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A NOTE ON INCIDENTAL BENEFIT AND MULTI-PARTY SITUATIONS

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The authors consider how the conferral of incidental benefits in two-party and multi-party situations is treated by the law of unjust enrichment. There is normally no need for a separate principle of incidental benefit, as where the claimant's primary objective is the pursuit of its own or a third party's interests, the ingredients of failure of consideration and free acceptance will not be satisfied, else the claim will be barred by the existence of a contractual matrix. Where the claim is made in mistake the analysis is more complex, and there may be need for a reconsideration of the workings of that unjust factor in such situations.

I. INTRODUCTION

Frequently a claimant confers a benefit on a defendant without meaning or aiming to, unconnected to the claimant's primary objective of furthering either its own interests or purposes (in a two-party case) or those of a third party (in a three-party case). The claimant acts without any thought of the defendant or of being paid by the defendant—although in a three-party case it may expect payment from the third party—and jurists and judges will usually agree that it is not unjust in such cases for the defendant to retain an enrichment without making restitution. Yet the orthodox account of the law of unjust enrichment, and its four-part test (enrichment, at the expense of, unjust factor, no defence),[1] fails coherently and consistently to deal with this problem, the problem of so-called 'incidental benefits'. It is not even clear

* Barristers, 3 Verulam Buildings. Thanks are due to Frederick Wilmot-Smith for his helpful comments during discussions on these topics, and Justice Edelman for comments on a draft of this article.

[1] Most recently approved by the majority in *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351, [10].

whether there is a separate legal rule relating to incidental benefits, and, if there is, under which if any of the four parts it resides.

The Supreme Court was due to meet this problem head on in the dispute in *Benedetti v Sawiris*, a case of a large telecoms company sale partly put together by the appellant Mr Benedetti. Mr Benedetti had provided his services pursuant to the request, and for the intended benefit, of the first respondent, Mr Sawiris. As a consequence of late changes in the structure of the transaction, the purchase was effected largely by the second and third respondents, which were holding companies for wider Sawiris family interests but which were independent of Mr Sawiris. Thus the benefit of Mr Benedetti's services, on the purchase side, was obtained primarily by the holding companies rather than by the party for whom the services were rendered[2].

The trial judge, Patten J, had held each of the respondents to be jointly and severally liable in *quantum meruit* in the sum of €75.1m.[3] The Court of Appeal[4] allowed the appeal of the holding companies and substantially reduced the sum awarded against Mr Sawiris. When Mr Benedetti discontinued his appeal against the holding companies two working days before the Supreme Court hearing, this left a narrow two-party dispute between Mr Benedetti and Mr Sawiris. The latter had never contested the former's right to *quantum meruit*, and the dispute between the two turned on the role of subjectivity and objectivity in the valuing of the enrichment. Those issues have now been determined in favour of Mr Sawiris,[5] and neither that dispute nor the Supreme Court's decision is the subject of this article.

Instead, this article concerns the incidental benefit and three-party issues that were not considered by the Supreme Court. In the view of these authors (who were counsel for the holding companies in *Benedetti*), it is important to ensure that the unresolved issues in this area are at least aired in the academic literature (i.e. here), so that they can be dealt with clearly when the right dispute arises.

II. FAILURE OF CONSIDERATION

[2] The benefit to Mr Sawiris was obtained through the 4th respondent, which was wholly owned and controlled by Mr Sawiris, and which acquired a relatively minor stake in the target company.
[3] [2009] EWHC 1330 (Ch).
[4] [2010] EWCA Civ 1427.
[5] [2013] UKSC 50.

