**QUANTUM MERUIT: RIGHT OR REMEDY?**

Graham Virgo

Professor of English Private Law, University of Cambridge

**1. The new orthodoxy**

The law of restitution is that body of law which is concerned with the award of gain-based remedies, triggered either by the defendant’s unjust enrichment at the claimant’s expense, by the commission of a relevant wrong or the vindication of a property right. Within the law of unjust enrichment the defendant can be considered to have been enriched either by the receipt of money, property or services and the recognised grounds of restitution apply regardless of the nature of the enrichment. Where the defendant has been enriched by the receipt of services the remedy which is awarded is described as a *quantum meruit*, representing the reasonable value of the services provided. *Quantum meruit* itself originated as a form of action, but it was abolished by the Common Law Procedure Act 1852, along with other forms of action such as money had and received and *quantum valebat* (for the reasonable value of goods). Although the antiquated language of *quantum meruit* is still used, this can be considered simply to be a useful shorthand to describe the remedy awarded by the court where the defendant has benefited from the claimant’s services, which would otherwise have to be called ‘the reasonable value of the service provided’ measure. *Quantum meruit* has no bearing on the nature of the cause of action. Indeed, as Lord Atkin recognised in *United Australia Ltd v Barclays Bank Ltd*,[[1]](#footnote-1) as regards contracts implied to meet the perceived requirement of the old forms of action,‘the forms of action which have now disappeared should not in these days be allowed to effect actual rights.’ It follows that the language of quasi-contract to explain these cases has long been outmoded and should be comprehensively rejected.[[2]](#footnote-2) Neither does the use of the old language of *quantum meruit* have any bearing on the interpretation of the remedy, which is restitutionary in that it is concerned with valuing the benefit of the service to the defendant.

 The only problem with this new orthodox analysis of restitutionary claims for services is that it is one that is not shared by a significant number of judges and barristers. Although sometimes the courts have explicitly recognised that a remedy of *quantum meruit* lies within the law of restitution and is founded on the reversal of the defendant’s unjust enrichment,[[3]](#footnote-3) there have been cases where the courts have failed to refer to the law of unjust enrichment as the foundation for the award of a *quantum meruit* remedy, preferring instead to use the language of unconscionability,[[4]](#footnote-4) or simply assuming that *quantum meruit* is a cause of action in its own right.[[5]](#footnote-5) This reference to *quantum meruit* outside of the law of unjust enrichment, might be rejected straightforwardly as unprincipled, with the judiciary simply not understanding the revolution which the law of obligations has undergone over the last 25 years, whereby the law of unjust enrichment is the essential touchstone against which gain-based remedies need to be assessed,[[6]](#footnote-6) at least as a cause of action distinct from that founded on wrongdoing and the vindication of property rights, neither of which will be of relevance to gain-based claims involving services. But such a dismissal of recent decisions is not satisfactory, for two reasons. First, it ignores the contemporary state of the law. If judges, especially senior judges, are referring to *quantum meruit* as a cause of action, it is important to consider whether, contrary to the trend of unjust enrichment jurisprudence and analysis, such a cause of action does exist and, if it does, what its component elements are and how it should be analysed and justified. Secondly, even if *quantum meruit* is analysed simply as a remedy, it may not necessarily form part of the law of restitution, in the sense of the law of gain-based remedies, but might be contaminated with compensatory notions of reimbursement and reward. Whether this is the case and should be the case needs to be considered with care.

This paper seeks to identify whether there is an independent law of *quantum meruit*. In doing so it seeks to identify the elements of a *quantum meruit* cause of action and assesses whether such a cause of action is sufficiently distinct from the law of unjust enrichment to justify its independent existence. Ultimately this paper seeks to ask the questions: does *quantum meruit* create rights or is it only a remedy, and, if only a remedy, what is its rationale: compensation or restitution, or both?

**2. The recognition of a claim in *quantum meruit***

The most significant case where *quantum meruit* was explicitly recognised as a claim in its own right is the decision of the House of Lords in *Yeoman’s Row v Cobbe*,[[7]](#footnote-7) which was the last pronouncement of the House of Lords on the law of unjust enrichment; one which leaves a lot to be desired. Although this case was primarily concerned with an unsuccessful claim founded on proprietary estoppel, a personal claim for the provision of services did succeed. What makes the case so significant, and unsettling, is that three distinct claims were recognised for which personal remedies were considered to be available.

In *Yeoman’s Row* the claimant had entered into an oral agreement in principle with the defendant to buy the defendant’s land. No written contract was made. The claimant successfully made an application for planning permission to develop the land. Negotiations broke down and the claimant sought a restitutionary remedy from the defendant. This claim succeeded on the basis that the defendant had benefited from the claimant’s services in obtaining the planning permission. Lord Scott, with whom the other judges agreed, recognised that there were three well recognised common law remedies available to the claimant and that each produced a similar result:[[8]](#footnote-8) unjust enrichment; *quantum meruit* and restitution.

*(i) Unjust enrichment*

Lord Scott assumed that there was a remedy for unjust enrichment, without analysing its nature or ambit. The defendant was considered to have been enriched by the grant of the planning permission procured by the claimant. The value of this enrichment was considered to be what the defendant had saved by not having to pay for the planning permission, rather than the increase in value of the property after the grant of the planning permission, since it did not create the development potential of the property but merely unlocked it. This is a perfectly logical analysis of whether the defendant had been enriched and whether this was at the claimant’s expense. But Lord Scott concluded that a remedy for unjust enrichment would lie without identifying the third element of the formula, namely the ground of restitution. He had earlier[[9]](#footnote-9) indicated that the injustice of the enrichment in this type of case could be identified from the defendant’s ‘repudiation of the oral agreement in principle that frustrated the basis upon which [the claimant] had been relying’. This might be regarded as amounting to the ground of total failure of basis, in that the claimant had received nothing in return for his services in obtaining planning permission, or even as equating with Birks’s absence of basis thesis,[[10]](#footnote-10) in the sense that the repudiation of the oral agreement meant that there was no loner any basis for the claimant’s provision of the service. The reference to reliance might even indicate a new approach to the identification of the ground of restitution. Much more rigorous analysis is required before we can be certain what the trigger for such a claim might be.

*(ii) Quantum meruit*

Alternatively Lord Scott recognised that the claimant was entitled to ‘a *quantum meruit* payment for his services in obtaining the planning permission.’[[11]](#footnote-11) He did acknowledge that the value of this remedy should ‘represent the extent of the unjust enrichment for which the [defendant] should be held accountable to’ the claimant. Perhaps this indicates that Lord Scott assumed that *quantum meruit* is triggered by unjust enrichment, but the structure of his judgment (treating unjust enrichment and *quantum meruit* as distinct ‘remedies’) and use of the language of representation, rather than being a remedy for unjust enrichment, means that the position is unclear.

*(iii) Restitutionary remedy*

Finally, Lord Scott recognised that the claimant was entitled to a restitutionary remedy grounded on what he called ‘total failure of consideration’, but which is increasingly being called total failure of basis.[[12]](#footnote-12) He considered that this would arise where the claimant had provided services in return for a legal but unenforceable promise which the promisor refused to carry out after the services had been received. The promisor’s refusal to perform would constitute a complete failure of performance for what the claimant had provided. The claimant could then recover a fee for the services provided. Lord Scott considered that this restitutionary remedy would be co-extensive with the *quantum meruit* remedy, but presumably was not identical with it.

 In the end the claimant was specifically awarded a *quantum meruit*, rather than a remedy in unjust enrichment or a restitutionary remedy. This was assessed on the basis that the defendant was entitled to the use of the architect’s plans which had been used to obtain the planning permission, so that the claimant could recover the expenses which he had reasonably incurred in getting the plans ready and applying for planning permission, plus interest.

