot be satisfactorily applied as part of English law, without extensive modifications of English law itself. For instance, proprietary estoppel, let alone a more expansive notion of it, may have little or no role in the commercial context, owing to the importance of certainty and the primacy of contract in such relationships. In so far as a precontractual duty of good faith is concerned, that will inevitably involve recognising the existence of “shades of grey” of liability in English law, which would fundamentally change how English law works.


6. Whittle Movers Ltd [2009] EWCA Civ 1189, [15]; Proactive Sports Management Ltd v Rooney [2010] EWHC 1807 (QB), [776]. The plaintiff’s appeal to the Court of Appeal was allowed in part (see [2011] EWCA Civ 1444) although that does not affect the present point being made.


10. N Piska, “Hopes, Expectations and Revocable Promises in Proprietary Estoppel” (2009) 72(6) MLR 998. McFarlane, a proponent of the estoppel solution, suggests that reliance may be reasonable if an agreement in principle is in place and one party has promised to honour that agreement: see McFarlane (2010) 9(2) OUCJL 95, 121. Such a suggestion however severely limits the availability of an estoppel solution, as parties often conduct negotiations on a “subject to contract” basis. See also A Silink, “Equitable Estoppel in ‘subject to contract’ Negotiations” (2011) 5 J Eq 252.

Second, and more importantly, we do not agree that the existing approaches within English law are so unsatisfactory as to justify a search for novel solutions. The problem lies in the present lack of precision in distinguishing how the law of contract and the law of unjust enrichment both have relevant roles to play in dealing with the problem. To some extent, this has been exacerbated by the lack of clarity in the content of the law of unjust enrichment.

The first and second approaches described above commonly focus on a dominant approach with no or little room for an alternative. In contrast, this paper takes the view that there can be room for applying both contract and unjust enrichment analyses, provided that clear doctrinal lines are drawn between them. In order to show this, the third part of this paper (which immediately follows this) will discuss the limitations of the implied collateral contract technique.

The fourth part of this paper will argue that the recognition of this contractual model does not preclude the operation of the restitutionary model. This involves addressing two questions: first, why the law of unjust enrichment should allow recovery in some cases when the law of contract denies recovery; and secondly, why there is a need for unjust enrichment analysis (instead of contract) if the cases essentially involve some form of agreement that the services performed will be paid for.

The fifth and final part will propose a principled framework for the claim in unjust enrichment, specifically addressing the problems associated with identifying and quantifying the enrichment as well as finding the unjust factor for the claim.

III. THE CONTRACTUAL MODEL

A. General principles

Somewhat ironically, a claim for work done in anticipation of a contract may nonetheless lie in contract. Through their conduct, the parties may have come to an agreement without the execution of formal documents, or they may have reached an agreement of a smaller scope.12 The legal device through which these possibilities are reached is the (real) implied contract.13

An agreement, whose terms are implied by conduct rather than by express words or signed documents between the contracting parties, is an implied contract. Such contracts will not be implied unless necessary.14 It has been said that “necessary” means to give “business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that

12. A similar idea is that of the “provisional” contract. McGuinness argues that in some situations where work has started before a contract is concluded, there will be a “provisional contract”, which is decipherable from the objectively ascertainable documents exchanged between the parties: see J McGuinness, The Law and Management of Building Subcontracts, 2nd edn (Blackwell, Oxford, 2007), 19. This idea is supposedly derived from the judgment of HHJ Thornton QC in Hall & Tawse South Ltd v Ivory Gate Ltd [1996] 62 Con LR 117, [3].

13. This can be distinguished from historical quasi-contract, which has been rejected explicitly in Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, 710 (Lord Browne-Wilkinson).

business reality and those enforceable obligations to exist”.15 This reiterates that the courts should be slow to imply a contract, unless there is cogent evidence to demonstrate that the formation requirements are satisfied.16 Indeed, no contract will be implied if the parties have acted inconsistently with an intention to contract.17

B. The limits of the contractual model

1. An elaboration of the implied contract approach

The implied contract approach has been used by both courts and academics to explain liability for work done in anticipation of a contract. Havelock, in a recent article, argues that the implied contractual approach can indeed be used where the facts support an implication.18 According to Havelock, such situations arise where there is either an “express undertaking” of responsibility by the defendant over the services provided or an “informal arrangement” between the parties to the same effect.19 While we agree that a contract can be implied on an express undertaking of liability, some caution needs to be exercised in relation to the implication of the same through an “informal arrangement”. As Havelock also seems to suggest,20 certain cases that were seemingly resolved by an implied contract may well be wrongly decided from a doctrinal perspective.21

Thus, notwithstanding the utility of the contractual model, it should not be over-stretched. The key to implied contracts is the finding of an intention to contract. In particular, as we will see below, there is a need to be clear as to what the parties intended. An intention to contract cannot extend to each and every conceivable contract of whatever scope. The intention to contract must be tied to a specific scope of contract.22 In a recent article, Davies argues that cases of anticipated contracts can be resolved exclusively within contract and so there is neither room nor need for restitution.23 He suggests that, even if the parties did not reach the hoped-for main contract, there could be a collateral agreement of a smaller scope as long as it can be established that the parties have “agreed that the services would be paid for”.24 The “consensual nature of the transaction” puts it within contract.25

Davies’ proposed contractual approach is founded on three basic tenets. First, contracting parties may reach a collateral agreement of a smaller scope than the hoped-for main contract that had been the subject matter of the parties’ negotiations. In a proposed main contract containing several cross-promises, Davies’ proposition necessarily means

16. That parties had relied on the agreement only makes it easier for the court to find that there is an enforceable agreement and imply a term to resolve any uncertainty: see G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd’s Rep 25.
17. This is particularly the case if they would or might have acted exactly as they did in the absence of a contractual relationship: The Aramis [1989] 1 Lloyd’s Rep 213, 224 (Bingham LJ).
19. Ibid., 75–77.
20. Ibid., 77.
21. An example given was Latchin v General Mediterranean Holdings SA [2003] EWCA Civ 1786.
22. See, eg, Eugena Ltd v Gelande Corp Ltd [2004] EWHC 3273 (QB), [85–87] in which the court correctly limited the scope of the contract argued for upon examination of the relevant evidence.
24. Ibid., 471.
25. Ibid.
that those cross-promises are capable of forming separate collateral agreements. Second, such collateral contracts are not unenforceable even if the parties did not agree on the exact price for the work done.26 What matters is that there is an “agreement” to pay for the work done and the court can fill in the “gaps” through the implication of terms. Finally, such collateral contracts are not precluded by a “subject to contract” clause in the draft main contract under negotiation because such a clause only precludes the formation of the main contract and not the collateral contract.27 While Davies’ approach appears simple and elegant,28 a close scrutiny reveals that it is not entirely free from problems.

2. The validity of collateral contracts

Davies’ key proposition is that collateral agreements may be made between the parties which effectively contain terms found in the hoped-for main contract. The validity of such collateral contracts depend on, first, the presence of essential terms and secondly, and more fundamentally, the parties’ intention for such contracts.

(a) Essential terms

First, the continued relevance of “essential terms” is important in considering this question.29 It is trite law that, before there can be a concluded contract, its terms must be certain and the agreement must similarly be complete.30 The requirement of certainty is such that the court is not required to make the contract for the parties. Accordingly, where the parties are not agreed on “essential terms”,31 the courts will not “make” the contract for the parties by implying agreement on such terms.

Davies relies on Rix LJ’s judgment in Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD32 and the relatively recent decision of the Supreme Court in RTS Flexible Systems v Müller33 for the proposition that courts should strive to preserve rather than destroy bargains and, where commercial transactions are concerned, the courts would be willing to fill in “gaps” in the contract by implying the necessary terms.34 However, since agreement on certain essential terms is a precondition to the formation of a contractual relationship, there is nothing to “preserve” unless and until there is agreement on those terms. Indeed, based on the various principles set out by Rix LJ in Mamidoil-Jetoil, it is obvious that courts should only play a facilitative role in preserving

26. Ibid.
27. Ibid., 474.
28. It is not disputed that the failure to prove the existence of the main contract ought not to prevent the proof of the existence of an implied contract of a smaller scope.
29. Of course, as pointed out in Barbudev v Eurocom Cable Management Bulgaria EOOD [2011] EWHC 1560 (Comm), [104], it is for the parties to decide at what stage they wish to be bound, and they can agree to be bound even though there are terms that remain to be agreed. However, this is still subject to satisfying the requirement of essentiality.
34. Davies [2010] CLJ 467, 471.
a bargain.\textsuperscript{35} Nowhere in the judgment was it suggested that an agreement may be foisted on the parties where none existed, especially if an essential term is absent. Thus, even if a contract may be broken down into a number of collateral agreements, in so far as one or more of such agreements are short of an essential term, it ought not to be possible for the court to “fill in” such lack using the process of implication of terms.