Where the unjust factor is failure of consideration, the incidental benefit issue provides little difficulty, because a central requirement of this unjust factor, for present purposes, is the shared understanding of the conditions on which the services are being rendered or the benefit provided. Most commonly, these will include the conditions that the services (i) are to be paid for (ii) by the defendant.[6] In such cases, it is the failure of that counter-performance, i.e. the non-payment by the defendant, that triggers the restitutionary remedy.[7]

Where the claimant confers an incidental benefit on the defendant, and so the benefitting of the defendant is not part of the claimant's objective in performing the service, it is unlikely that there will be any shared understanding between claimant and defendant as to the basis upon which the benefit is being provided. Specifically, there will be no shared understanding that the defendant will pay and so the non-payment will not give rise to a failure of consideration.[8] There is no failure of consideration in incidental benefit cases, whether a two- or three-party claim.

In *Benedetti* itself, there was a potential failure of consideration as between Mr Benedetti and Mr Sawiris (who was always expected to pay for Mr Benedetti's services).[9] In contrast, there was no failure of consideration between Mr Benedetti and the holding companies:[10] Mr Benedetti provided services in the shared expectation that he would look exclusively to Mr Sawiris for remuneration, and Mr Sawiris always accepted his obligation to remunerate Mr Benedetti.[11] Any benefit to the holding companies (or to other parties, such as the vendors, who were never defendants to the claim) was incidental and without expectation of payment by them.

III. FREE ACCEPTANCE

[6] Whilst the concept of failure of consideration is broader than a failure of counter-performance, and may include for example a failure to achieve a particular legal result, the key in each instance is a departure from the mutually understood basis upon which the services are rendered.

[7] Mitchell et al (eds), *Goff & Jones: The Law of Unjust Enrichment*, 8th edn (London: Sweet & Maxwell, 2011) at [13-01 to 13-04], also [16-03]. See also A Burrows, *The Law of Restitution*, 3rd edn (Oxford: OUP, 2011) at 319; J Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialize' in A Burrows and E Peel, *Contract Formation and Parties* (Oxford: OUP, 2010).

[8] Or if there is a shared understanding that the defendant will pay despite the benefit being incidental to the parties' objective, there is no objection to an order for restitution, i.e. the benefit is not incidental in any objectionable way.

[9] It seems clear that the unjust factor here was failure of consideration. See, in the Supreme Court, Lord Reed at [86] and Lord Neuberger at [175 to 176]. *Cf* Burrows, *The Law of Restitution*, 339.

[10] G Virgo, 'Unjust Enrichment – Valuing Services' [2011] CLJ 299, 299. In the written submissions to the Supreme Court, Mr Benedetti relied only on free acceptance and not failure of consideration as against the holding companies.

[11] Cf in the Supreme Court decision Lord Reed at [86 and 96] and Lord Neuberger at [176].

When the enrichment requirement is satisfied by proof of free acceptance (rather than by the alternative means of request or establishing an incontrovertible benefit), or when the unjust factor itself is free acceptance (if such a factor exists[12]), there will similarly be little difficulty in incidental benefit cases.

Although the conditions for free acceptance have not been conclusively determined, the principle is articulated in *Goff & Jones* as being engaged when the defendant, as a reasonable man, should have known that the claimant expected to be paid for the services yet did not take a reasonable opportunity to reject the proffered services.[13] Birks set out as a good test the question whether the defendant had reason to believe that, if the claimant knew what it was in the defendant's power to tell the claimant, the claimant would desist.[14] Assuming as a precondition to the analysis that there is no shared understanding that the defendant will pay for the services, neither formulation admits of a claim in respect of an incidental benefit, which is conferred when the claimant acts in its self-interest. There is no basis for the defendant to think either that the claimant expects to be paid or that the claimant will desist if told that the defendant will not pay. Further, the services are not being proffered to the defendant and so there is no true opportunity to accept or reject them.[15]

This point is exemplified by the decision of Lightman J in *R (Rowe) v Vale of White Horse District Council*.[16] The Council failed in a claim for restitution following the provision of sewerage services without payment, because free acceptance (which the Council sought to rely on as the unjust factor[17]) was not made out. Lightman J explained that: "*An essential ingredient for application of the principle of free acceptance is acquiescence by the defendant in the supply of the services for a consideration…*", and that acceptance without actual or constructive knowledge that the claimant expected to be paid was not enough.[18]

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[12] The separate question of whether free acceptance can operate as an unjust factor is discussed in the final section of this article.