 Lord Scott’s brief analysis of the common law remedies leaves many questions unanswered. It is easy to place too much weight on a small part of a judgment, which may have been structured as it was to replicate the way the case was argued by counsel. But that would be to dismiss too readily the ratio of a decision of the House of Lords, with which all the other of their Lordships agreed. Judges in the appellate courts have a responsibility for accuracy of analysis and, crucially, to avoid unnecessary complexity. If the underlying cause of action is not understood by counsel, the judge needs to explain clearly why they have got it wrong. Judges, especially in appellate courts, do not just decide the case before them; they clarify and rationalise the law for the benefit of those who do not or cannot go to court.

Further, although Lord Scott did acknowledge that the amount of *quantum meruit* did represent the extent of the defendant’s unjust enrichment and that it was co-extensive with the restitutionary remedy, this might simply be an acknowledgment that it is a gain-based claim. He did describe *quantum meruit* as a remedy, but he also described unjust enrichment and failure of consideration in the same way, neither of which can be described as remedial in any meaningful sense. All of this is very confused, especially when the orthodox analysis of the law of unjust enrichment would suggest that Lord Scott had divided a single claim into three parts. For the preferable analysis of the claim, consistent with the orthodox interpretation of the law of unjust enrichment, is that the underlying claim was grounded on unjust enrichment, with the relevant ground of restitution being total failure of basis, since the claimant did not receive what he had expected following the grant of planning permission. The remedy would be restitutionary, since it would be assessed with reference to the defendant’s gain, and, since the enrichment involved services, the appropriate measure of the gain would be the reasonable value of those services: a *quantum meruit*. That the claimant could obtain a personal restitutionary remedy in these circumstances was not controversial; that the claimant had three distinct ways to obtain this is. Lord Scott was simply describing one claim but from three different perspectives: the underlying cause of action, the ground of restitution and the remedy.

 But the House of Lords did not adopt this orthodox analysis. The unified claim was broken up so that three distinct common law ‘remedies’ were available. This cannot be simply dismissed as *obiter dicta*; this is what the case decided. *Quantum meruit* consequently has an existence independent of unjust enrichment and restitution, albeit perhaps co-extensive with both of these so-called ‘remedies’. And this conclusion cannot simply be dismissed by arguing that *quantum meruit* as a form of action was abolished in 1852. It does not follow that *quantum meruit* cannot have any independent existence as a cause of action subsequently. The law has moved on since 1852 and new causes of action can be created; the recognition of the law of unjust enrichment is testament to that.

 It follows that *Yeoman’s Row v Cobbe* can be interpreted as authority for the recognition of *quantum meruit* as a cause of action creating a right in the party who provides the service. The key question then is whether this can be analysed in terms of unjust enrichment in all cases and, if not, what the components of a claim in *quantum meruit* might be to distinguish it from unjust enrichment.

**3. The rationale of *quantum meruit* as a claim**

Following the decision of the House of Lords in *Yeoman’s Row* it remains a matter of particular controversy as to what the underlying rationale of the claim in *quantum meruit* might be. Four options can be identified: contract, unjust enrichment, unconscionability and reliance.

*(a) Contract*

English law has been hostile to claims for services rendered or work done in the absence of a contract between the parties.[[13]](#footnote-13) No contractual obligation should be considered to have arisen unless there is an express or implied request from the defendant to the claimant for the work to be done or the services to be rendered. The significance of the contract for claims for services was recognised by the Supreme Court in *RTS Flexible Systems Ltd v Molkerai Alois Müller Gmbh.*[[14]](#footnote-14) In that case the parties started to perform whilst they were still negotiating a contract. Before any contract had been signed or executed the defendant had paid to the claimant 70% of the money which would have been due under the contract had it been finalised for the work it had done. The defendant refused to pay the balance because of an alleged failure to comply with the agreed specification. It was held that there was sufficient evidence of an intention to create legal relations, including that there had been performance pursuant to the putative contract. It followed that the contract governed their relationship and there was no need to consider *quantum meruit.*

The implications of this decision are significant, since it suggests a greater willingness to recognise a contract, so that there is much reduced scope to consider an independent claim in *quantum meruit*. For, as Tindal CJ recognised in *Planché v Colburn*[[15]](#footnote-15) ‘when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*’.[[16]](#footnote-16) The language of *quantum meruit* is, however, used within the law of contract, where the parties have not agreed a scale of remuneration for services, for then the law will impose an obligation to pay a reasonable sum and will call this *quantum meruit*.[[17]](#footnote-17) Similarly, *quantum meruit* may also be relevant where the parties have acted outside the agreed terms of their bargain. In such circumstances the court may imply a collateral contract for the supply of services such that the defendant is required to pay the reasonable value of the services provided. So, in *Steven v Bromley Son*[[18]](#footnote-18) Bankes LJ recognised that: ‘When the charterers tendered a cargo which was outside the charterparty, and for which no rate of freight had been agreed, the inference is justified that they made an offer to the owners to pay a reasonable freight if the cargo were accepted for carriage.’

 A point may be reached, however, where the court cannot identify an obligation to pay for the reasonable value of services within the law of contract. This is especially the case where services are rendered in anticipation of a contract being made subsequently. In *British Steel Corp v Cleveland Bridge Engineering Co Ltd*[[19]](#footnote-19) Robert Goff J recognised that the obligation to pay *quantum meruit* imposed in such cases sounds in restitution and not in contract. In many cases whether the claim lies within contract or in the law of unjust enrichment does not matter, since, regardless of how the claim is characterised, the defendant will be awarded the reasonable value of the service provided. Sometimes it may matter as regards defences, since, if the claim lies within unjust enrichment the change of position defence would apply and contractual defences, such as for late delivery, would not. The decision whether to analyse the claim as contractual or restitutionary is illustrated by the so-called ‘if’ contract, whereby one party agrees to pay reasonable remuneration if the other supplies a service. In *Whittle Movers Ltd v Hollywood Express Ltd* [[20]](#footnote-20) Waller J recognised that there may not be much difference between an ‘if’ contract and a claim in unjust enrichment, although he emphasised that the court should not strain to find a contract where terms are still under negotiation, because the award of a restitutionary remedy in unjust enrichment would solve most of the difficulties. No contract was identified in that case because the parties had accepted that the negotiations were subject to contract and that no binding agreement would come into effect until a formal document was signed. The later decision of the Supreme Court in *RTS Flexible Systems* suggests a preference for contractual analysis where services have been provided in anticipation of a contract being made, but there must comes a point, as illustrated by *Whittle Movers*, where the uncertainty of the negotiations makes it impossible to identify a contract.