Nor have recent cases done away with the requirement of an essential term.\textsuperscript{36} Although Davies takes \textit{Müller} as support for the proposition that only “very rarely will a term be considered ‘essential’ if performance has been requested and accepted”,\textsuperscript{37} that statement does not deny the continued relevance of the concept. Further, it is relevant that the Supreme Court in \textit{Müller} found that the parties had concluded the main contract. The price had been agreed, extensive work had been undertaken and variations were not agreed “subject to contract”. It was not a case where the court had stripped away the uncertainty and artificially “preserved” a collateral contract of a smaller scope relating to the performance of the work. As such, \textit{Müller} does not concern a “collateral contract” and it is of little support for Davies’ thesis. In contrast, Robert Goff J, in \textit{British Steel Corp v Cleveland Bridge and Engineering Co Ltd},\textsuperscript{38} despite having referred to the possibility of an “if” contract, was still concerned that the parties had reached agreement on the ambit of their liability. That he regarded as an essential term which must be enforced together with any agreement as to price.

Both \textit{Müller} and \textit{British Steel} show further that the breaking down of a complex commercial contract into discrete promises each forming a binding contract is not usual. In both cases, the respective courts were looking at package transactions comprising the parties’ liabilities and benefits: in \textit{Müller} the Supreme Court was concerned with the parties’ principal contract; and in \textit{British Steel} the court was concerned with the possibility of a collateral contract with the requisite essential terms (as distinguished from a smaller “if” contract argued by the defendant). The general need for package transactions is also illustrated by the “battle of form” cases. As is well known, the majority judges in \textit{Butler Machine Tool Co v Ex-Cell-O Corp (England) Ltd}\textsuperscript{39} accepted the traditional approach in resolving such “battles”, which looks to when a particular party finally concedes by way of an unqualified acceptance.\textsuperscript{40} This shows that commercial contracts, subject to precise construction on the facts, generally come in packages. When commercial parties negotiate, they contemplate not the formation of discrete contracts, but a general contract which takes into account their general liabilities and benefits. To separate such a general contract into discrete collateral contracts seems to be unrealistic.

(b) An “agreement” to pay for the work is not necessarily an enforceable contract

Another danger of over-broadening the implied contract approach is that of hindsight reasoning. The danger of such reasoning is most clearly seen by a contractual resolution

\textsuperscript{35} \textit{Mamidoil-Jetoil} [2001] EWCA Civ 406; [2001] 2 Lloyd’s Rep 76, [69]. For example, where the parties have “acted in the belief that they had a binding contract” or where they “may desire or need to leave matters to be adjusted in the working out of the contract”.

\textsuperscript{36} See, eg, \textit{Barbudev} [2011] EWHC 1560 (Comm).

\textsuperscript{37} Davies [2010] CLJ 467, 474.

\textsuperscript{38} [1984] 1 All ER 504.

\textsuperscript{39} [1979] 1 WLR 401.

\textsuperscript{40} As opposed to a mere counter-offer.
of *Whittle Movers v Hollywood Express* as proposed by Davies. The parties in that case were negotiating for a long-term contract for the supply of services. Prior to the conclusion of a formal contract, Whittle Movers commenced work and invoiced based on the price agreed during the parties’ negotiations and subsequent invoices reflected the progress of the negotiations. Hollywood accepted the services and paid some of those invoices. Before the trial judge, both parties’ primary case was that there was a contract. Whittle Movers argued that a long-term contract had been concluded. The trial judge held that there was an “interim contract” entered into and the price was that as agreed between the parties during the negotiations for a long-term contract. On appeal, Whittle Movers argued that it had a claim in unjust enrichment instead.

Davies equates the defendant’s undertaking of financial responsibility for the work, the claimant’s performance of the work, and the defendant’s acceptance of the work as amounting to there being a *consensus ad idem* as to a collateral contract of a smaller scope. But Davies’ view is open to challenge. There is a difference between performing work in anticipation of a concluded long-term agreement and an intention to enter into a collateral agreement of a much smaller scope. Returning to our example, the parties in *Whittle Movers* never considered a collateral agreement. They were dedicated to concluding a long-term agreement, as evidenced by Whittle’s invoices that reflected the development of the negotiations between the parties for a long-term contract. It is artificial to say that there had been offer and acceptance when it was unknown to Whittle that it was an offer to procure work on an interim basis and the rate of remuneration for the work had not been discussed between the parties. The parties in *Whittle Movers* had simply taken a voluntary risk that a long-term agreement would be concluded. At best, the parties understood that the work would not be performed for free. Such an understanding, even if accompanied by a partial or substantial performance of the work, cannot automatically amount to a contractual arrangement of a scope the parties had never contemplated. This is because the intention must be aimed at such a specific arrangement; anything short of it will not suffice.

3. Implying terms

Davies’ suggestion that an essential term such as the rate of remuneration may be implied into the collateral contract of a smaller scope cannot be true all the time. This is illustrated by *Way v Latilla*. In that case, there was no agreement between the parties on the rate of remuneration for the plaintiff’s obtaining gold-mining concessions for the defendant, although there was an agreement on the type of remuneration. The House of Lords held that no contract was made but granted remuneration on the basis that there was a second contract of employment between the parties, with Lord Atkin stating that it was “plain that there existed between the parties a contract of employment”. The “plainness” of the existence of such a collateral contract stems from the underlying presumption that

44. [1937] 3 All ER 759.
“commercial parties confer benefits in the expectation of receiving payment”. However, it remains controversial as to whether Way v Latilla, which predated the recognition of the principle of unjust enrichment in Lipkin Gorman v Karpnale Ltd, should now be understood as part of the law of unjust enrichment which justifies the imposition of fair value for work done. This point of controversy was discussed in Benedetti v Sawiris, with Arden LJ taking the view that Way v Latilla concerns restitutionary quantum meruit and Etherton LJ taking the opposite view, that the case was “a classic case of a contractual term to pay reasonable remuneration”.

Whether terms can be implied to resolve problems of uncertainty or incompleteness is heavily dependent on the facts of the case. But, as a matter of principle, there is a difference between implication of terms pursuant to what the parties agreed at the point of formation and implication of terms post-contract formation to ensure that the contract is workable. Where there is already an intention to contract on the specific scale (as evident from implication of terms post-formation), it is less objectionable to imply a term to make that contract work. However, where the parties did not contemplate a contract of a smaller scale, then a term should not be implied in order to ensure that contract’s formation in the first place. In such cases, the contract will generally be unenforceable for uncertainty or incompleteness. As Maugham LJ said in the oft-cited English Court of Appeal decision of Foley v Classique Coaches Ltd:

“unless all the material terms of the contract are agreed there is no binding agreement. An agreement to agree in future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it”.

Such statements are easy to make but difficult to apply. It is submitted that the correct approach depends on two factors, viz, whether the parties intended anything in addition to the “essential term” that is sought to be upheld and whether the contract in its present form is workable. Although the courts have turned to established business practice, previous dealings of the parties, and even the test of “reasonableness” to ascertain the completeness of contracts, the parties’ intention is all important. Therefore, in Perry v Suffields Ltd, an offer to sell a public house with vacant possession for £7,000 was accepted without qualification because the parties intended so without any “extra” provisions relating to, inter alia, the date for completion and the payment of deposit. An intention to be bound solely by price seems easy to find since price is the fundamental touchstone of a contract. However, if price was not agreed between the parties, the courts have still been willing to imply a price, but only if there was found to be a prior intention.

