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UNJUST ENRICHMENT, LEAPFROGGING, AND A DEFENCE OF ENTITLEMENT

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This article argues that a defence of entitlement should be recognized in the law of unjust enrichment, consistently with the case law and sound principle, and in mutual support of a rule against leapfrogging. In so doing, this article also explores the relationship between unjust enrichment and contract.

Keywords: unjust enrichment – defence – entitlement – leapfrogging

I. INTRODUCTION

If you pay someone under a contract, and get nothing of what was promised in return, should you get your money back? If you give someone a generous gift, but only because they exerted an undue influence over you, should you get your money back? If you pay too much tax by mistake, should you get the extra money back? If the answer is yes, then the mechanism is the law of unjust enrichment, and that is why we have it.

We did not always have it. Once upon a time, problems now addressed directly by the law of unjust enrichment tended to be fudged through an unconvincing application of contract law. For example, if A paid B money by mistake, the law implied a promise by B to repay the

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money, and A could sue upon that implied promise. No doubt in most cases B should have repaid the money, but the *promise* to repay it was pure fiction, and objectionable on that basis alone. This approach, sometimes called implied contract theory, or in similar circumstances called quasi-contract,[2] imposed the regime of contract law, but inappropriately because no contract was ever agreed. It was the unhappy but necessary consequence of formulaic pleading practices and constrictive litigation processes which have long since gone.

The implied contract theory has now been judicially disapproved.[3] Instead, unjust enrichment has been recognized as a cause of action in its own right.[4] In general terms, unjust enrichment concerns basic rights which we get for free, and basic duties which we must comply with whether we like it or not. In this regard, it is more like tort than contract; with contract, extra rights must generally be bought with consideration, and duties are usually only binding if we agree to them.

Again in general terms, the law of unjust enrichment says that if you behave unjustly, and profit at my expense, then you will have to hand that profit over to me, your victim. It is not all unjust conduct which the law penalizes in this way. Similarly, it is not all unreasonable conduct which sounds in tort, and not all promises which result in a contract. Unjust enrichment only applies to those types of unjust conduct which the law recognizes as sufficiently serious to warrant intervention.

More specifically, what a plaintiff needs to show in order to found a cause of action in unjust enrichment is as follows: that the defendant has been enriched; at the expense of plaintiff;

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[2] This phrase derives principally from the judgment of Lord Mansfield in *Moses v Macferlan* (1760) 2 Burr 1005, 1008; 97 ER 676, 678

[3] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 710

[4] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

through a recognized unjust factor. After that, the defendant may be able to raise a defence.[5] If successful, the plaintiff will recover, in money, the enrichment which the defendant made at his expense. (Alternatively, in some cases, unjust enrichment might yield a subrogation remedy.[6])

One of the recognized defences to unjust enrichment is called change of position (we shall come across this again later). It applies where the defendant's position has changed as a result of his receipt such that it would be inequitable to require him to make restitution.[7]

There used to be discussion about whether unjust enrichment and restitution are the same thing. The terms were sometimes used interchangeably. The better approach, and standard modern practice, is to call the remedy restitution and the cause of action unjust enrichment. Restitutionary damages are also available in contract, tort and equity, but they tend to be rare. For example, restitutionary damages are available only exceptionally for breach of contract, at the discretion of the court, where the usual remedies of compensatory damages and specific performance are not adequate, and where the plaintiff has a legitimate interest in preventing the defendant's profit-earning activity.[8] Whereas in unjust enrichment, restitutionary damages are available as of right.

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[5] See for example: *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221, 227; *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [22]; *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79, [67]; *Benedetti v Sawiris* [2013] UKSC 50, [10]

[6] For example, see: *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221; *Kingsway Finance Ltd v Wang Qingyi* [2013] HKCU 1684

[7] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

[8] For example, see: *Attorney General v Blake* [2001] 1 AC 268, 285 (Lord Nicholls); *Union Knopf (HK) Ltd v Marcel Sossnowski* [2013] HKCU 2676, [240], [243]

Despite the death of implied contract theory, there is still a strong relationship between contract and unjust enrichment. Duress, undue influence, and unconscionable conduct can vitiate a contract; they are also recognized unjust factors. Mistake and misrepresentation can vitiate a contract; mistake is a recognized unjust factor (including those induced mistakes which would otherwise be called misrepresentation in contract law). A total failure to perform what was promised is a repudiatory breach of contract; that scenario also engages the unjust factor inaptly but commonly known as "total failure of consideration".