[13] [17-03]

[14] P Birks, 'In Defence of Free Acceptance' in A Burrows, *Essays on the Law of Restitution* (Oxford, 1991), 105, at 121.

[15] This too was a problem in *Benedetti*. As was held by the Court of Appeal in *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC*, it is not unconscionable to receive a benefit if there is no real option to reject the services without pulling out of the entire transaction. See further the comments of Arden LJ in the Court of Appeal in *Benedetti* at [118-9].

[16] [2003] EWHC 388 (Admin), [2003] 1 Lloyds Rep 418.

[17] It did not need to rely on free acceptance to demonstrate enrichment, as incontrovertible benefit at the expense of the claimant was not disputed: *Ibid.*, [12].

[18] *Ibid*., [12, 14].

Another important case in this line is *Becerra v Close Brothers Corporate Finance Ltd.*[19] The claimant introduced a buyer to the defendant sellers and auctioneers of a company. Thomas J found that there was no request for the introduction services, and concluded that it was unnecessary to examine whether there had been a free acceptance by the defendant of the benefit of the claimants' valuable introduction of a buyer, or whether the defendant had been incontrovertibly benefited, because the defendant had made it clear in advance that it would not pay for any introduction.[20] The importance of showing an expectation on the part of the defendant receiving the benefit that it would pay for it was explained by the judge in the following terms:

> "if a defendant was required to make restitution in every case where a plaintiff had conferred the benefit whilst acting in his own self interest, it would open a Pandora's box of claims. For example, anyone in the plaintiffs' position introducing a bidder into an auction may be conferring multiple benefits…"

The same point applies to three-party situations, where the defendant may obtain the incidental benefit of services provided for a third party. Indeed, in such cases, any benefit may be accepted on the positive understanding that the services will be paid for by that third party and not by the defendant. As *Goff & Jones* puts it: "*Free acceptance will also fail where the defendant believes, as a reasonable person, that the services he is being offered are to be paid for by a third party.*"[21] In such a situation the benefit is a gift as between the claimant and the defendant.

It was for this reason that the Supreme Court of Victoria dismissed the claim in *Brenner v First Artists' Management Pty Ltd*.[22] In that case the claimants provided management services to a singer pursuant to a request by the singer's investors' company, which was expected to pay for the management services, all without any enforceable contract. The test of free acceptance failed because "*there could be no room for restitution by the defendant*" (the singer) when "*services were provided at a time when the plaintiffs understood that they would in due course be recompensed by FAM*" (the investors' company). Thus, as Lightman J observed in *R (Rowe) v Vale of White Horse DC*, "*no claim lies against a defendant where there is a common*

[19] (Unreported, 25/6/99).
[20] The unjust factor was not discussed, and it appears that free acceptance was relied upon as the unjust factor as well as to establish enrichment.
[21] [17-12].
[22] [1993] VicRp 71.

understanding between the claimant and the defendant that a third party shall alone be liable to pay for the service supplied…"[23]

This is why Mr Benedetti's claim against the holding companies in *Benedetti* (which relied upon free acceptance and not incontrovertible benefit[24]) was bound to fail.

IV. CONTRACT AND THE THREE-PARTY SITUATION

In many cases of conferral of a benefit on the understanding that the benefit will be paid for, there will be an express contract.