47. [1991] 2 AC 548.
49. [2010] EWCA Civ 1427.
50. Ibid., [53]
51. Ibid., [148].
52. [1934] 2 KB 1, 13.
53. Hillas v Arcos (1932) 147 LT 503.
54. Ibid.
to have the price settled by recourse to reasonable means.\textsuperscript{57} \textit{Hillas & Co Ltd v Arcos Ltd}\textsuperscript{58} is a good example: an option to buy timber was held binding although there was no price specified because it provided for the price to be calculated by reference to the official price list. On the other hand, it would be inappropriate to imply a term of reasonable remuneration in two types of case: first, where the parties have very different views as to the rate of remuneration which was the precise reason why they could not agree on the contract price in the first place, and second, where the parties have not addressed their minds to the rate of remuneration. To imply a term on price in either type of case is to \textit{impose} an intention on the parties. This is all the more inappropriate where the term is implied to find an implied contract.

The second element of “workability” is related to the requirement of certainty such that the court is not required to make the contract for the parties. Given freedom of contract, courts are not going to construct a contract between the parties if the terms are uncertain. Thus, in \textit{G Scammell & Nephew Ltd v Ouston},\textsuperscript{59} the House of Lords refused to enforce an agreement to acquire goods “on hire-purchase” because it was not possible to decipher what sort of hire-purchase terms the parties had agreed. The precise factual matrix is, in the final analysis, all important, bearing in mind the important fact that the focus ought always be on the \textit{substance} of the transaction. Conversely, in \textit{Perry}, it was possible for the court to conclude that some contractual agreement had been reached since the parties agreed that the public house was to be sold for £7,000 and, accordingly, the parties could be taken to have agreed to a simple agreement of sale.

4. Two interpretations of “subject to contract”

Where negotiations are conducted on a “subject to contract” basis, Davies takes the view that such clauses do not preclude the formation of a collateral contract because that clause merely precludes the main contract. On this narrow interpretation of the phrase, the question becomes whether a collateral contract can be implied, a question already discussed in the preceding section. It is, however, an open question whether “subject to contract” clauses must necessarily be construed in such a manner.

There seems to be no reason why “subject to contract” clauses may not be read more broadly to preclude any contractual relationship between the parties further to the letter of intent pending the conclusion of a formal contract, including Davies’ collateral contract. By this reading, the pertinent question is not whether a collateral contract can be implied,\textsuperscript{60} but whether the parties have waived the “subject to contract” requirement. Establishing whether there is such a waiver on the facts of the case requires us, then, to consider the intentions of the parties which might underlie their mutual communications and dealings, in the period following the issue of the letter of intent. The requirement that

\begin{itemize}
\item 57. This can be contrasted with the sale of goods cases where the Sale of Goods Act 1979, s.8 has codified the common law implication of a reasonable price without reference to any such prior intention. However, in these cases, the contract would have satisfied the formation requirements. Indeed, this supports our view that implication should not be used to satisfy the formation requirements where such requirements are clearly not satisfied. Also see E Peel (Ed), Treitel, \textit{The Law of Contract}, 13th edn, (Sweet & Maxwell, London, 2011), 55–60.
\item 58. (1932) 147 LT 503.
\item 59. [1941] AC 251.
\item 60. The answer is no, such implication being precluded by the “subject to contract” clause.
\end{itemize}
the parties’ intentions be objectively ascertained means that express words in the contract are not determinative. It has been said that, in very strong and exceptional circumstances, the courts are willing to go behind the express words used and ascertain whether the parties had waived the express requirement of “subject to contract”. The latter is in fact illustrated by the recent example of *RTS Flexible Systems v Müller*, where the Supreme Court inferred that parties had agreed to waive the “subject to contract” clause.

**C. Avoiding over-narrowing of the contractual model**

Just as we should not overly broaden the contractual model, we should not narrow it too much. There is a real risk that courts may unduly limit the reach of contractual approach by thinking that the law of unjust enrichment (which has developed only belatedly) can now provide a solution to the parties. Evidence of such judicial thinking can be found in Waller LJ’s judgment in *Whittle Movers v Hollywood Express*. In reversing the lower court’s decision that an interim contract had been concluded between the parties, Waller LJ accepted as correct the approach that the courts should not strain to find a contract given that a restitutionary remedy can solve most if not all of the problems. With respect, this seems to put the cart before the horse. It is a fundamental principle of the law of unjust enrichment that a contractual regime precludes restitutionary relief. Accordingly, whether a claim for work done in anticipation of a contract can succeed by way of a restitutionary claim is not just separate from, but is subsequent to, the question whether there was a contract governing the payment or non-payment of the work performed in the first place.

The contractual model has a more obvious role to play in simple and straightforward transactions. In such cases, save where both parties deny the existence of a contract, a real implied contract can usually be found where one party has performed work that has been accepted by the other party. Even if they have not agreed on the price for the work done, it will usually not be objectionable to imply a term of reasonable remuneration, unless the evidence clearly suggests that the parties are clearly not at consensus ad idem on this matter. In “difficult” cases, however, the role for contract law is more curtailed. These “difficult” cases are typically ones where the parties are negotiating for a complex contract on a “subject to contract” basis and have yet to reach agreement on the complete set of terms, including “essential” terms. The role for contract law is more curtailed in such cases because the parties may not have the precise intention to enter into legal relations in the form of a limited collateral contract. Further, due to the complexity of the transaction, there is the additional problem of whether the parties’ agreement is complete and certain as amounting to an enforceable contract. The courts should not strain to find a contract in each and every case merely to justify liability to pay for the work done, if to do so is tantamount to imposing intentions on the parties.

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IV. WHAT IF THERE IS NO CONTRACT: CAN THERE BE A RESTITUTIONARY CLAIM?

A. The distinction between contract and restitution

If no contract is found on the facts, cases have shown that the party who had carried out the work prior to the execution of the final contract is not barred from claiming for restitution.66 Although this has been largely accepted, Davies suggests that a party who performs services prior to reaching any agreement is a risk-taker and, as such, neither the law of contract nor the law of unjust enrichment should show sympathy to such a claimant, who must be taken to have accepted the risk that he would not be able to recover anything for the work done.67

Davies’ view finds seeming support in the case of Regalian Properties Plc v London Docklands Development Corp,68 where the parties conducted their negotiations on a “subject to contract” basis. In that case, Rattee J held, inter alia, that, where parties had used the words “subject to contract”, and no contract had been concluded, losses should lie where they fell.69 However, this reasoning has been subject to criticisms.70 First, as Mannolini has astutely pointed out, in an unjust enrichment claim the only crucial question is whether the defendant has been enriched.71 If no enrichment is shown, there could be no claim in restitution. Rattee J need not have resorted to the reasoning that the phrase “subject to contract” generally bars a claim for restitution.

Secondly, and more generally, although there is “nothing unjust about being visited with the consequences of a risk which one has consciously run”,72 this raises a question as to the nature and extent of such risk. It is arguable that the risk a claimant takes which militates against the finding of liability in the law of unjust enrichment is not necessarily the same risk that militates against the finding of a contract. There will be no liability under the law of unjust enrichment if a claimant has taken a risk that his work will not be paid for.73 On the other hand, there will be no liability under the law of contract if a claimant has taken the risk that his work is not performed in pursuance of a concluded contract. Thus, whilst a contractual regime also ensures that the claimant is remunerated, the basis of remuneration is different.74 It is one that has been agreed between the parties and one that reflects the claimant’s expectation interest. Remuneration in accordance with the principles of unjust enrichment is assessed based on the gain to the defendant and a

68. [1995] 1 WLR 212.
69. Ibid., 231.
72. Stephen Donald Architects Ltd v King [2003] EWHC 1867 (TCC); 94 Con LR 1, [79] (HHJ Richard Seymour QC).
73. See infra, Part V. The key idea underlining a successful claim in unjust enrichment in cases of anticipated contracts is the defendant’s assumption of the risk of financial responsibility.
74. Of course, to the extent that the contractual measure of quantum meruit is often tied to reasonable value of services, the assessment may be practically indistinguishable from the restitutionary measure barring any restitutionary defences. However, this does not detract from the fact that the basis of liability is different.
valuation that is imposed on the parties. It does not take into account the losses to the claimant or what its bargaining position can command in the market.