This overlap between contract and unjust enrichment is no doubt partly a legacy of the fact that the principles of unjust enrichment were developed latently within the confines of implied or quasi-contract. Regardless, it should not be surprising that conduct condemned and remedied in one area of law similarly finds remedies in other areas too. For example, tort law also recognizes pleas of duress and misrepresentation. But unjust enrichment is also broader than the shadow of contract law. We have already seen how restitutionary damages are exceptional in contract, but available as of right in unjust enrichment. Further, total failure of consideration applies not just to unfulfilled promises, but also to unfulfilled legitimate expectations which fall short of contract.[9] What is more, money can be recovered in unjust enrichment when it was paid under legal compulsion,[10] or pursuant to an illegal activity from which the plaintiff has withdrawn,[11] or in consequence of a public authority acting ultra vires.[12] And there is academic debate as to whether ignorance and necessity should also be recognized as unjust factors (although my view is no).

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[9] *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504

[10] *Exall v Partridge* (1799) 8 Term Rep 308

[11] *Tribe v Tribe* [1996] Ch 107

[12] *Woolwich Equitable Building Society v IRC* [1993] AC 70

Because unjust enrichment is relatively young as a cause of action, there are further controversies besides which unjust factors should be recognized. There is academic debate over whether unjust enrichment can yield proprietary remedies or invoke tracing (again my view is no). And there remains discussion about the possibility of leapfrogging. For example, A contracts with B who contracts with C, with the effect that A provides services directly to C. If B does not pay A under the A / B contract, can A leapfrog B and sue C in unjust enrichment?

This article argues in favour of recognizing an additional defence to a claim in unjust enrichment: a defence of entitlement. Put simply, a plaintiff cannot complain that a defendant's enrichment was unjust if the defendant was legally entitled to his receipt, for example because it was promised him under a contract or ordered by the court. A defence of entitlement has not yet been recognized by the courts, but it should be. First, the case law is consistent with, indeed best explained by, such a defence. Second, there is good reason in principle for the defence, and this is increasingly recognized by other scholars, albeit not in the same terms as argued for here. Further, this article also argues that a general rule against leapfrogging, which is well attested in the case law, stands in a position of mutual support with a defence of entitlement. What is more, by exploring the justifications for a defence of entitlement, we are also led to a clearer understanding of the relationship between unjust enrichment and contract.

II. A DEFENCE OF ENTITLEMENT

A defence of entitlement is consistent with the case law. Although the defence has not yet been recognized, there are a number of dicta which support it. For example, the courts have held that there is no obligation to make restitution where money is paid under a "legally effective transaction";[13] that a payee cannot be said to be unjustly enriched if he was "entitled to receive" the sum paid to him;[14] that there can be no recovery of mistaken payments if the money was paid for "good consideration".[15]

This last phrase needs unpacking. Paying money for "good consideration" means paying money under a contract. It expresses the idea that there can be no restitutionary recovery of money when the defendant was entitled to receive it under an effective contract. Indeed, the case law tends to suggest that the notion of good consideration and legal entitlement are interchangeable.[16] But we would do better to adopt the language of entitlement, and abandon the language of consideration, for two main reasons. First, the language of consideration tends to hark back to the time when unjust enrichment was still viewed as quasi-contract, when instead it is now its own independent cause of action, free from the fetters of formulaic pleading and implied but fictional contractual regimes. Second, as we have seen, unjust enrichment as a cause of action is broader than the shadow of contract law. So too the defence of entitlement extends

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[13] *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202, 208

[14] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 408;

[15] *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1980] QB 677, 695; *Yukio Takahashi v Cheng Zhen Shu* (2011) 14 HKCFAR 558, [38]-[39]

[16] *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110, 130, 132; *Jones v Churcher* [2009] EWHC 722, [41]-[42], [48]

beyond contractual entitlement, as we shall see below. It is therefore unhelpful to phrase the defence by reference only to contract.[17]

A defence of entitlement is not only consistent with the case law, it can explain it too. For example, a plaintiff cannot sue in unjust enrichment for the value of his services (ie quantum meruit) where the price is fixed by a contract.[18] This is because the defendant is entitled to receive those services at that price and on those terms. So too where a sailor died shortly before reaching the ship's destination, his wife could not sue for the value of his services when the contract provided that he would be paid only if he completed the whole voyage.[19] In other words, the defendant was contractually entitled to receive part performance without payment (the risk of only part performance had been taken contractually by the sailor).