Often the claimant confers the benefit on the defendant pursuant to a contract between the claimant and a third party. Typically, a claimant employee or independent contractor will confer a benefit upon the defendant pursuant to the claimant's contract of employment with a third party. The law is clear that in these situations the claimant has no claim against the defendant, often justifying this result by the conclusion that the benefit was not conferred 'at the expense of' the claimant (but rather was at the expense of the third party) and/or the claimant should not be allowed to 'leapfrog' the third party.[25] In these cases the claim will be denied whether or not the third party also has a contract with the defendant.[26]

The contract between the claimant and third party who it was expected would pay may be an implied contract with an implied contractual obligation to pay a reasonable sum.[27] The minority of their Lordships in the Supreme Court were inclined to think that this was the position in *Benedetti* itself, although it was not argued that way.[28] Certainly, had there been a contract between Mr Benedetti and Mr Sawiris then that would have been another reason why the claim by Mr Benedetti against the third parties would have been bound to fail.

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[23] [2003] 1 Lloyds Rep 418, [12, 14], citing *Bridgewater v Griffiths* [2000] 1 WLR 524.

[24] Arden LJ considered and rightly rejected incontrovertible benefit in the Court of Appeal at [2010] EWCA Civ 1427, [121], and this was never part of the appeal to the Supreme Court.

[25] *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930, [2012] QB 244. See also *Goff & Jones* at [3-58 to 3-76] and [6-12ff]; *Burrows* at 74 to 75 and 108; *Brown and Davis v Galbraith* [1972] 1 WLR 997; *Pan Ocean Shipping Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 WLR 161; *Matthew Lumbers v W Cook Builders Pty Ltd* [2008] HCA 27.

[26] *Costello*; Burrows, *Restatement*, 53.

[27] See in particular *Chitty on Contracts*, 31st edn (2012) at [29-070]; *RTS Flexible Systems Ltd v Mokerei Alois Müller GmbH* [2010] UKSC 14, [2010] 1 WLR 753 , especially at [58ff].

[28] Lord Reed at [94] and Lord Neuberger at [177]. Compare Lord Clarke for the majority at [9].

Thus where a conferral of a benefit is incidental to performance of a contract, even though the defendant is not party to that contract, no unjust enrichment claim will lie, because of the policy of not undermining the contractual or risk allocation regime set up by the parties.[29] Largely the same rationale applies in three-party incidental benefit cases where there is no contract between any of the parties but there is an understanding that the third party and not the defendant will pay, and the High Court of Australia made it clear in the case of *Lumbers v Cook* that even if there had been no contract between the claimant and third party, the claimant's claim would still have been confined to one against the third party who it expected would pay.[30]

IV. MISTAKE, INCONTROVERTIBLE BENEFIT AND THE 'AT THE EXPENSE OF' REQUIREMENT

The problem of incidental benefit therefore only really arises where the unjust factor relied upon is neither failure of consideration nor free acceptance, and further where the enrichment is not founded upon free acceptance. In other words, the problem principally arises where the claim is for unjust enrichment on the basis of incontrovertible benefit (the enrichment) conferred by mistake (the unjust factor).

In that situation, the requirements of unjust enrichment may all be made out despite the claimant having conferred an incidental benefit, i.e. a benefit that the claimant conferred incidentally to another purpose, without expecting payment from the defendant, and the defendant accepted without expecting to have to pay. Most commentators agree that there should be no claim, but not how to achieve this result within the four-element unjust enrichment test.

The classic example of incidental benefit by a mistaken incontrovertible benefit is provided by Professor Birks:

> "If I live in a flat, and you live above me, in winter my central heating will cut your fuel bills. Heat rises. Investment in insulation may minimize the escape of warmth for which I am paying, but it is true in a sense that I am powerless to prevent this benefit accruing to you. You are enriched in that you are saving heating expenditure which you would inevitably incur if I turned my heating off, and the enrichment is coming from me. Similarly, if you have a flat which overlooks the Oval you will be able to watch test matches without paying."[31]

[29] *Goff & Jones*, [3-67 to 3.76].
[30] *Matthew Lumbers v W Cook Builders Pty Ltd* [2008] HCA 27.
[31] Birks, *Unjust Enrichment* 2nd edition (2005) at 158 to 159.

Birks concludes that there should be no restitution because the benefit is intended to pass to the defendant—it is a "*grudging gift*"[32]—although it is not clear where in the scheme of unjust enrichment requirements this incidental benefit rule falls for Birks.