Indeed, in *Countrywide Communications Ltd v ICL Pathways Ltd*,75 Nicholas Strauss QC stated that “a court will at least be more inclined to impose an obligation to pay for a real benefit, since otherwise the abortive negotiations will leave the defendant with a windfall and the plaintiff out of pocket”.76 It is suggested that a court will be more inclined to impose an obligation to pay in such circumstances because it is less likely, where a real benefit is conferred on the defendant, that the parties would have any prior understanding that this real benefit should not be paid for even where the hoped-for main contract is not concluded. Thus, in *Whittle Movers*, the defendant’s undertaking of financial responsibility for the work, the claimant’s performance of the work, and the defendant’s acceptance of the work do not necessarily amount to a collateral contract of a smaller scope. There remains the question whether the claimant is prepared to run the risk of not being paid if the hoped-for main contract is concluded. He may be prepared to run the risk that he will not be paid on a certain basis and the parties’ rights and obligations are not regulated by a contractual regime. But this is different from saying that the claimant has run the risk of not being paid at all. Returning to *Whittle Movers*, one cannot reasonably say that the parties had an understanding of any sort that the work would be provided gratuitously if the hoped-for main contract is not concluded.

**B. A test based on categorisation?**

If we accept that there can be a claim in unjust enrichment following the failure of a contractual claim, it remains to be examined how to draw the line between contract and unjust enrichment. We do not think it is possible to lay down a more or less definitive categorisation for analytic purposes, such as Havelock has suggested. According to Havelock, situations in which work was done in anticipation of a contract can be categorised under three main headings: (a) “non-contractual request situations”, (b) “contractual request situations”, and (c) cases concerning preparatory work rendered on a “subject to contract” basis.77 While helpful in terms of drawing some general common fact patterns in existing cases, such categorisation runs the risk of being too rigid.

It suffices to point to some potential problems. The general problem concerns the predictive value of the categorisation. While useful as a way of understanding past cases, it is difficult to say that an express undertaking per se would lead to the conclusion that there is a contract. An express undertaking must be accompanied by other elements of a valid contract to form a valid contractual obligation.78

More specifically, there is also the problem of distinguishing an “express undertaking” from an “informal arrangement”. While it is true that the existence of an express undertaking will usually result in contractual liability, it is less clear what an “informal arrangement” is. It seems that the determinative question must be whether there is an

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75. [2000] CLC 324.
76. Ibid., 349.
77. Havelock [2011] RLR 72, 73. In respect of contractual request situations, Havelock distinguishes between “an express undertaking by the defendant for payment of the services” (express undertaking) and “an informal arrangement between the parties for payment of the services” (informal arrangement).
78. To be fair, Havelock does allude to this: see *ibid.*, 74.
undertaking to pay for the work, not how the arrangements were concluded. In *Way v Latilla*, there was an assurance by the defendant that the plaintiff would receive some interest in the concessions. While not as certain as the express undertaking in *Brewer Street Investments Ltd v Barclays Woollen Co Ltd*, it is unclear why this amounted to a mere “informal arrangement”, which puts it in a category of “weaker” contractual liability. In both cases, there was arguably some undertaking of responsibility (even expressly in *Way v Latilla*). It seems therefore that the distinction between an “express undertaking” and an “informal arrangement” is very thin and may be too difficult to draw.

Instead of a categorisation approach, we would suggest a flexible approach which looks to various indicators of a contract, as outlined above. If there is no contract between the parties, one still needs to have a principled framework in unjust enrichment to cater for the situation being discussed. This is an important task because many challenges to the legitimacy of a restitutionary solution are aimed at the difficulty in casting the problem as an unjust enrichment. This is a task that we take up in the following part.

**V. UNJUST ENRICHMENT**

*A. Quantum meruit*

The task is made more difficult by the continued incantation of the language of *quantum meruit* (fair value for services rendered) and *quantum valebant* (fair value for goods supplied) in unjust enrichment cases. Although modern cases have emphasised that *quantum meruit* awards are founded on the principle of unjust enrichment and not on the fiction of implied contract, the retention of the anachronistic language of *quantum meruit* jeopardises the development of the law of unjust enrichment, as can be seen in the following two instances.

First, in *Yeoman’s Row Management Ltd v Cobbe*, Lord Scott of Foscote considered three “separate” grounds for the award of a personal remedy in common law: (a) unjust enrichment; (b) *quantum meruit*; and (c) failure of consideration. However, there is really only one cause of action—unjust enrichment. Failure of consideration is an unjust factor and *quantum meruit*, in the context of *Yeoman*, is a label for a restitutionary

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79. [1937] 3 All ER 759.
82. In *RTS Flexible Systems Ltd* [2010] UKSC 14; [2010] 1 WLR 754, the claim was couched in the language of *quantum meruit*. In *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB), Beatson J referred to the claim in unjust enrichment as restitutionary *quantum meruit* throughout the judgment.
86. Virgo (supra, fn.84), 180–182.
monetary award. Second, in *Benedetti v Sawiris*, Patten J, in quantifying the *quantum meruit* award, suggested that courts have a *wide discretion* in determining “a fair and reasonable sum”.[87] On appeal, Arden LJ opined that it would be inappropriate to depart from market valuation in favour of the value to the particular defendant if the value was less than market value.[88] Such remarks indicate a failure to appreciate that *quantum meruit* awards are restitutionary in nature, and what that means. Restitution for unjust enrichment is awarded on the basis of principle, not discretion.[89] Further, a value less than market value may certainly be awarded by the application of the principle of subjective devaluation.[90]

The confusion of legal principles could be better avoided if we analyse the cases in terms of: (a) enrichment; (b) at the expense of; (c) unjust factor; and (d) defences. The discussion below will focus on the elements of enrichment and unjust factor, which some have said to be confusing. This has led some to take the view that the unjust enrichment analysis is not up to the task of resolving the cases of precontractual liability. We would agree that unjust enrichment analysis is not, *alone*, sufficient to explain all such cases—but that is not to say that it *never* has explanatory force in this context.

**B. Enrichment**

The enrichment inquiry in a general context has two elements: (a) identification and (b) quantification. Focusing on the first element, to prevent too much restitution, the enrichment test should weed out cases where the work done was not of a kind that one would reasonably expect to be provided gratuitously and where the claimant is taking a risk. Both of these concerns run large where some form of payment is sought for work done in anticipation of a contract.

1. **Assumption of risk of financial responsibility for the benefit**

The test of enrichment in the context of work done in anticipation of contracts must be formulated based on the theoretical underpinning of the law of unjust enrichment. This paper proceeds on the basis that the law of unjust enrichment is underpinned by Weinrib’s account of corrective justice.[92] Drawing on the Kantian notion of “right”,[93] Weinrib explains that parties enjoy pre-transactional equality of self-determination. This means that individuals should not be deprived of their wealth unless they part with it voluntarily.

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87. *Benedetti v Sawiris* [2009] EWHC 1330 (Ch), [58].
88. [2010] EWCA Civ 1427, [84].
91. *Falke v Scottish Imperial Insurance Co* (1886) 34 Ch 234, 248.
93. Individuals have the right to bodily integrity and “external objects of will”. 
The first condition for restitutionary liability to arise is that the plaintiff has transferred value to the defendant where the plaintiff’s intention to transfer is, in some sense, defective. The second condition is that the defendant must have accepted the transfer of value on the basis that it is not being given for nothing. The correlative structure of restitutionary liability thus respects both the autonomy of the claimant and the defendant.

Clearly, the unjust factors are used as means of identifying the plaintiff’s defective intent, for the fulfilment of the first condition. As for the second condition, leading commentators note that the concept of enrichment should take into account the defendant’s freedom of choice.\(^{94}\) The question whether the defendant has been enriched may thus be reformulated as a question as to whether the defendant has accepted the transfer of value as not being provided gratuitously. This, however, does not mean that the law accommodates all idiosyncratic preferences of the defendant.

As a starting point, the law distinguishes between money benefits and non-money benefits. Money is the classic example of an incontrovertible benefit.\(^{95}\) This is not to say that everyone in this world subjectively considers money to be a benefit. However, the law’s compass of fairness and justice is based on the reasonable person. A reasonable person desires commercial value and would thus, without more, consider money a benefit. This starting premise cannot be faulted because money is in itself value and the measure of value.\(^{96}\) Goods and services, on the other hand, are not in themselves value, although they may have market value and may be converted into value upon sale. In exceptional cases, the provision of goods and services may constitute a saving of a necessary expense; but beyond such cases reasonable people may not consider their receipt as beneficial because they may not desire the particular service or goods or are unwilling to pay for them.