A defence of entitlement is consistent with the trend of scholarly discussion, albeit that it uses different language. For example, Virgo talks about a "presence of basis bar" to unjust enrichment.[20] Burrows talks about legal entitlement being a "qualification" such that enrichment is not overall unjust.[21] Tettenborn,[22] and the editors of *Goff & Jones*,[23] discuss "justifying

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[17] Burrows also says that talk of "good consideration" is muddled, whereas the better view is to acknowledge openly the defendant's entitlement to the receipt. But although a defence of entitlement would be "elegant", he prefers to deal with the issue "upfront" by asking whether the entitlement is "outweighed" by the unjust factor: "Is There A Defence of Good Consideration?", in Mitchell and Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment* (Oxford: Hart, 2013). We return to this point below.

[18] *The Olanda* [1919] 2 KB 728; *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936

[19] *Cutter v Powell* (1795) 6 TR 320, 101 ER 573; see too *Sumpter v Hedges* [1898] 1 QB 673

[20] Virgo, "Demolishing the Pyramid – Presence of Basis and Risk-Taking in the Law of Unjust Enrichment", in Robertson, Tang (eds), *The Goals of Private Law* (Oxford 2009) 479, 488-504

[21] Burrows, *The Law of Restitution*, 3rd ed (Oxford 2011) 88-89. Alternatively, Burrows says that entitlement might "outweigh" the unjust factor: above (n 17).

grounds" which give the defendant a legal entitlement to keep what he has received despite unjust enrichment otherwise being made out.

All of these approaches are grounded in the simple but important point that a defendant cannot be described as *unjustly* enriched if he was legally entitled to his receipt. Nevertheless, this simple point is best served by using the language of entitlement, and for it to be recognized as a defence. The language of "presence of basis" is obscure; the "basis" which bars the cause of action appears to be precisely the fact that the defendant was entitled to his receipt. Similarly, what makes "justifying grounds" justified is again precisely the fact that the defendant was entitled to his receipt. And when it comes to "bars" to restitution, or "justifying grounds" for receipt, or "qualifications" which make enrichments not unjust, it is not immediately clear whether a claimant is obliged to disprove them, or whether this is a matter to be raised, or proven, by the defendant. At what point do these considerations arise in any analysis? Instead, recognizing entitlement as a defence gives it a clear role to play in the structure of any litigation or analysis, and so helps ensure that the simple point it encapsulates does not risk getting lost for want of any formal position. It also represents the natural order of the argument: the plaintiff proves his cause of action, demanding the return of the money; then the defendant proves that he is entitled to keep it anyway.

Further, it is not simply that a defence of entitlement gives honest expression to the intuitive but forceful claim that a defendant is not unjustly enriched when legally entitled to his receipt. The defence also achieves a result which is consistent in theory, both with other

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[22] Tettenborn, *Law of Restitution in England and Ireland*, 3rd ed (London 2002) 20-31; "Lawful Receipt – A Justifying Factor" [1997] RLR 1

[23] Mitchel et al (eds), *Goff & Jones: The Law of Unjust Enrichment*, 8th ed (London 2011) 21-77

approaches already recognized within unjust enrichment, and with the interplay between unjust enrichment and contract. More than that, a defence of entitlement consolidates these disparate other approaches, bringing them together into one neat package. It can thus claim a cohering and tidying effect.

To see this, let us assume a P / D contract pursuant to which P has promised to pay $100 to D. P pays the money. P now wants to recover the money in unjust enrichment. Perhaps P paid the money by mistake, for example through administrative oversight, not intending to pay the money at this time. This would be sufficient to found a cause of action in unjust enrichment (such a mistake being a recognized unjust factor).[24] Thereafter, there are a number of possibilities.

First, if P does recover the money, then D might sue under the P / D contract, because he was promised the money, yet now he does not have it. In which case, any success P might enjoy in recovering the money in unjust enrichment would be quickly undone by D's successful counterclaim for breach of contract.