Professor Burrows agrees with Birks as to the outcome of this example.[33] He supports an incidental benefit rule falling within the 'at the expense of' requirement in the schema, and explains that this "*does seem the best explanation for a range of situations where one would wish to deny restitution*".[34] *Goff & Jones* also supports this principle, although files it without explanation under the heading of 'enrichment'.[35]

Exactly this point—incidental benefit in a mistakenly conferred incontrovertible benefit claim—recently arose in the summary judgment application in *TFL Management Ltd v Lloyds TSB Bank plc*.[36] The claimant TFLM Ltd stood in the shoes of another company, Explora Group Ltd. Explora had, through a trial in the Queen's Bench Division and an appeal before the Court of Appeal,[37] pursued Hesco Bastion Ltd for payment of various debts. Those proceedings cost the claimant £550,000 plus VAT but failed in relation to certain debts because those debts had, it was found on appeal, not been assigned to Explora but instead were book debts retained by the initial creditor Trading Force Ltd (who was a non-participating party to the proceedings), and so were available to the defendant bank under its charge over Trading Force Ltd's assets. In this way, to the extent that the proceedings were unhelpful to the claimant, they nevertheless benefited the bank by establishing that the debts had not been assigned by its debtor Trading Force Ltd and so were available to it.

TFLM Ltd sued the bank for unjust enrichment, arguing that it had been incontrovertibly benefited by the proceedings TFLM Ltd had brought and lost, including by saving the bank considerable cost, since the litigation enabled the bank or receivers to pursue the relevant debts by a much cheaper debt claim (shorn of the by-then-resolved dispute as to whether the debts had been assigned), which later

[32] *Ibid*.
[33] Burrows, *Restatement*, 55 (Example 21)
[34] *Ibid.*, 54 to 55. Also Burrows, *The Law of Restitution*, 108.
[35] [4-52 to 53].
[36] [2013] EWHC 772 (Ch).
[37] [2004] EWHC 1863 (QB); [2005] EWCA Civ 646.

settled with Hesco paying the receivers and so the bank in the region of £1.2m plus costs. The unjust factor relied upon was a mistake that the relevant debts had been assigned to Explora.

HHJ Pelling QC, sitting in the High Court, granted Lloyds TSB a strike out of TFLM Ltd's claim as unarguable because, even assuming for these purposes a mistake not barred by Explora having taken a risk that it was wrong,[38] the proceedings were commenced for Explora's benefit and not the bank's, seeking a judgment that would have assisted Explora and not the bank.[39] Any benefit to the bank was held to be barred by the rule that "*incidental benefits do not found a claim in unjust enrichment*", said to derive from *Ruabon Steamship* and *Becerra*.[40]

The judge rejected as fanciful counsel's argument that the unjust factor may make a difference to the analysis of incidental benefits.[41] This rejection is, with respect, simplistic. In the majority of cases in which the incidental benefit principle has developed, the result can be reached by proper application of (i) the requirement of failure of consideration that there be a mutual understanding that the defendant pay, (ii) the requirement of free acceptance that the defendant failed to reject the proffered services when it knew or ought to have known that they were not rendered gratuitously, or (iii) the rule preventing interference with the contractual matrix, where there is a contract for the provision of services.

Thus, although the academics agree with refusal of recovery in cases of incidental benefits, in most cases no separate incidental benefit rule is required, and so it remains to be worked out in the mistake and incontrovertible benefit context of *TFLM v Lloyds Bank* whether such a separate rule is required, and its scope. Although relied upon by *Goff & Jones* to support the incidental benefits principle, *Ruabon Steamship*[42] provides scant support, given that it was a 19th century insurance contract claim (in which the insured benefited by getting a survey done while the vessel was in dock at the insurer's expense). *Becerra* is stronger authority, but had as its unjust factor free acceptance or possibly failure of consideration, both of which have built-in

[38] See [24, 26]. This point was held to be arguable and so not suitable for summary judgment.
[39] [24]. But see now the very recent judgment of the Court of Appeal allowing TFLM Ltd's appeal: [2013] EWCA Civ 1415.
[40] [18].
[41] [25].
[42] *Ruabon Steamship Co v London Assurance* [1900] AC 6.

requirements that are not satisfied where (as there) the defendant accepts a benefit after making clear that it will not pay for it.