To prevent the infringement of the defendant’s freedom of choice, McInnes suggests that it must be shown that the defendant has assumed the risk of financial responsibility for the benefit.\(^{97}\) Mere desire is insufficient because one’s subjective valuation of a benefit does not necessarily mean that one is willing to pay for it.\(^{98}\)

2. Request from the defendant and receipt

Whilst a request from the defendant with the understanding that the requested work will be paid for is indicative of his choice to assume financial responsibility for the benefit, McKendrick has argued that the imposition of liability on the sole basis of a request for the benefit could lead to a multiplicity of cross-claims, as parties in negotiations often make requests of each other.\(^{99}\) McKendrick thus suggests that receipt is required to


\(^{95}\) BP Exploration Co (Libya) Ltd v Hunt (No 2) [1979] 1 WLR 783, 799 (Robert Goff J).


\(^{98}\) Ibid., 175.

\(^{99}\) McKendrick (supra, fn.5), 177.
complete the restitutionary formula for liability. This shows that the defendant has in his hands a benefit. On the other hand, cases such as Planche v Colburn and Brewer Street Investments Ltd v Barclays Woollen Co Ltd appear to contradict the requirement of receipt. It will be shown that receipt ought not to be a formal requirement.

Recent scholarship suggests that Planche v Colburn was not a case of restitution for unjust enrichment or quantum meruit. It has been suggested that it is best treated as a sui generis claim. Given that it was decided one and a half centuries before the recognition of the principle of unjust enrichment in English law and that the state of English contract law at that time was very different, the suggestion is defensible.

In Brewer Street, the parties were negotiating for a contract for a lease. Although the principal matters were agreed, while negotiations were ongoing the defendants requested the plaintiff landlords to carry out some alterations to the premises and undertook to pay for the same. Negotiations subsequently broke down because the defendants insisted that the plaintiffs grant them an option to purchase, although the plaintiffs had all along maintained that they would not do so. The Court of Appeal awarded restitution to the plaintiffs for the alterations that had been carried out.

The result in Brewer Street has been criticised on the basis that the defendants did not receive the benefit and were thus not enriched, as the plaintiffs remained in possession of the premises. The criticism is unmeritorious. In Brewer Street, the defendants did not stipulate that coming into possession of the premises was a condition of payment. As a matter of evidence, the defendants’ architect had written to the plaintiffs ‘unequivocally accepting responsibility for the cost of the work’ and the defendants requested that the work be commenced prior to the conclusion of the contract. In the circumstances, the defendants took the risk that no lease would be granted to them. They chose to consider themselves as having been benefited whether they would come into possession of the premises or not.

Based on the above analysis of Brewer Street, one is compelled to conclude that receipt is not a requirement in each and every case—it is open to the recipient to assume financial responsibility for the enrichment whether the enrichment is ‘received’ in some sense, or not at all. Ultimately, what is crucial is the defendant’s choice of when and how he considers himself to have been enriched and assumes financial responsibility for the enrichment. One defendant may decide that he need not be in physical receipt of the full performance but another defendant may decide that physical receipt of the full performance is a condition for payment. The defendant may choose what is of value to him and

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100. Also see Burrows, The Law of Restitution, 3rd edn (OUP, 2011), 46–47. Burrows similarly advocates that receipt is the crucial test for whether services are objectively beneficial.

101. (1831) 5 Car & P 58; 172 ER 896


is not confined strictly to economic value.\textsuperscript{109} That said, the defendant’s choice must be construed objectively, in the interests of fairness to the claimant.

### 3. Free acceptance or assumption of risk of financial responsibility?

Where the claimant commences the performance of the work without the defendant’s request, the claimant is usually a risk-taker. But, if the claimant delivers the work (which a reasonable man would understand to be provided non-gratuitously by the claimant) to the defendant and the defendant has received the same without protest where there is reasonable opportunity to make such protest or reject the benefit, it may be said that the defendant has assumed the risk of financial responsibility for the same.\textsuperscript{110} Equally, it may be said that the defendant has freely accepted the enrichment. Is there a difference between the two tests?

Turning first to the principle of free acceptance, Birks has described it in the following terms: “[a] free acceptance occurs where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept”.\textsuperscript{111} Free acceptance was initially conceived by Birks to be a test showing that the defendant values the benefit; but this conception had attracted many criticisms.\textsuperscript{112} Chief among these criticisms is Burrows’ argument that a defendant who foregoes an opportunity to reject the benefit may simply be acting indifferently.\textsuperscript{113} In defence of the concept, Birks later clarified that the principle of free acceptance is concerned with the unconscionability of the defendant’s conduct, and which therefore precludes him from raising an argument based on subjective devaluation to deny that he has been enriched.\textsuperscript{114} On the clarified conception of free acceptance, Burrows remarked that Birks merged the “unjust factor” inquiry and the “enrichment” inquiry.\textsuperscript{115}

Assumption of financial responsibility, on the other hand, is concerned with the defendant’s freedom of choice and comes very close to Birks’ earlier conception of free acceptance being based on the defendant’s valuation of the benefit. The difference between the two tests is that a person who values a benefit may not be willing to pay for it. Cases concerning goods and services generally reflect a requirement that the defendant has assumed the risk of financial responsibility for the benefit conferred.

In \emph{Cressman v Coys of Kensington},\textsuperscript{116} the Court of Appeal held that a defendant would have received an incontrovertible benefit if that benefit were readily returnable but the

\textsuperscript{109} \textbf{Brenner v First Artist Management} [1993] 2 VR 221, 257–259 (Bryne J).

\textsuperscript{110} \textit{Ibid}; McInnes (supra, fn.97), 181.


\textsuperscript{113} Burrows (1988) 104 LQR 576. Cf J Edelman, “The Meaning of Loss and Enrichment”, in R Chambers, C Mitchell and J Penner (eds), \textit{Philosophical Foundations of the Law of Unjust Enrichment} (Oxford, 2008), 234. Edelman argues that in such cases the defendant has a very small desire for the benefit “at least as much as the minimal effort required to speak out and ask the cleaner to stop” but questions if such desire met the \textit{de minimis} for imposition of restitutionary liability.


\textsuperscript{116} [2004] EWCA Civ 47; [2004] 1 WLR 2775.
defendant chose to retain it upon request for return. This test of enrichment is distinct and separate from Birks’ clarified version of free acceptance, which the court did consider but did not ultimately adopt as the basis for finding enrichment. The proof of an incontrovertible benefit necessarily means that the defendant is precluded from making any argument based on subjective devaluation. Underlining this “returnable benefit” test is the idea that the defendant has made a choice not to return a benefit when its return has been demanded and where the benefit could have been easily returned to the claimant. Such circumstances indicate that the defendant has assumed the risk of financial responsibility for the benefit as this is the only way in which he may become entitled to retain it. On the facts of Cressman, the defendant’s conduct (including the fact that he gave the mark to his partner) showed amply that he valued the mark. Making a choice to retain a benefit that is easily returnable and for which a request has been made for its return constitutes forgoing a reasonable opportunity to reject the benefit. That there has been a request for return negates any benefit of doubt that may be given to the defendant that he did not know that the benefit was not provided gratuitously.117

However, Weatherby v Banham118 shows that the Court of Appeal in Cressman may have articulated the test too narrowly and the proper basis for finding there is enrichment is simply evidence that the defendant has assumed the risk of financial responsibility for the benefit. In Weatherby v Banham, the claimant successfully recovered from the defendant the price of issues of the Racing Calendar sent to the defendant’s house. Unknown to the claimant, the defendant inherited the house from the subscriber of the Racing Calendar, who had passed away. Enrichment was established notwithstanding that the claimant did not ask for the return of the magazine. Although Lord Tenterden CJ was of the view the action was maintainable “[i]f the defendant receive[d] the books, and use[d] them”,119 there was no evidence to suggest that the defendant had read any of the magazines and thus subjectively valued the magazine, apart from his failure to return the magazines or notify the publisher of the death of the subscriber. Indeed, Lord Tenterden CJ was satisfied that the particular defendant should be liable because “the books [came] addressed to the deceased gentleman, whose estate ha[d] come to the defendant and he [kept] the books”.120 The result can, however, be justified on the basis that the defendant had assumed the risk of financial responsibility for the magazines. The issues were delivered over a two-year period during which the defendant, who was aware that the subscriber had passed away, had never once attempted to notify the claimant of the mistake or offered to return them. The defendant could not have reasonably argued that he did not know that the issues were provided non-gratuitously given that the Racing Calendar was not a magazine that was provided gratuitously to the public.