Second, perhaps it might be argued that D could not sue under the P / D contract, on the basis that P's original payment fulfilled the P / D contract, thus rendering the contract spent, with no further remaining contractual rights or duties. Of course, there would be something very wrong if P could discharge his obligations by paying the money, only to recover the money later. It looks a bit like the old joke of paying at a vending machine with a coin on a string, yanking the coin back out once the vending machine has registered the order and delivered the goods. As a matter of theory, how can this result be precluded? One answer is to invoke the recognized defence in unjust enrichment of change of position: as a consequence of P's original payment,

[24] *Barclays Bank Ltd v WJ Simms Ltd* [1980] QB 677

D's position has changed, because his contractual right against P has been extinguished by P's performance, thus making it inequitable for P to recover the money, leaving D now without either money or contractual right to sue for it.[25] Thus the defence stops P from recovering the money in the first place.

Third, an alternative way of reaching that same result is to turn to the necessary element in any claim of unjust enrichment, namely, that the defendant be enriched. It seems straightforward to say that D is enriched by the money he receives from P. But Edelman and Bant suggest otherwise. They say that a defendant in such a position is never enriched: he merely exchanges one asset (the contractual right to payment) for another asset (the payment itself).[26] If D is not enriched after all, then P has no claim in unjust enrichment.

A defence of entitlement tidily draws all of these otherwise parallel possibilities together. It internalizes these arguments into a neat package. P cannot recover the payment because D was entitled under the contract to receive the money and keep it.

If P wishes to be successful, and avoid any defence of entitlement, then he must set aside the contract. That would then mean that D could not counterclaim for breach of contract, because there would be no contract to breach. It would also mean that D could not invoke a defence of change of position: if the contract is set aside, for that reason he legitimately loses his contractual right to sue, and not consequent to P's payment. And it would mean that D was enriched after all, receiving the money without giving up in exchange any contractual right to it, because he no longer has any such contractual right to give up. Put shortly, if the contract is set aside, D cannot

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[25] *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110, 126; *Yukio Takahashi v Cheng Zhen Shu* (2011) 14 HKCFAR 558, [39]

[26] Edelman and Bant, *Unjust Enrichment in Australia* (Melbourne 2006) 345

plead that he was entitled to the receipt. All of which further explains why it has been tentatively recognized in the case law that, before a plaintiff can bring a claim in unjust enrichment, he must first disable any contract with the defendant which applies to the transaction,[27] or perhaps at least disable the severable part of the contract which applies to the transaction.[28]

The need to set aside an underlying contract must be stressed. Consider the following example: A sells his property to B at an undervalue. This is something which happens very often, to a greater or lesser extent. There appears to be nothing preventing A from setting up a claim in unjust enrichment. After all, B was enriched by the difference between the sale price and the property's true worth, at the expense of A, who can invoke the recognized unjust factor of mistake (A got the price wrong). But economic reality is that we allow people like B to make such profits; capitalism permits B to benefit from his superior knowledge, or simply to cash in on a lucky opportunity. We do not re-open every contract of sale just because the seller later realizes he could have charged more. So what in theory stops A from recovering the missing value in unjust enrichment? The answer is a defence of entitlement: B is contractually entitled to receive the property at that price. If A wishes to recover the price differential, A must first set aside the contract of sale. And contract law only allows contracts to be set aside in a narrow range of circumstances. In particular, mistake is a very narrow doctrine in contract law, and would not avail A in circumstances as plain as these.

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[27] "To rely on total failure of consideration, the innocent party must clearly and unequivocally communicate its acceptance of the repudiation to the other party": *Fook Lee Holdings Ltd v Joy Future International Ltd* [2012] HKCU 897, [140]. Whereas affirmation of a contract precludes restitution: *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459.