 The relationship between contract and *quantum meruit* is significant in one other respect, which has proved to be especially controversial. Where the claimant has provided a benefit to the defendant pursuant to a contract and the defendant then breaches that contract, the claimant has a choice whether to sue for breach of contract and seek a compensatory remedy, or sue in the law of unjust enrichment and seek restitution of the benefit transferred, typically on the ground of total failure of basis.[[21]](#footnote-21) This is, at least, the situation where the benefit is money. Restitution will then be available, and especially attractive, even though the contract constituted a bad bargain. Where, however, the claimant has rendered a service to the defendant, there has been a tendency to confine the claimant to his or her contractual remedies and not allow him or her to seek a *quantum meruit* outside of the contract. This was the position adopted in *Taylor* *v* *Motability Finance Ltd*,[[22]](#footnote-22) where the defendant had terminated an employment contract with the claimant who argued that this constituted a repudiatory breach so that a restitutionary remedy could be awarded outside of the contract for the work done. This argument was rejected because the claimant had fully performed the contract by providing services to the defendant and so, although the primary obligation to perform had been revoked, the contractual regime subsisted in terms of the secondary obligation to pay damages for breach.[[23]](#footnote-23) It follows that, where a claimant has paid money to the defendant and has received nothing in return, the contractual regime no longer applies once the contract has been discharged, so that a restitutionary claim will lie.[[24]](#footnote-24) Where, however, services are provided by the claimant, the contractual regime still governs the award of remedies, despite the repudiation of the contract.[[25]](#footnote-25) Cooke J recognised that:

there is no room for a remedy outside the terms of the contract where what is done amounts to a breach of it where ordinary contractual remedies can apply and payment of damages is the secondary liability for which the contract provides.[[26]](#footnote-26)

This distinction was approved in *Howes Percival LLP v Page*[[27]](#footnote-27) where it was held that, where a solicitor had a conditional rightto receive payment for services if litigation was successful, once the defendanthad committed a repudiatory breach of the contract there was no right to obtaina *quantum meruit* for the services provided by the solicitor, but only damages forthe breach of contract. This would be particularly significant where the defendantwas likely to lose the litigation, for then the solicitor would not have suffered anyloss.

 The legitimacy of confining a claimant to a contractual claim where services had been provided was considered in Australia in *Sopov v Kane Constructions Pty Ltd (No 2)*,[[28]](#footnote-28) where the Court of Appeal of Victoria held that, where a building contract had been terminated by the claimant builder’s acceptance of the defendant landowner’s repudiatory breach, after building work had been substantially undertaken by the claimant, the claimant could elect to sue on a *quantum meruit* rather than for compensatory damages for breach of contract. But the court only reached this decision because the judges felt bound by prior authority so to decide.[[29]](#footnote-29) The court considered that the arguments in favour of confining the claimant to compensatory damages were very powerful.[[30]](#footnote-30) The essence of these arguments echoed the reasoning of Cooke J in *Taylor v Motability Finance*. Essentially, termination of a contract following a repudiatory breach discharges the parties from further performance of the contract, but rights which have already been acquired are not discharged. If there is a valid and enforceable agreement which governs the right to payment for services provided it is not necessary for the law to impose an obligation to pay a reasonable remuneration for the work done.[[31]](#footnote-31) It follows that there is no room for a restitutionary remedy to be awarded, because the claim for payment is governed by the contract under which the work was carried out. Those cases which recognised that the claimant could choose whether to sue on the contract or for *quantum meruit* were founded on the so-called ‘rescission fallacy’, whereby the acceptance of a repudiatory breach ‘rescinded’ the contract ab initio, so that there was no longer a valid agreement to govern the claim for services. It is now clear that acceptance of a repudiatory breach does not have this result and so a claim in *quantum meruit* outside of the contract should not be available in such circumstances.

 The Victorian Court of Appeal considered this to be a powerful argument,[[32]](#footnote-32) but, because of the state of the English and Australian authorities, concluded that this was a matter for the High Court of Australia to resolve. The High Court of Australia refused leave to appeal.[[33]](#footnote-33) This might be considered to be an implicit endorsement of the view that *quantum meruit* is available as an alternative to compensatory damages, and indeed the Victorian Court of Appeal considered that the earlier refusal of the High Court to grant leave to appeal on this point constituted implicit endorsement of the availability of the alternative *quantum meruit* claim.

 It is indeed the case that the ‘rescission fallacy’ has been rejected, but it does not follow that the option to sue for *quantum meruit* rather than for breach of contract has been excluded. It has long been recognised, in claims for restitution of money paid under a contract which is subsequently breached, that the claimant can recover the money paid on the ground of total failure of basis, even though the contract was a bad bargain so that the restitutionary remedy was preferable to compensatory damages for breach. There is no policy reason for a different rule applying where the enrichment is services. There is also authority in favour of *quantum meruit* being available as an alternative to the contractual remedial regime. In *De Bernardy v Harding*[[34]](#footnote-34)Alderson B recognised that:

Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a *quantum meruit* for the work actually done.

In *Prickett v Badger*[[35]](#footnote-35) an agent was employed to sell land at a certain price, but, although he found a purchaser, the owner refused to sell and wrongfully revoked the agent’s authority. The agent successfully sued for reasonable remuneration for his work and labour up to that date even though he also had a claim for breach of contract. In *Elek v Bar-Tur*[[36]](#footnote-36) David Donaldson QC reluctantly accepted that a claimant who has provided services pursuant to a contract which has been repudiated following breach by the defendant, can bring a restitutionary claim to recover the value of the services. However, following *Taylor v Motability* *Finance*,[[37]](#footnote-37) he recognised that this only applies where the claimant has been unable to complete his contractual performance and, as a result, the defendant’s counter-performance is not yet due. Where, however, the claimant has fully performed and is entitled to payment under the contract, the claimant is confined to a contractual claim.

Where the party who has provided the services pursuant to a contract then breaches the contract, a claim for *quantum meruit* will generally be unavailable, even if the other party has terminated the contract, save where the claimant has performed a distinct part of a divisible contract,[[38]](#footnote-38) or where the Apportionment Act 1870[[39]](#footnote-39) applies to enable an employee who had been dismissed to recover a proportionate part of his monthly salary for the period he had actually worked, despite his breach of the contract of employment. In *Miles* *v* *Wakefield Metropolitan District Council*[[40]](#footnote-40) Lords Brightman and Templeman considered that a claimant who had taken industrial action in the form of a ‘go slow’ would have been entitled to a *quantum meruit* in respect of the work done.[[41]](#footnote-41) This is, in fact, dubious because the contractual regime would typically still be in existence, since the contract will not have been repudiated.

Although the law of contract may provide for the reasonable remuneration of claimants who have provided services to the defendant, either through implied terms or an implied contract, the law of contract does not provide a complete regime for recovery. There will still be circumstances where an obligation to pay for the services arises outside of the law of contract, either because there is no applicable contractual regime or because the claimant has opted to bring a claim outside of that regime. It is then necessary to identify the basis for bringing such a non-contractual claim.

*(b) Unjust enrichment*

That unjust enrichment does have a role to play in determining liability for the provision of services is supported by *Yeoman’s Row v Cobbe* itself. For Lord Scott in that case recognised that one of the routes to obtain a remedy was in unjust enrichment, although he failed to identify all the elements of such a claim satisfactorily. Subsequent decisions have recognised explicitly that a claim in unjust enrichment is available where the defendant has benefited from the claimant’s services. The leading case now is *Benedetti v Sawiris*,[[42]](#footnote-42) where the claimant had provided services for the benefit of the defendant anticipating that he would be paid under a contract which was not concluded. Although the decision of the Supreme Court was that the claimant could not recover from the defendant, because the defendant’s liability was considered to have been discharged by previous payments, that the defendant was liable in unjust enrichment was accepted.