In Rowe v Vale of White Horse DC121 Lightman J approved the principle of free acceptance as a test of enrichment but he did not find that a case of free acceptance had been established on the facts of the case. In illustrating the principle with a common example, it is clear that Lightman J had in mind the principle of free acceptance based on

117. Cf G Virgo, “Enrichment: The Case of the Cherished Mark” (2004) 63 CLJ 280, 282. Virgo suggests that the defendant’s knowledge that the claimant wanted the mark to be returned was indicative of fault on the defendant’s part.

118. (1832) 5 C & P 228.

119. Ibid.

120. Ibid.

the idea that the defendant has assumed the risk of financial responsibility for a benefit which he did not reject: 122

“On the facts of any ordinary case, a householder who receives and uses services from a supplier such as the Council must reasonably expect to pay for such services and will know that he has the option to reject them, and he will accordingly be liable under the principle of free acceptance to pay for them.”

Nevertheless, an argument based on assumption of the risk of financial responsibility may attract the same criticisms that have been directed at Birks’ original conception of free acceptance. Burrows’ point, that a defendant who fails to reject the goods or services rendered may simply be indifferent to the benefit received, seems, at least superficially, equally applicable to an argument premised upon such failure signalling an assumption of the risk of financial responsibility. It may also be argued that the principle is inconsistent with other areas of the law. For example, mere acquiescence does not amount to acceptance of an offer in contract law and the law of torts does not impose a positive duty to avert harm to the defendant. 123 Hence, why should the burden fall on the defendant to reject the benefit in the law of unjust enrichment? There is also a complaint that the principle is unclear on the steps a recipient is required to take to resist the benefit, especially if rejection may cause great inconvenience to him. 124

We will first address Burrows’ criticism based on the possibility that the defendant may be indifferent to the benefit. While the defendant’s act of forgoing an opportunity to reject the benefit may not indicate that he subjectively values the benefit (a matter of his state of mind), his doing so can certainly be seen as having chosen to pay for the benefit (a matter of observable conduct). The choice is to be construed objectively based on all the circumstances, and the defendant’s conduct is thus important.

This answer is insufficient until one can justify putting the burden on the defendant to resist the benefit. The justification is rooted on the basis that only a reasonable defendant deserves the law’s respect for his freedom of choice. A reasonable person would take advantage of reasonable opportunities to indicate his choices. The law protects the defendant who has not been given a reasonable opportunity to indicate his choice, but not otherwise. The law does not put the burden on the claimant to find out whether the defendant desires the benefit because the claimant may be genuinely mistaken in believing that the defendant had assumed financial responsibility for the benefit. If so, the plaintiff would never have realised that there was a need to make further inquiries. Extending protection only to a reasonable defendant is not an idea that is foreign to the law of unjust enrichment when it comes to protecting the defendant’s autonomy. We see the same principle at work in the defence of change of position. 125 In cases of defendant-instigated changes of position, Bant has persuasively argued that the defendant’s reliance on the receipt must be reasonable because “there is no very strong case for protecting defendants who fail to take reasonable precautions to protect themselves, such as by making enquiries

122. Ibid., [14].
124. Ibid., 464–466.
125. Recent accounts of the change of position defence have argued that the purpose (or one of the purposes) of the defence of change of position is the protection of the defendant’s autonomy: see R Grantham and C Rickett, “A Normative Account of Defences to Restitutionary Liability” [2008] CLJ 92, 119–124; E Bant, The Change of Position Defence (Hart, Oxford, 2009), 217–218.
as to the nature of a received payment”. Similarly, in the present context, it may be said that there is no strong case for protecting defendants who fail to take reasonable steps to protect their freedom of choice, such as by rejecting the benefit or protesting against the conferment of the benefit.

Finally, what constitutes reasonable steps will depend on the circumstances of each case, a concept that has been applied in many areas of private law. One must not equate the complexities of the factual inquiry with unworkability of the legal test.

4. Test of enrichment for pure services based on character of services?

Where services performed by the claimant are concerned, our proposed test of enrichment does not focus on the type of service, distinguishing pure services from services which result in an end product. Nor does our test focus on the receipt of the services as a formal requirement. As explained above, where the services in question do not constitute a saving of a legally or factually necessary expense, the focus of our test is on the defendant’s assumption of the risk of financial responsibility.

In a recent paper, Havelock similarly argues that pure services can qualify as an enrichment and receipt should not be the focus of the test of enrichment for pure services. However, Havelock recommends a test of enrichment for pure services that focuses on the character of performance. In his view, pure services will qualify as a negative enrichment where (a) they are performed by the claimant pursuant to the defendant’s request; (b) they constitute a saving of a factually necessary expense to the defendant instead of being merely preparatory; and (c) they are received by the defendant, whether in full or in part, as long as it can be established that the defendant has been saved a factually necessary expense. The key idea underlining Havelock’s enrichment test for pure services is the proof of saving of a factually necessary expense to the defendant.

The problem with Havelock’s test of enrichment for pure services is that it is under-inclusive and potentially uncertain. First, an enrichment will be shown only in situations where the defendant has requested the services. This ignores the fact that a defendant may choose/accept a particular benefit notwithstanding that the conferral was initiated by the claimant. Further, Havelock does not explain why a request emanating from the defendant is crucial if the test of factual necessity can be satisfied on the facts. The proof of a factually necessary expense overcomes the argument of subjective devaluation at the first stage of showing the existence of an enrichment.

Second, the claimant must prove that the services constitute a saving of a factually necessary expense to the defendant. The test therefore does not capture situations where the services performed by the claimant constitute the saving of a legally necessary expense to the defendant, for example, where the defendant is under a statutory duty to perform certain services. The test also does not capture situations where the defendant merely

128. Ibid., 83.
129. But McInnes stressed that “the defendant is enriched only to the extent that he was saved a necessary expense”. The defendant is entitled to plead subject devaluation at the stage of quantification of the enrichment. See McInnes (supra, fn.97), 185.
desires the services and is willing to pay for them, but the services are not in any real sense “necessary” to him.

Finally, the concept of “factually necessary expense” is inherently uncertain, as nothing is strictly necessary. An overly inflexible test of factual necessity will render the test impracticable and of little use. An overly flexible test, on the other hand, will severely compromise the law’s respect for an individual’s freedom of choice. McInnes has argued that the identification of factually necessary expenses can begin by drawing analogies with rules concerning the enforceability of contracts for the provision of necessities of life to incapacitated persons.\textsuperscript{130} McInnes, however, admits that beyond necessities of life, it is unclear how far the courts will go in identifying factually necessary expenses.\textsuperscript{131}

Our proposed test for enrichment therefore avoids the problems which Havelock’s test may run into. By recognising that both the saving of a necessary expense and the defendant’s assumption of the risk of financial responsibility can establish an enrichment, our analysis is more realistic and avoids stretching the reasonable limits of the concept of factual necessity.

C. Unjust factor

Despite a line of cases on precontractual restitutionary liability, the exact unjust factor that should apply in such cases is still uncertain. This disappointing state of affairs is partly due to the courts’ preoccupation with the question of risk, which is in itself a conclusion.\textsuperscript{132} Further, in some cases, the defendant may have conceded on the element of unjust factor, as in \textit{Benedetti v Sawiris},\textsuperscript{133} thereby limiting the court’s analysis.

In the present context, there are several possible unjust factors: (a) free acceptance; (b) failure of consideration; and (c) unconscionability, “which may be the basis of the doctrine of proprietary estoppel”.\textsuperscript{134}

1. Free acceptance

Free acceptance as an unjust factor is problematic. In his last work, Birks admitted regret in creating a defendant-sided category called “free acceptance”.\textsuperscript{135} He attributed the elimination of this false category to Burrows’ analysis.\textsuperscript{136} Essentially, Burrows pointed out that many of the cases relied on by Birks as cases of “free acceptance” can be explained on other grounds.\textsuperscript{137} Burrows also found Mead’s arguments against the concept of “free
acceptance” persuasive. Indeed, in Cressman, the Court of Appeal was apprised of the difficulties with the concept of “free acceptance” both as an enrichment test and as a ground for restitution. As the case did not turn on the concept of “free acceptance”, the court did not decide whether it should be cut out from the law. Later cases which continue to mention the concept of “free acceptance” did not consider its conceptual difficulties. As such, it remains to be seen whether “free acceptance” may truly continue to be viewed as an unjust factor, though the academic view has clearly inclined against this.