Mistake, however, includes no such built-in requirements, but there are nevertheless two obvious solutions to the incidental benefit problem that avoid the need for a separate incidental benefit rule.

Perhaps the neatest solution in mistake cases is that of Mr Justice Edelman, who would disallow the unjust factor of mistake where the parties had contact and relations prior to the conferral of the benefit, whether or not they had a contract. In that situation, to allow the entirely unilateral unjust factor of mistake to operate where there were prior mutual relations would interfere with the autonomy of the parties, and instead the unjust factor must arise out of the mutual relations themselves, i.e. must be failure of consideration.[43] Whether this principle would extend to the mistake claim in *TFLM* would require further investigation at trial.

Alternatively, it might be said that the causation requirement in mistake cases (that but for the mistake the claimant would not have conferred the benefit) is not enough, and instead there should be a requirement of a nexus between the mistake and the non-payment by the defendant, i.e. that the mistake was in believing the defendant would pay or was obliged to pay. If a claimant confers a benefit on the defendant in the mistaken belief that a third party will pay (or, to take a more prosaic example, that it is Thursday rather than Tuesday), knowing all along that the defendant was not going to pay, why should the mistake give rise to a requirement that the defendant to pay for its incontrovertible benefit? Thus Professor Watts agrees that a claimant cannot sue a defendant for an incidental benefit because the conferral of the benefit is "*vis-à-vis the defendant, voluntary—neither mistaken nor conditioned*", in other words any mistake is not relevant to the position as between the claimant and defendant.[44] If this is right, one would need to consider the nature of the mistake in any given case.

V. A SIDE ISSUE: FREE ACCEPTANCE AS AN UNJUST FACTOR

One other point that would have featured in the *Benedetti* case before the Supreme Court if the claim against the holding companies had been persisted in is whether free

[43] 'Liability in Unjust Enrichment where a Contract Fails to Materialize' in A Burrows and E Peel, *Contract Formation and Parties* (Oxford: OUP, 2010), 171 to 178.

[44] 'Does a subcontractor have restitutionary rights against the employer?' [1995] LMCLQ 398, 401.

acceptance can be a separate unjust factor. It is in danger of being adopted unreflectingly, and that would be a mistake.

First, there is no English decision in which an unjust enrichment award was made in which the existence of free acceptance as an unjust factor formed part of the *ratio*. In *R (Rowe) v Vale of White Horse District Council*, the claimant did rely only on the unjust factor of free acceptance, but the claim failed. In *Cressman v Coys of Kensington* the unjust factor was mistake[45] and free acceptance was only discussed (and established) in proving enrichment. In *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd*, free acceptance was not found.[46] Likewise the claim failed in *Becerra*. In *Benedetti*, as explained above, the claim against Mr Sawiris, which would have succeeded if Mr Sawiris had not already paid Mr Benedetti enough, appears to be a failure of consideration claim, and the claim against the holding companies was dismissed on appeal as free acceptance was not made out, all without the court at that appellate level considering whether free acceptance could be a separate factor.[47]

Therefore there is no English authority for such an unjust factor. It is cut away from any explanation of unjust enrichment law by Occam's razor: it does no work; it explains no case.