 To establish that the defendant has been unjustly enriched the claimant needs to show that the defendant received an enrichment, at the expense of the claimant, within one of the recognised circumstances of injustice, and none of the defences to such a claim apply.[[43]](#footnote-43)

*(i) Enrichment*

First, it needs to be shown that the defendant has received a valuable service from the claimant such that the defendant can be considered to be enriched by it. Following the decision of the Supreme Court in *Benedetti v Sawiris*,[[44]](#footnote-44) when determining whether the defendant has been enriched, it is necessary to adopt an objective and subjective test of enrichment. The objective test has two components, which were described by Lord Reed as the ‘ordinary market value’ and the ‘objective value of the benefit’.[[45]](#footnote-45) The former is the price which would have been agreed in the market in the absence of some unusual characteristic of the purchaser, whereas the latter is the value of the benefit to the reasonable person in the position of the defendant which would have been taken into account by the market and which may be higher or lower than the ordinary market value. Usually both values will be the same, and it will be sufficient to assess what it would have cost a reasonable person to acquire the goods or services elsewhere in the market. The objective value of the benefit may be higher or lower than the ordinary market value by virtue of the defendant’s position, so it is necessary to consider what aspects of the defendant’s position would be taken into account by the market. The defendant’s position does not include characteristics such as his or her generous or parsimonious personality,[[46]](#footnote-46) but will include, for example, the defendant’s buying power in the market which enables him or her to negotiate a lower price, the defendant’s credit rating and even, according to Lord Reed,[[47]](#footnote-47) the defendant’s age, gender, occupation and state of health.

 Once it has been established that the defendant had been objectively enriched, it is then open to the defendant to subjectively devalue this enrichment. This was formally recognised by a majority in *Benedetti v Sawiris*,[[48]](#footnote-48) who held that the objective value of the benefit may be reduced with reference to the defendant’s own personal preferences and idiosyncratic views as to the value of the enrichment. Reliance on subjective devaluation will itself be defeated, however, if the benefit was incontrovertibly beneficial or had been requested or freely accepted by the defendant. The provision of a service will be incontrovertibly beneficial to the defendant where, for example, he or she has been saved an expense which would inevitably have been incurred had the service not been provided,[[49]](#footnote-49) or the service has been realised in money, for example by the sale of a car which has been repaired and improved by the claimant as a result of which the value increased.[[50]](#footnote-50) A number of cases which have considered the ambit of a claim in *quantum meruit* have specifically used the test of free acceptance to show that the service was beneficial to the defendant.[[51]](#footnote-51) Free acceptance will be established where the defendant had the opportunity to reject the service,[[52]](#footnote-52) knowing that the service was not provided gratuitously[[53]](#footnote-53) and failed to reject it.

It follows from the requirement that the defendant must have received a benefit that the defendant cannot be considered to have been enriched simply because the claimant commenced work in providing a service. But not every case is necessarily consistent with this principle. This is famously illustrated by *Planché* *v* *Colburn*,[[54]](#footnote-54) where the defendants engaged Planché to write a volume for publication in the defendant’s proposed series of *The Juvenile Library*. After Planché had written some of his work, the defendants abandoned the whole publication, and it was held that Planché might, without tendering his completed work, sue to recover reasonable remuneration for his work already done. The court particularly stressed that the remedy was a *quantum meruit* and that this was not being awarded for breach of contract.[[55]](#footnote-55) Since the defendant had not received a benefit this cannot be analysed as a claim within the law of unjust enrichment, since there was no gain to reverse. The remedy which was awarded could be justified if it is characterised as a remedy awarded to compensate for expenditure incurred in reliance on the contract, a measure of damages which is now clearly recognised for breach of contract,[[56]](#footnote-56) although this flies in the face of the clear decision that the claim was not founded on breach of contract. Possibly instead this case should be used as authority for the recognition of a distinct claim in *quantum meruit*. Of course this would be easier to justify since the case was decided before 1852 when *quantum meruit* was abolished as a form of action. Since then unjust enrichment has been recognised and, since the defendant had not been benefited, the claim should have failed.

*(ii) At the expense of the claimant*

Secondly, it must be shown that the defendant was enriched at the expense of the claimant. Usually the defendant will have been enriched directly at the expense of the claimant,[[57]](#footnote-57) although it has been recognised that an indirect enrichment will suffice, at least where as a matter of economic reality the defendant can be considered to have been enriched at the claimant’s expense.[[58]](#footnote-58) A particularly significant issue relating to enrichment by a service is whether the value of the defendant’s gain should be capped by the claimant’s loss, such that restitution is allowed only to the extent that loss and gain correspond. The authorities on this point are unclear. Some suggest that the focus of a restitutionary claim is on the defendant’s gain regardless of the claimant’s loss,[[59]](#footnote-59) whilst others indicate that there must be an exact correspondence of gain and loss.[[60]](#footnote-60) The latter is the preferable view because it is consistent with the underlying rationale of the unjust enrichment, namely to correct the injustice of the defendant gaining at the expense of the claimant. In most cases involving the provision of services the correspondence principle will cause no problems, since the value of the defendant’s gain will correspond precisely with the claimant’s loss, especially afterthe renewed emphasis on the objective test of valuation following *Benedetti v Sawiris*.[[61]](#footnote-61)

*(iii) Ground of restitution*

The third part of the unjust enrichment formula is that the defendant’s receipt of the enrichment can be considered to have occurred in circumstances of injustice. This requires the identification of a recognised ground of restitution. The most obvious ground is that of total failure of basis, which was recognised in *Yeoman’s Row v Cobbe*,[[62]](#footnote-62) although not specifically in relation to unjust enrichment. This ground was, however, specifically recognised by Lord Reed in *Benedetti v Sawiris*[[63]](#footnote-63) in order to correct ‘the injustice arising from the defendant’s receipt of the claimant’s services on a basis which was not fulfilled.’ But this ground of restitution will only apply where the claimant has received nothing from the defendant in respect of the provision of the service, for otherwise the basis will not have failed totally. The significance of this restriction is illustrated by *Whittle Movers Ltd v Hollywood Express*,[[64]](#footnote-64) where a claim relating to services provided in anticipation of a contract being made was considered to have been founded on unjust enrichment. But this was a case where the claimant had received some payment from the defendant for the services rendered, so it would not have been possible argue for a total failure of basis, save if the payment could be apportioned in some way, which seems unlikely on the facts.

 So might there be alternative grounds of restitution available in such circumstances? One ground might be mistake, in that the claimant in providing the service might argue that he or she was mistaken as to the contract being made. But this would be a misprediction rather than a mistake, since it relates to what might happen in the future rather than to existing state of affairs, which does not fall within the ground of mistake.[[65]](#footnote-65) In other circumstances mistake may be sufficient to establish a claim in unjust enrichment. So where the claimant has repaired or improved the defendant’s goods believing that they were his, a *quantum meruit* might lie. In *Greenwood v Bennett*[[66]](#footnote-66) Lord Denning MR was prepared to allow a person, who had improved a car honestly believing himself to be its owner, a direct claim against the owner, to be recompensed for the work done.[[67]](#footnote-67) Normally in this type of case, however, the claimant may be considered to be a volunteer and the claim will fail.[[68]](#footnote-68)

 An alternative, and controversial, ground of restitution relevant to *quantum meruit* claims is that of free acceptance. Where the defendant has freely accepted the service proffered by the claimant this may in itself make the receipt of the service without payment unjust.[[69]](#footnote-69) It is, however, difficult to justify free acceptance as a ground of restitution. Most grounds of restitution are concerned with the vitiation or qualification of the claimant’s intent to transfer a benefit to the defendant, such as by virtue of mistake or there being a failure of basis, whereas free acceptance is concerned with the defendant’s conduct in receiving a benefit knowing that it was not provided gratuitously. Recognition of such a ground of restitution equates rather more with liability being triggered by unconscionability rather than by reference to unjust enrichment.