2. Unconscionability

“Unconscionability” as an unjust factor is likewise fraught with difficulties. First, debate remains rife as to whether the law of unjust enrichment should also focus on the defendant’s conduct as a ground for restitution, as opposed to focusing only on the claimant’s imperfect intention to benefit the defendant and other policy-motivated grounds. This problem is exacerbated by the fact that “unconscionability” is “vague and wide-ranging.”

Perhaps, as an attempt to address the concern as to its vagueness, Goff & Jones explains “unconscionability” on the basis of proprietary estoppel, presumably meaning that the elements of proprietary estoppel may similarly be found in the unjust factor of unconscionability, ie (a) assurance; (b) reliance; and (c) detriment. If so, why should the response be restitution, instead of compensation for reliance loss? Arguably, further development along such lines by folding together “unconscionability” and “proprietary estoppel” could be seen as tantamount to “fashioning” a sword of promissory estoppel in the guise of unjust enrichment. The merits of such a development seem questionable, at least.

Finally, it may be inappropriate to characterise the typical behaviour of a defendant in cases concerning precontractual performance of work as being wrongful or unconscionable. Although Barker observes that the courts consider the relative fault of the parties in the course of negotiations to be a relevant factor, pointing out that the courts do

142. Edelman and Bant, 12; Birks, Unjust Enrichment, 2nd edn (2005), 42–43. In relation to unconscionable bargains, see Edelman and Bant, 32, in which the authors consider unconscionable conduct as a species of equitable wrongdoing. Cf M Bryan, “Unconscionable Conduct as an Unjust Factor”, ch.15 of S Degeling and J Edelman (eds), Unjust Enrichment in Commercial Law (2008); Bryan, in response, advances the view that unconscionable conduct can be an unjust factor. Also see Goff & Jones, [1.058–1.059] for support of accepting unconscionability as an unjust factor, provided it is clearly defined.
144. Evidence of such language is found in Nicholas Strauss QC’s judgment in Countrywide Communications Ltd [2000] CLC 324, 349.
145. Although fulfilment of expectations in specie is the typical outcome in cases of proprietary estoppel, Robertson argues that the paramount concern in determining the appropriate relief is to “prevent the claimant suffering harm as a result of his or her reliance”. Therefore, a claimant’s reliance interests may be adequately protected by way of an award of compensation in cases where the detriment suffered is purely financial or where the detriment may be quantified accurately. See A Robertson, “The Reliance Basis of Proprietary Estoppel Remedies” [2008] Conv 295.
investigate the reasons for a defendant’s unilateral withdrawal from the negotiations, the courts’ focus on fault is of debatable value. In many cases, it may be difficult to determine who caused the breakdown of negotiations. This is exemplified by the disagreement between the judges as to whether the defendant had been at fault in Brewer Street. It is noteworthy that Denning LJ contrasted a situation where parties fell out on a point which had not been agreed at all with a situation where one party was seeking to alter matters which have reached in-principle agreement. Where the former situation is concerned, Denning LJ was of the view that parties could not be said to be at fault if the negotiations broke down. But, even in the latter case, commercial parties should have the right to revisit agreed matters if required by new considerations to adjust the allocation of risks.

In this connection, it is important to note that the law does not presently impose a duty to negotiate in good faith. Nor can one describe unilateral withdrawal from negotiations for commercial reasons or self-interest as reprehensible conduct, justifying a legal response.

3. Failure of consideration

Failure of consideration is a well-established unjust factor under English law. It is an action for something which was given for a purpose which has failed. Consideration does not bear the same meaning as contractual consideration and is to be understood as a basis, a purpose or a contemplated state of affairs.

Edelman has recently argued that failure of consideration is the ground for restitution in precontractual liability cases. He argues that the question to ask in these cases is whether the claimant’s performance of the work was on the objective basis that it was part of an exchange. To put it simply, the question is whether the claimant has performed on the shared basis that the work will be remunerated. As such, where the defendant refuses to pay remuneration to the claimant, the basis has failed. Edelman further stressed that the basis which has failed must be shared between the parties and it is to be construed objectively. He also dismissed a unilateral mistake as a possible ground for restitution.

147. Brewer Street 1954 1 QB 425, 446 (Denning LJ); Countrywide Communications Ltd 2000 CLC 324, 349; Yule v Little Bird 2000 Unreported; 2001 WL 542118.

148. 1954 1 QB 425. Somervell and Romer LJ concluded that the defendant had been at fault. Denning LJ found neither party to have been at fault.


151. Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd 1943 AC 32.


153. See Edelman (supra, fn.132). Also see Burrows, The Law of Restitution, 3rd edn (2011), 372. Burrows similarly argues that failure of consideration is the unjust factor in such cases and the basis fails when the “defendant has refused to perform its promise (partially or totally) which was the claimant’s basis for rendering a benefit to the defendant”. Cf Havelock, who argues that the objective basis in precontractual liability cases is the common expectation that a contract will be entered into between the parties and, under this contract, the claimant will be remunerated for the work performed: see Havelock 2011 RLR 72, 86. However, this analysis does not explain why the claimant is entitled to remuneration when the basis fails, that is, when no contract has been concluded if both parties expect that work done by the claimant will be remunerated under the contract.


for bilateral non-contractual transactions.156 Drawing an analogy with contract cases, Edelman posits that in precontractual liability cases the law is similarly concerned with the “joint autonomy of parties and not the impairment of the autonomy of just one of them.” 157

Edelman’s analysis has helpfully cast light on this area of the law. There is some degree of congruence between the enrichment inquiry proposed in this paper158 and the unjust factor inquiry argued by Edelman—the common thread being the defendant’s assumption of the risk of financial responsibility for the benefit which in turn reflects the fundamental concern for the defendant’s autonomy. It must be emphasised that the concept of the defendant’s assumption of the risk of financial responsibility for the benefit does not render the analysis a contractual one in substance. The analysis in unjust enrichment only arises upon determining that there is no contract governing the payment or the non-payment of the benefit. There could be no contract where the court found that no contract has been formed on the evidence159 or where both parties deny the existence of a contract. Further, the defendant’s assumption of the risk of financial responsibility for the purpose of determining liability in unjust enrichment is not the same as his agreement to pay to the claimant a certain price in pursuance of a contract.160

However, one final obstacle remains. Davies has argued that failure of consideration is an unsuitable unjust factor for precontractual liability cases because the law161 does not presently allow partial failure of consideration which will be an obstacle for cases where the defendant has made some payment to the claimant.162 There are two oft-cited reasons for this requirement.163 First, restitution cannot be permitted to subvert contractual allocation of risk.164 Second, it may be difficult to apportion an entire obligation.165 However, these concerns do not apply in precontractual liability cases. There is no contract and hence no concern of the law of unjust enrichment subverting the law of contract.166 Further, modern courts are capable of engaging in complex and difficult valuation exercises.167 In any event, not every case involves complex and difficult apportionment. Accordingly, the requirement of total failure of basis cannot be justified in precontractual liability cases.

156. Such transactions concern the situation where two parties are in the course of negotiation and have yet to reach a binding agreement.
158. See ante, Part V(B).
159. See ante, Part III.
160. See ante, Parts III(B) and IV.
163. There are two other possible reasons for this requirement: (a) to prevent too much restitution; and (b) to prevent a claimant obtaining restitution when the defendant has conferred a benefit on him. Maher found all four reasons to be unmeritorious: see F Maher, “A New Conception of Failure of Basis” [2004] RLR 96, 105–106.
164. Roxborough v Rothmans of Pall Mall Australia Ltd [2001] HCA 68; 208 CLR 516, [106] (Gummow J).
165. Ibid.
166. However, the parties may agree to waive all legal claims against each other in the event of a failure to reach an enforceable agreement.
D. Quantification

Traditionally, *quantum meruit* awards are assessed objectively, by reference to market value. Benefit is valued at the time it is conferred. However, controversy remains as to the relevance of the price which a defendant would have been willing to pay for the benefit.168 The price that a defendant would have been willing to pay for a benefit may reflect his subjective valuation, which may or may not be linked to his objectively determined ability to obtain the same from the market at that preferred price.