[28] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; *Guido Van Der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB)

A defence of entitlement is not limited to contractual entitlement. It has the power to explain the case law more widely. Thus a defendant is entitled to his receipt where it was ordered to be paid him by a court judgment. It does not matter that the judgment proceeded upon a mistake; if the judgment is not set aside or appealed, then it remains valid, and so too does the defendant's entitlement to receive payment under it.[29] Also, a plaintiff cannot recover tax which the Revenue was entitled to receive, even if the plaintiff might otherwise have reduced its tax liability were it not for an earlier mistake (even an earlier mistake of the Revenue).[30]

In cases like these last two, the analysis is similar to contractual entitlement. If the plaintiff recovered in unjust enrichment, that might be undone by the defendant counterclaiming to enforce the judgment or the tax demand. Or, if the defendant cannot counterclaim because the judgment or tax demand has been fulfilled and so extinguished, that might raise a defence of change of position. Or the defendant is not enriched anyway where it merely exchanges one asset (the judgment or tax debt) for another asset (the payment itself). Again, all of these parallel arguments are consolidated in the defence of entitlement. For the plaintiff to avoid that defence, the entitlement (ie the judgment or tax demand) must be set aside – just as any contract must be set aside.

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[29] *Marriot v Hampton* (1797) 7 TR 269, 101 ER 969

[30] *Test Claimants in the Franked Investment Income Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103, [179]-[183], not discussed on appeal at [2012] UKSC 19; but see *Deutsche Morgan Grenfell plc v Inland Revenue Commissioners* [2006] UKHL 49

III. THE RULE AGAINST LEAPFROGGING

A transacts with B who transacts with C. The goods or services flow down the chain. If A goes unpaid, can A leapfrog B to sue C? This might be possible in a number of situations. First, A might be able to rely upon the laws of agency. But this can avail a plaintiff across a number of causes of action, and is nothing unique to unjust enrichment, so we shall not consider it further. Second, A might have a proprietary remedy which follows his property into the hands of C; or A might invoke the rules of tracing. But this has nothing to do with unjust enrichment either, if we accept the better view that unjust enrichment does not have proprietary remedies, and cannot invoke the rules of tracing.[31] Third, C might have committed some wrong against A which entitles A to sue him directly. This might allow for restitutionary remedies, but again it takes the matter outside of unjust enrichment. Fourth, the remedy of subrogation might put A into B's shoes and thus in a position to sue C. This can be compatible with unjust enrichment, but it is not a common solution. So let us put subrogation to one side, as a special case, and consider instead what remains of the general principle of whether A can leapfrog B to sue C in unjust enrichment.

The courts have repeatedly recognized a general rule against leapfrogging in unjust enrichment, insisting that the parties must be in a direct relationship,[32] although more recently

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[31] *Foskett v McKeown* [2001] 1 AC 102, 127; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [95]; Virgo, *Principles of the Law of Restitution*, 2nd ed (Oxford 2006) 11-14

[32] *Colonial Bank v Exhange Bank of Yarmouth* (1885) 11 App Cas 84, 85; *Brown and Davis v Galbraith* [1972] 1 WLR 997 (CA); *Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733, 749, on appeal at [1999] 2 AC 349; *Pan Ocean Shipping Co Ltd v Creditcorp, The Trident Beauty* [1994] 1 WLR 161 (HL); *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110 (CA); *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch); *Armstrong DLW GmbH v Winnington Networks Ltd.* [2012] EWHC 10 (Ch), [97]

there has been a softening of approach.[33] The general rule against leapfrogging can be justified by analogy to other familiar concepts in the law of obligations. In the tort of negligence there is a requirement of proximity. In contract there is a requirement of privity. In both there are further requirements of causation and remoteness. All of these concepts are rolled together in the necessary ingredient that any unjust enrichment be "at the expense of" the plaintiff – and that means at his *direct* expense.

For example, assume that A contracts with B who contracts with C, so that goods flow down the chain to C. If A is not paid by B, nevertheless the general rule against leapfrogging means that A cannot C sue in unjust enrichment. We could explain this in a number of ways. We might say that C is enriched only at the expense of C, who is liable to pay B under the B / C contract. Or we might say that C is enriched at the expense of B, who is liable to pay A under the A / B contract. C's enrichment at the expense of A is at a third remove, which is too remote, or lacks proximity or privity,[34] or it means that B's intermediary role breaks the chain of causation.[35] As a further alternative, C might be able to invoke a change of position defence: as a consequence of its receipt from A, C has incurred a liability to pay B under the B / C contract, while at the same time C's rights against B have been extinguished through B's performance in providing or procuring the goods for C.[36]

So already we have a number of familiar ways of justifying a rule against leapfrogging. We can now add a further approach: a defence of entitlement. Where A contracts with B who contracts with C, so that goods or services flow down the chain, C is entitled to the receipt under

[33] *Relfo Ltd v Varsani* [2014] EWCA Civ 360, [82]-[97]

[34] Virgo uses the language of privity: above (n 31) 105

[35] Burrows talks about breaking the chain of causation: above (n 21) 72

[36] *Yukio Takahashi v Cheng Zhen Shu* (2011) 14 HKCFAR 558, [38]-[40]

the terms of the B / C contract, and these might preclude A from suing C. This approach is an attractive and preferable addition for a number of reasons.