 One final ground which might have a role to play in *quantum meruit* claims founded on unjust enrichment is that of necessitous intervention in an emergency.[[70]](#footnote-70) The liability of the defendant to pay for the service provided has been recognised in the context of agency of necessity where the agent has acted reasonably in an emergency to protect the interests of the principal, the principal is then liable to reimburse the agent’s reasonable expenses even though he had exceeded his authority.[[71]](#footnote-71)

*(iv) Legal basis and risk*

Regardless of the ground of restitution which is relied on, it is clear that a claim founded on unjust enrichment will fail where there was a legal basis for the defendant’s receipt of the service. So, where, for example, the service was provided gratuitously by the claimant, there would then be a valid basis for the defendant’s receipt of the service.[[72]](#footnote-72) Similarly, where the service has been provided pursuant to a contract which remains valid, there can be no claim in unjust enrichment, because of the presence of a legal basis for the transfer.[[73]](#footnote-73) This is illustrated by *MacDonald Dickens and Macklin v Costello*[[74]](#footnote-74) where the claimants had been contracted to carry out work for a company, which was owned and controlled by the defendants. The claimant sued the company and the defendants for *quantum meruit*. It was held that, because the claimant had a contract with the company which had not been set aside, the claim against the defendants failed. This is clearly correct. It is not for the law of unjust enrichment to undermine the contractual regime, including the contractual allocation of risk. As Etherton LJ recognised:[[75]](#footnote-75)

The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties’ autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation.

Consequently, if the company had become insolvent, the claimant would have borne the risk of this and could not have avoided it by suing the defendants in unjust enrichment.

Further, a remedy will be denied to the claimant if he or she took the risk of non-payment in providing the servicer. So, for example, if the claimant provided a service whilst negotiating a contract with the defendant, the claimant will not receive payment for the service if he or she took the risk of a contract not being signed.[[76]](#footnote-76)

*(v) Defence*

Finally, the claim will be defeated or qualified by the operation of defences, most significantly change of position,[[77]](#footnote-77) such that, if the defendant changed his or her position in good faith in reliance on the receipt of the service then, to the extent of that change of position, the claim for restitution will be defeated.

*(c) Unconscionability*

The significance of unconscionability as the underlying principle for *quantum meruit* was recognised in *Countrywide Communications Ltd v ICL Pathway Ltd*,[[78]](#footnote-78) where the claimant had provided services in respect of a bid by the defendant to introduce a card system for the supply of financial benefits by the Post Office. No contract was made to appoint the claimant to provide these services, but the claimant anticipated that if it assisted with the bid it would get the formal contract if the bid was successful. The defendant’s bid was successful, but no contract was made with the claimant for the future provision of services. The claimant brought a claim for *quantum meruit* in respect of the work which it had done. The trial judge found it impossible to formulate a general principle which governs all cases of *quantum meruit*. He emphasised that much of the problem was caused by trying to categorise these claims as involving unjust enrichment when the real issue was whether the claimant should be compensated for a loss which was unfairly sustained. Consequently, he preferred to analyse the claim as being founded on justice or unconscionability. He identified a number of factors to determine whether an obligation should be imposed on the defendant to pay for the service provided. These included: whether the services would normally be provided free of charge; whether the claimant bore the risk of not being paid for the services and whether the defendant had given any assurances that he would not withdraw from the negotiations; whether the defendant had obtained a real benefit; and whether the defendant was at fault in preventing the contract from being made. The judge particularly emphasised the significance of the defendant being enriched and recognised the relevance of the claim being analysed as restitutionary. The application of these principles led the judge to conclude that the claimant should be recompensed for the work it had done. It was particularly significant that the defendant had benefited from the work and had assured the claimant that a contract would be made if the bid succeeded.

 Reliance on unconscionability as the underlying basis for a claim in *quantum meruit* is fraught with uncertainty, especially because it is unclear whose conscience is relevant. Is it the defendant’s conscience, subjectively or objectively determined, or the conscience of the court? The irony of *Countrywide Communication* is that the claim could easily have been analysed as being founded on unjust enrichment. The defendant had been benefited by services provided by the claimant. The claimant expected to be paid for the work under a contract. That contract was not forthcoming and so the basis had totally failed. Although the claimant had taken a risk that the contract might not be made if the bid was not successful, it had not taken the risk that no contract would be made if the bid was successful.

 Unconscionability has been referred to in other cases as the rationale for the award of a *quantum meruit*, notably *MSM Consulting Ltd v United Republic of Tanzania*.[[79]](#footnote-79) In that case the claimant sought to recover either a commission or a *quantum meruit* from the defendant in respect of work which the claimant had done in searching to find new premises for the defendant’s High Commission in London. On the assumption that no contract had been made, the claimant sought a *quantum meruit*. A number of propositions were identified by Christopher Clarke J.[[80]](#footnote-80) He recognised that the key question was whether ‘the law should, as a matter of justice, impose upon the defendant an obligation to make payment of an amount which he deserved to be paid (*quantum meruit*)’. He considered that such an obligation was likely to be imposed where the defendant had received an incontrovertible benefit, such as an immediate financial gain or the saving of an expense, as a result of the claimant’s services, or where the defendant requested the services or accepted them when he or she had the opportunity to refuse them, knowing that they were not being provided gratuitously. This is clearly an enrichment analysis, but the judge made no reference to the law of unjust enrichment. He also recognised that the court might not regard it as just to impose an obligation to pay for the service if the claimant took the risk that he or she would only be reimbursed if there was a concluded contract or the court considers that in all the circumstances the risk should fall on the claimant. Crucially, he considered that the court might regard it as just to impose an obligation on a defendant who received the benefit but behaved unconscionably in declining to pay for it.

 On the facts, the claimant was found to have done the work in the hope that a contract might be forthcoming and it was not considered to be the sort of work for which the defendant should pay if no contract was forthcoming. It was consequently not unconscionable for the defendant not to pay once the negotiations had collapsed. This was because the defendant had not been made aware of the hours of research which had been undertaken by the claimant or the proposed rate of charge. Further, even though had a contract been made the claimant would only have been paid under it if it had been the effective cause of the property being purchased for the defendant, this was not considered to be a decisive factor. The failure to agree a contract was not due to the fault of either party. There had been no assurance of payment. The defendant’s benefit was limited, in that it had simply been shown around certain properties. The benefit to the defendant was not such that it would be unjustly enriched if it did not pay for it. So there was no liability to pay for the services.

 This again appears to be a case where unjust enrichment reasoning could usefully have been employed, and in fact it was to some extent. It appears that the defendant could not have been considered to have been enriched by the claimant’s work and this by itself would have been a sufficient reason to deny the claim for *quantum meruit*. Relying on unjust enrichment reasoning is a much more clear and defensible mode of analysing *quantum meruit*cases than unconscionability, especially where the courts have regard to elements of the unjust enrichment principle to determine what unconscionability might mean. But if unconscionability is to be adopted as the justification for *quantum meruit*, ultimately the court needs to be clear as to whose conscience is relevant. Such clarity is completely lacking.

*(d) Reliance*

An alternative rationale for the award of a *quantum meruit* might be the claimant’s reliance, induced by the defendant, that the claimant would be paid for the service. This appears to have been a reason why a *quantum meruit* was awarded in *Yeoman’s Row v Cobbe,*[[81]](#footnote-81) because the claimant had relied on the oral agreement to purchase the property for which he was obtaining planning permission, and the defendant, knowing that the claimant had provided the services in the expectation of purchasing the property under an enforceable contract, withdrew from the negotiations.

 This reliance principle may in fact merge into that of unconscionability, since both have regard to the defendant’s fault in frustrating the claimant’s expectations of payment for the service provided. But, if reliance is a distinct justification to establish a claim for *quantum meruit*, it is unclear what the rationale for liability might be. For the language of reliance has connotations of estoppel, and estoppel is generally not a source of rights in English law. There is no reason why estoppel-based reasoning should justify the imposition of liability where services have been provided since reliance does not generally create liability.