One basic starting point is that the law of unjust enrichment is not concerned with the protection of a defendant’s subjective valuation but his freedom of choice. It has been suggested that Birks’ earlier conception169 of the subjective devaluation based strictly on subjectivity of value is wrong as a matter of principle.170 In *Sempra Metals Ltd v Inland Revenue Commissioners*,171 Lord Hope of Craighead clarified that market value may be departed from based on the circumstances of the enrichee, that is, what the enrichee could have otherwise realistically chosen. Burrows suggests that a price at which the defendant requested the benefit is relevant because a person may choose something only at a particular price.172 Burrows appears to restrict the relevance of the price which a defendant would have been willing to pay for the benefit to one that has been communicated to the claimant. If the claimant has duly provided the benefit without any protest on the price, this would have been a case of contract. One may therefore surmise that Burrows has in mind cases of incomplete or anticipated contracts where parties have communicated or negotiated on the contractual remuneration.

The recent case of *Benedetti v Sawiris*173 provides an opportunity to examine the relevance of parties’ precontractual bargainings to the valuation of the enrichment provided by one party to the other. The dispute concerned the measure of restitution for brokerage services provided by Benedetti to the defendant companies. The market value of the services was determined to be €36.3 million. At first instance, Patten J assessed the award at €75.1 million, based on an offer made by Sawiris to Benedetti after the completion of the services.174 On appeal, it was held that the services should have been valued at the market rate. Both Arden and Etherton LJJ agreed that the parties’ prior agreement (the Acquisition Agreement) as well as Sawiris’ post-transaction offer of €75.1 million were irrelevant to the assessment of the award.175 However, they clearly differed in their reasoning.

Arden LJ held that the court may take into account the parties’ prior agreement on remuneration or such other communications between them but will weigh these communications accordingly, in light of the circumstances.176 She recognised that such prior

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175. Rimer LJ agreed with the reasons given by Arden and Etherton LJ in relation to the valuation of the services and only gave reasoned judgment on issues of costs and interest: [2010] EWCA Civ 1427, [172].
176. *Ibid.*, [63].
agreement would carry little or no weight if it became irrelevant to the parties’ dealings or for the determination of the remuneration and agreed with Patten J that the Acquisition Agreement was no longer relevant to the parties’ dealings in the present case as the agreement contemplated a very different transaction.\textsuperscript{177} Drawing support from \textit{Way v Latilla}, Arden LJ further opined that the court may, in an appropriate case, depart from market rates in preference of rates that have been agreed between the parties in precontractual bargainings or rates which are based on the past course of dealing between the parties.\textsuperscript{178} She emphasised that the court would only take into account the “outward manifestation of the parties’ common intentions” but not one party’s subjective wishes not shared by the other party.\textsuperscript{179} Hence, she found that Patten J had erred in assessing the quantum based on Sawiris’ post-transaction offer of €75.1 million as that had not been accepted by Benedetti.

On the other hand, Etherton LJ held that market valuation is the default position, subject to the application of the principle of subjective devaluation or the principle of subjective revaluation, if the latter is found to exist.\textsuperscript{180} These two principles involve taking into account the actual characteristics of the defendant and circumstances to show that the actual benefit is less than or above the ordinary market value.\textsuperscript{181} The relevant characteristics or circumstances do not include the defendant’s emotional response to the claimant’s work or how generous he is.\textsuperscript{182} Of relevance are the conditions which justify adjusting the objective value of the benefit to a reasonable person in the same position as the defendant.\textsuperscript{183} Etherton LJ did not find that there was any condition on the facts to justify the increase of the objective value of the benefit. He was of the view that \textit{Way v Latilla} concerned a contract for reasonable remuneration and Patten J had thus erred in relying on Lord Atkin’s speech in this case in increasing the award from €36.3 million to €75.1 million.\textsuperscript{184}

While both Arden and Etherton LJJ were right in stating that the valuation of the services in the law of unjust enrichment is not concerned with the defendant’s subjective valuation, the reasoning of neither judge is entirely satisfactory. Arden LJ’s analysis, especially her emphasis on the “common intention” of the parties, has a strong contractual undertone. Moreover, she treats an in-principle agreement on the rate of contractual remuneration in itself to be relevant evidence of the market value. However, the parties’ in-principle agreement on a contractual remuneration may not always reflect the objective value of the benefit conferred. There are benefits of a contractual relationship which parties take into account when engaged in negotiations. They may propose terms which they are willing to commit to \textit{if and only if} the parties enter into a contract, for example, where the parties are contemplating a long-term contract.\textsuperscript{185} A party may be willing to offer a lower price in the hope of securing a long-term working relationship with a reputable partner.

\textsuperscript{177} Ibid., [67].
\textsuperscript{178} Ibid., [72].
\textsuperscript{179} Ibid., [72].
\textsuperscript{180} Ibid., [142–145].
\textsuperscript{181} Ibid., [144–147].
\textsuperscript{182} Ibid., [145].
\textsuperscript{183} Ibid., [145].
\textsuperscript{184} Ibid., [148–149].
By contrast, a plain reading of Etherton LJ’s judgment appears to suggest that the parties’ precontractual bargainings are irrelevant. But this would be incorrect. The objective market value of a benefit refers to the rate for “a reasonable person in the defendant’s position”. As such, the defendant’s view of the price as disclosed in parties’ precontractual bargainings is relevant to the extent that it is evidence of the objective value of the benefit to a reasonable person in the defendant’s position at the moment of conferral of the benefit in question. That said, one should note that post-transaction bargainings may be irrelevant and may not reveal the objective value of the benefit to the defendant at the moment of conferral. For one, the parties may have been influenced by the threat of litigation. Further, where the work concerned has no ready objective market value, the parties’ in-principle agreement on the rate of remuneration may be indicative of the objective value of the work to the defendant. An appeal to the Supreme Court is pending in Benedetti v Sawiris and it is hoped that the Supreme Court will take advantage of this opportunity to consider and clarify the relevant principles.

There remains the question of “the degree of abstraction, and relevant qualities of the defendant” that are to be ascribed to the reasonable recipient of a similar benefit. Edelman preliminarily concludes that there is no simple resolution, drawing reference to the different approaches taken to assess the characteristics of a reasonable person in determining whether a breach of duty has occurred in the law of torts. It is submitted that the issue in the law of unjust enrichment is less complicated than that which bedevils the law of torts. The breach of duty issue in the law of torts concerns whether there is liability in the first place. There are policy concerns underlining the reasonable standard of care to which people should adhere, especially in the area of professional negligence, where there is an impact on industry practices. For example, whether a junior doctor should be held to a lower standard than a senior doctor is a difficult question.

In summary, the quantification of restitutionary awards concerns the extent of liability which is underpinned by a principal concern to protect the defendant’s autonomy. The question is how much it would cost a particular defendant to acquire the same benefit in the market. The answer will depend on the kinds of choices which a particular defendant is able to make in the circumstances and the availability of credible evidence to prove these alternative choices.

VI. CONCLUSION

In this paper, we have shown that contract and unjust enrichment each have a proper role to play in cases of anticipated contracts and bright doctrinal lines can be drawn between the two areas of the law. We have explained that the courts should not adopt an overly expansive implied contract approach that amounts to an artificial construction of parties’ intentions. We have also recommended a framework for a claim in unjust enrichment for

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186. Edelman (supra, fn.113), 231.
188. In Benedetti v Sawiris [2010] EWCA Civ 1427, [87], Arden LJ agreed, obiter, that an offer made under the threat of litigation can affect the weight to be attached to the offer as evidence of the market value.
precontractual liability, to address any concerns that the law of unjust enrichment is inadequate to deal with such claims. Although, at a very general level, both contract and unjust enrichment are concerned with an understanding that the work done will be paid for, the nature and extent of the risk taken by the claimant, the nature of the liability under the respective area of the law and the substantive principles are not the same. It must also be emphasised that unjust enrichment analysis only arises upon determining that there is no contract between the parties in relation to the payment or non-payment of the work done. Contract and unjust enrichment are thus alternative claims, and not concurrent claims. An understanding that the work done by one party shall be paid for by the other does not amount to a contract in every case if, for example, the parties have not come to an agreement on “essential” terms or if they do not have the intention to enter into legal relations. The same facts may, however, be sufficient to support liability in unjust enrichment.