Second, free acceptance as an unjust factor (as opposed to a means of demonstrating enrichment) has almost universal academic disapproval. Professor Burrows has always been a strong opponent.[48] Professor Birks, initially supportive, later recanted and saw such a factor as a result of 'muddled thinking'.[49] Professor Virgo agrees.[50] Only Professor Mitchell in the latest edition of *Goff & Jones* allows for free acceptance is an unjust factor. A chapter (17) is devoted to it. The authors accept that the point has not been explored in the cases,[51] and contend that the "*core example*" of free acceptance is the unusual one in which the claimant tenders a non-conforming contractual performance, gambling on the defendant being prepared to accept it. The examples given are primarily those of *property* tendered by the

[45] [2004] 1 WLR 2774 per Mance LJ at [25, 29, 30, 31, 32, 37, 41].

[46] Although it appears that the court did assume obiter that free acceptance was an unjust factor, without any discussion of the point, per Morritt C at [50], Smith LJ at [54], Maurice Kay LJ at [69].

[47] [2010] EWCA Civ 1427.

[48] Burrows, *The Law of Restitution*, 334 to 339. Burrows' *Restatement* allows a role for free acceptance in proving enrichment but has no place for it in the chapters on unjust factors.

[49] Birks, *Unjust Enrichment* 2nd edition (2005) at 42 to 43.

[50] G Virgo, *The Principles of the Law of Restitution*, 2nd edition (Oxford: OUP, 2006), 121 to 124.

[51] [17-18].

claimant in purported performance of a contract and retained by the defendant.[52] Any award justified in such cases can be explained by failure of consideration.[53] The particular example cited, the dictum in *Munro v Butt* (supply of badly made furniture pursuant to a contract in which the entire obligation to pay was not substantially performed,)[54] leaves no room for an unjust enrichment claim arising out of the service of making the furniture, because the contract set up the conditions for payment and any unjust enrichment claim would subvert that,[55] and so we are just left with a claim for property if at all.[56]

Finally, as for the need for such a factor, it remains very much unproven. It is dangerous, being an entirely defendant-sided factor that would have a "*(unique) dual role"*[57] as both a test for enrichment and an unjust factor, thus allowing unjust enrichment without any reference to the claimant's intention or understanding, and even where the claimant intended the defendant to have the benefit for free. The injustice of not allowing a claim is far from clear, given that *ex hypothesi* the claimant is acting without an agreement that the defendant will pay (a contract) or even a shared understanding to that effect (in which case there would be a failure of consideration). Such claimants are not obviously deserving of the law's sympathy or an award of restitution.[58]

VI. CONCLUSIONS

A defendant in receipt of an incidental benefit will normally have no risk of liability in restitution for the value of that benefit. Where the claimant's primary objective is the pursuit of its own or a third party's interest, the ingredients of failure of consideration and free acceptance (to the extent that this exists) will not be satisfied, and there will often also be problems over interference with existing contractual or risk allocation. Where the basis of the claim is mistake, the analysis is more complex.

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[52] *Goff & Jones*, [17-07 to 17-08].
[53] Burrows, *The Law of Restitution*, 338.
[54] (1858) 8 El & Bl 738; 120 ER 275.
[55] The rule from *Sumpter v Hedges* [1898] 1 QB 673.
[56] Burrows, *The Law of Restitution*, 356 to 361.
[57] *Goff & Jones*, [17-02].
[58] Thomas J in *Becerra*; Arden LJ in *Benedetti* in the Court of Appeal: [2010] EWCA Civ 1427, [115]; *Goff & Jones* [13-10]; Virgo, *Principles*, 39 to 40; Burrows, *The Law of Restitution*, 49 to 50. Cf cases in which the claimant provides a benefit even though arrangements are subject to contract, as in *Regalian Properties Ltd v London Docklands Development Corpn* [1995] 1 WLR 212; see also *Goff & Jones*, [16-09]; *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324.

Whilst many of such claims should also fail, it remains unclear whether this conclusion should be derived from an application of the established tests or whether it is necessary to have a separate rule concerning incidental benefits and, in any event, where the line should be drawn.[59]

[59] Postscript: NB: After this article was typeset, the judgment in *TFLM v Lloyds Bank* was reversed at [2013] EWCA Civ 1415, to which reference should also be made.