*(e) Conclusions*

This analysis of the possible explanations for a *quantum meruit* award reveal that unconscionability and reliance are not convincing, especially because the language of unjust enrichment is typically used when analysing such claims. By far the most appropriate explanation of *quantum meruit* awards is that they operate to reverse the defendant’s unjust enrichment. Where the defendant has benefited from a service provided by the claimant, then it is the fact that the defendant has been benefited in circumstances where the claimant did not intend the defendant to be benefited gratuitously which justifies the imposition of liability. It is unjust enrichment which creates the claimant’s right to be paid. But it is a fundamental principle that there will be no right to restitution where the defendant’s basis for the receipt of the service can be legally justified, typically because it was transferred pursuant to a valid contract which has not been set aside.

**4. The rationale of *quantum meruit* as a remedy**

If the *quantum meruit* remedy is awarded by reference to the law of unjust enrichment then the orthodox analysis of that body of law is that the only type of remedy which can be awarded is restitutionary, in the sense that it is concerned only with depriving the defendant of the value of his or her gain rather than the compensating the claimant for loss suffered. The benefit should be valued from the defendant’s perspective and the value of this gain paid to the claimant. This is because the function of the law of unjust enrichment is to correct an injustice by restoring to the claimant what the defendant had gained. Although, there is a view that the defendant’s liability should be capped by the extent of the claimant’s loss. But if the claimant’s loss is greater than the value of the defendant’s gain, the defendant should not be required to pay more to the claimant. Again, the liability should be capped to the extent of the defendant’s gain.

 This orthodox analysis of *quantum meruit* as a restitutionary remedy is not always reflected in the cases. Lord Scott in *Yeoman’s Row v Cobbe*[[82]](#footnote-82) specifically distinguished between the restitutionary and *quantum meruit* remedy. But he also recognised that, on the particular facts of that case at least, that *quantum meruit* would ‘represent the extent of the unjust enrichment.’ There is consequently some fundamental uncertainty in the cases as to the function of *quantum meruit* as a remedy. Does it have a solely restitutionary function or is there in fact a component of compensation for loss suffered? These issues have been particularly important when determining the relevance of the contract to the assessment of the *quantum meruit* and whether the award of *quantum meruit* enables the claimant to be remunerated for the services provided.

*(i) The relevance of the contract*

One of the key issues in assessing *quantum meruit* concerns the relevance of any prior negotiations or agreement. In some cases this may be the best evidence of the appropriate value to place on the service received by the defendant. So, in *Scarisbrick v Parkinson*[[83]](#footnote-83) even though a contract to employ a minor was unenforceable for lack of writing, it could still be admitted in evidence on a claim for *quantum meruit*, to show ‘the value which the defendant had put upon his services, and so of enabling the jury to estimate such services.’[[84]](#footnote-84) Similarly, in *Way v Latilla*[[85]](#footnote-85) the plaintiff had agreed to provide the defendant with information about gold mines and concessions in West Africa in return for the defendant paying a reasonable sum for the information and giving the plaintiff a share of the concessions. The plaintiff was awarded a *quantum meruit* consisting of reasonable remuneration for his services, although this was in fact a case about the implication of a term of the contract about payment for the service. Lord Atkin recognised that trade usage would be relevant evidence, but, if this was not available , evidence of the negotiations between the parties was admissible in determining what would be reasonable remuneration, on the ground that this was evidence of the value which each of them put on the services. Further, in *BP Exploration Co (Libya) Ltd v Hunt (No. 2)*,[[86]](#footnote-86) albeit in the context of a claim for the award of a just sum under section 1(3) of the Law Reform (Frustrated Contracts) Act 1943), Robert Goff J recognised that the terms of the frustrated contract were relevant when assessing the value of the sum, since this might assist in the determination of a fee or whether any limit should be imposed on the sum awarded.

Where the service has been provided pursuant to a contract which the defendant then breaches, the claimant may wish to pursue a claim in *quantum meruit* rather than for the contract price if the claimant had entered into a bad bargain. Even if the claimant is allowed to opt for a *quantum meruit* it has been recognised that the agreed contract price should constitute an appropriate ceiling for the award. In *Taylor v Motability Finance Ltd*[[87]](#footnote-87)Cooke J stated that there is no justification for the award of a restitutionary remedy which is in excess of the contractual ceiling, since the award of such a remedy would put the claimant in a better position than he or she would have been in had the contract been fulfilled which would be unjust. He emphasised that, when determining the *quantum meruit*,regard should be had to the contract both as a guide to the value which the parties put on the service and to ensure justice between the parties. The better view, however, is that the fact that the claimant suffered a loss under the contract should be of no relevance to the restitutionary claim because, by definition, the contract is no longer subsisting. Cooke J’s approach in *Taylor v Motability Finance* appears to have been based on his assumption that, where a *quantum meruit* claimis brought, the contractual regime remains operative, at least where the claimant has substantially performed the contract. This is unnecessarily complicated and the preferable view is that, once the contract is no longer operating, an unjust enrichment claim can be made which is unaffected by the contractual regime. This was recognised in *Sopov v Kane Constructions Pty Ltd (No 2)*,[[88]](#footnote-88) where the Court of Appeal of Victoria held that the contract price should not operate as a ceiling on the amount recoverable on a *quantum meruit*, because *quantum meruit* is based on a fiction that the contract ceases to exist *ab initio* so that it cannot limit the quantum meruit,[[89]](#footnote-89) so that the contract should have no continuing influence on the *quantum meruit* claim when assessing the value of the work provided, save that it is evidence of the reasonable value of the benefit received, but it is not necessarily the best evidence because the price is struck prospectively based on the parties’ expectations of the future course of events, whereas *quantum meruit* is assessed in hindsight on the basis of the events which had happened. Subsequent events might be radically different from what had been anticipated at the time of the negotiations.

*(ii) Remunerating and rewarding the claimant*

Cases do sometimes use compensatory language when describing the nature of the *quantum meruit* remedy, such as the language of remuneration and reward for the service.[[90]](#footnote-90) The key problem in valuing the *quantum meruit* was identified by Nicholas Strauss QC in *Countrywide Communications Ltd v ICL Pathway Ltd,*[[91]](#footnote-91) who said:

Much of the difficulty is caused by attempting to categorise as an unjust enrichment of the defendant, for which an action in restitution is available, what is really a loss unfairly sustained by the plaintiff. There is a lot to be said for a broad principle enabling either to be recompensed, but no such principle is clearly established in English Law. Undoubtedly the court may impose an obligation to pay for benefits resulting from services performed in the course of a contract which is expected to, but does not, come into existence….Undoubtedly, such an obligation will be imposed only if justice requires it or, which comes to much the same thing, it would be unconscionable for the plaintiff not to be recompensed.

 The courts have provided some clarification as regards how the *quantum meruit* should be assessed. In *MSM Consulting Ltd v United Republic of Tanzania*[[92]](#footnote-92)Christopher Clarke J, in a case involving a *quantum* *meruit* claim arising from work done in anticipation of a contract which did not materialise, recognised that it is not possible for the claimant to claim for the cost of bidding for the contract or for a ‘beauty parade’. Further, on the facts, the claim for £250 per hour for assessment and research was considered to be too much, since the claimant had no surveying or valuation qualifications. £125 per hour was considered to be a more appropriate rate of payment for the claimant’s services.