First, a defence of entitlement remains consistent with the case law (here, the case law against leapfrogging). By way of further example, charterers A hired a ship from owners B who assigned the right to receive hire to credit agency C. A made advance hire payments to C. The ship went off-hire while undergoing repairs, and could not return to service thereafter. A sought to recover the hire from C. The court held that A could only recover under the charter party from B. C was entitled to the hire under the B / C contract on terms which precluded any recourse by A.[37]

Similarly, builders A were sub-contracted to B who contracted with head builders C. B became insolvent. A could not sue C for the value of its work. This would otherwise side-step the insolvency regime: instead of C paying B, with that then shared rateably among B's creditors, including A, A would otherwise claim the money from C all for itself and in priority. But what is more, C was not enriched unjustly: C was entitled to receive the work on terms which obliged it to pay B only.[38]

Second, a defence of entitlement renders unjust enrichment more coherent, in two ways. Again it consolidates the law, drawing together into one neat package the various disparate approaches to the rule against leapfrogging. Also, it provides a single defence which applies across both two-party and three-party scenarios: A will have a defence of entitlement against any claim in unjust enrichment by B or C. Altogether this makes for a tidier analysis, without A

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[37] *Pan Ocean Shipping Ltd. v Creditcorp Ltd, The Trident Beauty* [1994] 1 All ER 470, especially at 475

[38] *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] 3 HKC 290; *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930

having to rely upon a number of different, if sometimes overlapping, approaches as against each separate party.

Third, a defence of entitlement is consistent with the position, adopted by scholars and the court, that A should not be able to leapfrog out of any contractual scheme.[39] After all, A has taken the contractual risk of looking only to B for payment, while C has taken the contractual risk of looking only to B for performance. C cannot sue A for non-performance. So why should A be able to sue C for payment? A defence of (contractual) entitlement meets this point head on, and thus openly and honestly, rather than achieving the result circuitously through a variety of indirect approaches.

Finally, it is worth remembering that a defence of entitlement is not limited to contractual entitlement. C may be entitled to the receipt for other reasons, perhaps because B was ordered by the court to provide the enrichment to C, or because B was obliged to do so by statute (as in the case of a tax demand) – or perhaps even because B has gifted the enrichment to C. The defence of entitlement prevents A, not simply from undermining any contractual regime, but also from subverting other lawful arrangements which affect B and C. This stops unjust enrichment from becoming too wide. Otherwise every B / C transaction would risk being re-opened by third party A (and by how many other parties further up the chain as well?). Any claim in unjust enrichment can only succeed if C's entitlement can be set aside, and it will be a very rare case when a third party can manage that.[40]

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[39] Burrows, above (n 21), 75; Birks, *Unjust Enrichment*, 2nd ed (Oxford 2005) 89-93; *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch), [68]

[40] An example might be where C is tainted by actual or constructive knowledge of B's undue influence over A, by analogy with *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44

IV. CONCLUSION

It is time to recognize a defence of entitlement: a defendant is not obliged to make restitution for any receipt he was legally entitled to, whether that entitlement was provided by a contract or in any other way. In order for a plaintiff to succeed in unjust enrichment, any such entitlement must first be set aside.

Such a defence is consistent with and explains the case law. It is consistent with the trend of scholarly discussion, but achieves the desired result more directly and obviously. It is explicable through (and so further consistent with) a range of different techniques already known to the law of obligations more generally, or recognized particularly within unjust enrichment, including the rule against leapfrogging. And yet it consolidates that diversity of disparate approaches into one straightforward argument. In doing so, it renders unjust enrichment more coherent, by providing a single defence in place of multiple arguments, and across both two-party and three-party scenarios. And all the while it is founded on a very simple but forceful justification which further renders the law intuitively intelligible: a defendant cannot be described as *unjustly* enriched when he was legally entitled to what he received.