Further guidance on the nature of the remedy was identified in *Sopov v Kane Constructions Pty Ltd (No 2)*[[93]](#footnote-93)where it was recognised that the essential test was to determine the fair and reasonable value of the claimant’s services. It was emphasised that the measure of the restitutionary remedy is the value of the benefit conferred on the defendant, but this can be proved by evidence of the costs which had actually been incurred. Further, a profit margin could be included as part of the *quantum meruit*, since this was consistent with the restitutionary objective of measuring the value of the benefit conferred on the defendant.[[94]](#footnote-94)

*(iii) Synthesis*

Whilst there is certainly evidence of the courts having regard to compensatory language when determining the amount of the *quantum meruit* award, this is inappropriate. The focus should be on the defendant’s gain, since *quantum meruit* is a restitutionary, gain-based award. Of course, being restitutionary, the effect of the remedy is to correct the injustice and to restore to the claimant what he or she had lost, but the claimant should not gain any more than this. In the light of the decision of the Supreme Court in *Benedetti v Sawiris* the core focus should be on the objective value of the enrichment received by the defendant. This will typically be the market value. That value might be assessed with reference to the value of the services provided by the claimant, if that is what the defendant would have had to pay to obtain an equivalent service. But the claimant should not be reimbursed beyond this amount. The contract price may provide evidence of this market value, but there should be no rule which requires the contract price to operate as a ceiling on the restitutionary award. The contract price should be treated as evidence of the reasonable value of the benefit received, but it is not necessarily the best evidence. It is appropriate to include a profit margin as part of the *quantum meruit*, but only because this is consistent with the restitutionary objective of measuring the value of the benefit conferred on the defendant.

 The confusion about the method of assessing the *quantum* *meruit* is reflected in

*Yeoman’s Row* where the *quantum meruit* which was awarded included a sum to reimburse the claimant for his outgoings in applying for and obtaining planning permission. The outgoings were presumed to be reasonably incurred unless the defendant could prove otherwise. In addition a fee was included for the claimant’s work which was to be assessed at the rate which would be charged by an experienced property developer. The inclusion of such a fee would indicate that the claimant was being reimbursed for the work which he had done rather than the defendant being liable to make restitution of the value of the benefit received as a result of the claimant’s work. That was instead a matter for the remedy of unjust enrichment, where Lord Scott considered whether the defendant had been enriched by the enhancement in the value of the property or the value of the services themselves. Again, by treating *quantum meruit* as a claim the court fell into error in its analysis of the nature of the remedy. If the focus is on unjust enrichment alone, it follows that the remedy will necessarily be gain-based. The effect of that remedy is not to compensate the claimant for any loss suffered, but rather focuses on valuing the defendant’s gain. Of course, typically, the value of the defendant’s gain will correspond with the loss suffered by the claimant and where this is the case the defendant will be required to restore the value to the claimant. For that is what the law of unjust enrichment is about: to correct the injustice of the defendant being enriched in circumstances of injustice and restoring value to the claimant.

**5. Conclusions**

The law of unjust enrichment was born in *Lipkin Gorman (a firm) v Karpnale Ltd*, nearly 25 years ago. It has since matured and is fully embedded in English law. The effect of this is that it is entirely right and proper to conclude that the law of unjust enrichment should be able to provide gain-based remedies where the defendant has benefited from a service provided by the claimant. Any other conclusion is unconvincing. *Quantum meruit* cannot be a cause of action in its own right, partly because it was explicitly abolished in 1852, but also because it is unclear what the elements of such a claim might be. Rather, the principle underlying the claim is unjust enrichment, for which the remedy is gain-based.

1. [1941] AC 1, 29. [↑](#footnote-ref-1)
2. As confirmed in *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, where a claim for restitution succeeded even though the defendant lacked any capacity to make a promise to repay the claimant. [↑](#footnote-ref-2)
3. *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189, [46] (Waller LJ); *Sharab v Al-Waleed* [2012] EWHC 1798 (Ch), [58] (Sir William Blackburne); *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938. [↑](#footnote-ref-3)
4. *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB), [171(d)] (Christopher Clarke J). See also the preference for ‘unconscionability’ rather than unjust enrichment in Australia: *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14. [↑](#footnote-ref-4)
5. *Yeoman’s Row v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752, [42] (Lord Scott); *Lissack v Manhattan Loft Corporation Ltd* [2013] EWHC 128 (Ch), [86] (Roth J). See also *Sopov v Kane Constructions Pty Ltd (No. 2)* [2009] VSCA 141, [13]. [↑](#footnote-ref-5)
6. Following its formal recognition by Lord Goff in *Lipkin Gorman (a firm)* *v* *Karpnale Ltd* [1991] 2 AC 548, 578. [↑](#footnote-ref-6)
7. [2008] UKHL 55, [2008] 1 WLR 1752. [↑](#footnote-ref-7)
8. Ibid, [39]. [↑](#footnote-ref-8)
9. Ibid, [3.iii]. [↑](#footnote-ref-9)
10. *Unjust Enrichment* (2nd ed., 2005), Ch. 5. [↑](#footnote-ref-10)
11. [2008] UKHL 55, [2008] 1 WLR 1752, [42]. [↑](#footnote-ref-11)
12. *Barnes v The Eastenders Group* [2014] UKSC 26, [105], Lord Toulson). [↑](#footnote-ref-12)
13. *Falcke v Scottish Imperial Insurance Company* (1887) 34 Ch D 234, 248–249. [↑](#footnote-ref-13)
14. [2010] UKSC 14, [2010] 1 WLR 753. [↑](#footnote-ref-14)
15. (1831) 8 Bing. 14. [↑](#footnote-ref-15)
16. Ibid, 16. See also *Berezovsky v Edmiston* [2010] EWHC 1883 (Comm), [70] (Field J). [↑](#footnote-ref-16)
17. *Way v Latilla* [1937] 3 All ER 759; *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938, [9] (Lord Clarke). [↑](#footnote-ref-17)
18. [1919] 2 KB 722, 726. [↑](#footnote-ref-18)
19. [1984] 1 All ER 504, 511. [↑](#footnote-ref-19)
20. [2009] EWCA Civ 1189, [15]. [↑](#footnote-ref-20)
21. See Virgo, *The Principles of the Law of Restitution* (3rd ed.) (OUP, 2015), ch 13. In *ISG Retail Ltd v Castletch Construction Ltd* [2015] EWHC 1443 (TCC) such a claim for the recovery of money was characterized as arising under contract. Such characterization is unnecessary and suggests a failure to divorce unjust enrichment from its quasi-contractual origins. [↑](#footnote-ref-21)
22. [2004] EWHC 2619 (Comm). [↑](#footnote-ref-22)
23. See *Johnson v* *Agnew* [1980] AC 367. [↑](#footnote-ref-23)
24. [2004] EWHC 2619 (Comm), [25] (Cooke J). [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. Ibid, [23]. [↑](#footnote-ref-26)
27. [2013] EWHC 4104 (Ch). [↑](#footnote-ref-27)
28. [2009] VSCA 141. [↑](#footnote-ref-28)
29. *Planché v Colburn* (1831) 8 Bing 14; *Lodder v Slowey* [1904] AC 442; *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350. [↑](#footnote-ref-29)
30. [2009] VSCA 141, [11]. See especially *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50, [651]-[659] (Finn J). [↑](#footnote-ref-30)
31. *Pavey and Matthews Proprietary Ltd v Paul* (1987) 162 CLR 221, 256. [↑](#footnote-ref-31)
32. [2009] VSCA 141 at [11]. See also *Elek v Bar-Tur* [2013] EWHC 207 (Ch), [2013] 2 EGLR 159, [12], David Donaldson QC. [↑](#footnote-ref-32)
33. 11th December 2009. [↑](#footnote-ref-33)
34. (1853) 8 Exch 822, 824. See also *(Eastbourne) Ltd v Cooper* [1941] AC 108, 140–141 (Lord Wright). [↑](#footnote-ref-34)
35. (1856) 1 CB (NS) 296. [↑](#footnote-ref-35)
36. [2013] EWHC 207 (Ch), [2013] 2 EGLR 159. [↑](#footnote-ref-36)
37. [2004] EWHC 2619 (Comm). [↑](#footnote-ref-37)
38. *Taylor v Laird* (1856) 25 LJ Ex 328. [↑](#footnote-ref-38)
39. *Item Software v Fassihi<r>* [2004] EWCA Civ 1244; [2005] ICR 450. [↑](#footnote-ref-39)
40. [1987] AC 539. [↑](#footnote-ref-40)
41. *Ibid*, 553 (Lord Brightman), 661 (Lord Templeman). [↑](#footnote-ref-41)
42. [2013] UKSC 50, [2014] AC 938. [↑](#footnote-ref-42)
43. *Banque Financière de la Cité v* *Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn).Unjust enrichment itself is not the cause of action. Rather, it is the ground of restitution which distinguishes between different causes of action within the law of unjust enrichment: *Uren v* *First National Home Finance Ltd* [2005] EWHC 2529 (Ch). [↑](#footnote-ref-43)
44. [2013] UKSC 50, [2014] AC 938. [↑](#footnote-ref-44)
45. *Ibid*, [108]. [↑](#footnote-ref-45)
46. *Ibid*, [17] (Lord Clarke). [↑](#footnote-ref-46)
47. *Ibid*, [101]. [↑](#footnote-ref-47)
48. *Ibid,* [21] (Lord Clarke). [↑](#footnote-ref-48)
49. *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32; *Craven-Ellis v* *Canons Ltd* [1936] 2 KB 43. [↑](#footnote-ref-49)
50. *Greenwood* *v* *Bennett* [1973] QB 195; *Rover International Ltd* *v* *Cannon Film Sales Ltd (No 3)* [1989] 1 WLR 912. [↑](#footnote-ref-50)
51. See, for example, *Rowe v* *Vale of White Horse DC* [2003] 1 Lloyd’s Rep. 418; *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB), [171]. [↑](#footnote-ref-51)
52. *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449. [↑](#footnote-ref-52)
53. *Rowe v* *Vale of White Horse DC* [2003] 1 Lloyd’s Rep. 418. [↑](#footnote-ref-53)
54. (1831) 5 Car and P 58. See also *Prickett* *v* *Badger* (1856) 1 CB (NS) 296. [↑](#footnote-ref-54)
55. See Tindal CJ in (1831) 5 Car and P 58, 61. [↑](#footnote-ref-55)
56. See *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16. [↑](#footnote-ref-56)
57. *MacDonald Dickens and Macklin v Costello* [2011] EWCA Civ 930, [2012] QB 244, [20] (Etherton LJ). [↑](#footnote-ref-57)
58. *Investment Trust Companies v The Commissioners for Her Majesty’s Revenue and Customs* [2015] EWCA Civ 1960, [2014] 1 WLR 854; *Menelaou v Bank of Cyprus plc* [2013] EWCA Civ 1960, [2014] 1 WLR 854; *Relfo Ltd v Varsani* [2014] EWCA Civ 360, [2015] 1 BCLC 14. [↑](#footnote-ref-58)
59. See, for example, *Sempra Metals Ltd v IRC*[2007] UKHL 34, [2008] 1 AC 561. [↑](#footnote-ref-59)
60. *Relfo Ltd v Varsani* [2014] EWCA Civ 360, [2015] 1 BCLC 14, [98] (Arden LJ). [↑](#footnote-ref-60)
61. [2013] UKSC 50, [2014] AC 938. [↑](#footnote-ref-61)
62. [2008] UKHL 55, [2008] 1 WLR 1752. [↑](#footnote-ref-62)
63. [2013] UKSC 50, [2014] AC 938, [99]. [↑](#footnote-ref-63)
64. [2009] EWCA Civ 1189. [↑](#footnote-ref-64)
65. *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108, [104]. [↑](#footnote-ref-65)
66. [1973] 1 QB 195, 203 (Cairns LJ). [↑](#footnote-ref-66)
67. *Ibid,* 202. [↑](#footnote-ref-67)
68. *Forman Co Proprietary Ltd v Ship ‘Liddelsdale’* [1900] AC 190. [↑](#footnote-ref-68)
69. *Rowe* *v Vale of White Horse DC* [2003] 1 Lloyd’s Rep 418; *Sharab v Prince Al-Waleed Bin Talal Bin Abdul-Aziz Al-Saud* [2012] EWHC 1798 (Ch), [2012] 2 CLC 612, [68] (Sir William Blackburne); *Professional Cost Management Group Ltd v Easynet Ltd* Unreported, July 9, 2012 (QBD District Registry, Manchester), [90] (HHJ Raynor QC). [↑](#footnote-ref-69)
70. See *Nicholson v Chapman* (1793) 2 Hy Bl 254, 257 (Eyre CB). [↑](#footnote-ref-70)
71. <i>*Guildford Borough Council v Hein<r>* [2005] EWCA Civ 979, [33] (Clarke LJ), and [80] (Waller LJ); *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2012] UKSC 17, [2012] 2 AC 164. [↑](#footnote-ref-71)
72. *Yeoman’s Row v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752, [42]. See *Lissack v Manhattan Loft Corporation Ltd* [2013] EWHC 128 (Ch). [↑](#footnote-ref-72)
73. *Berezovksy v Edmiston and Co Ltd* [2010] EWHC 1883 (Comm), [70]. [↑](#footnote-ref-73)
74. [2011] EWCA Civ 930, [2012] QB 244. Se also *Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27. [↑](#footnote-ref-74)
75. [2011] EWCA Civ 930, [2012] QB 244, [23]. [↑](#footnote-ref-75)
76. *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189, [22]. [↑](#footnote-ref-76)
77. *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548. [↑](#footnote-ref-77)
78. [2000] CLC 324. See also *Killen v Horseworld Ltd* [2011] EWHC 1600 (QB) and *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14 (unconscionability rather than unjust enrichment underpins the restitutionary claim). [↑](#footnote-ref-78)
79. [2009] EWHC 121 (QB). [↑](#footnote-ref-79)
80. *Ibid,* [171]. [↑](#footnote-ref-80)
81. [2008] UKHL 55, [2008] 1 WLR 1752, [3] and [42] (Lord Scott). [↑](#footnote-ref-81)
82. [2008] UKHL 55, [2008] 1 WLR 1752, [42]. [↑](#footnote-ref-82)
83. (1869) 20 LT 175. [↑](#footnote-ref-83)
84. *Ibid*, 177 (Kelly CB). [↑](#footnote-ref-84)
85. [1937] 3 All ER 759. [↑](#footnote-ref-85)
86. [1979] 1 WLR 783. [↑](#footnote-ref-86)
87. [2004] EWHC 2619 (Comm), [26]. See also *SSHD v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC), [53]-[56] (Akenhead J). [↑](#footnote-ref-87)
88. [2009] VSCA 141. [↑](#footnote-ref-88)
89. Ibid, [21]. [↑](#footnote-ref-89)
90. *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189, [20] (Waller LJ); *SSHD v Rayhtheon Systems Ltd* [2014] EWHC 4375 (TCC), [58] (Akenhead J). [↑](#footnote-ref-90)
91. [2000] CLC 324. [↑](#footnote-ref-91)
92. [2009] EWHC 121 (QB), [171]. See also *Edmonds v Lawson* [2011] EWHC 2867 (TCC). [↑](#footnote-ref-92)
93. [2009] VSCA 141. [↑](#footnote-ref-93)
94. *Ibid*, [35]. [↑](#footnote-ref-94)