

Institution: University of Oxford
Unit of Assessment: 20 - Law
Title of case study: Shaping the English law of unjust enrichment (restitution)
1. Summary of the impact <p>The work of the late Professor Peter Birks and of Professor Andrew Burrows QC has had a profound impact on the development by the courts of a new branch of English private law, namely the law of unjust enrichment (sometimes called the law of restitution). This branch was first officially recognised by the highest court in the United Kingdom in 1991 and it is now widely viewed as being an important and independent part of the law as is, for example, the law of contract or the law of tort. Every citizen and institution is potentially affected by it, most obviously where payments are made by mistake. The particular contribution of Birks' and Burrows' research has been in assisting the courts to identify, clarify, and refine the leading principles of this new branch of the law. Their work has made what was previously obscure and under-developed, intelligible and accessible, thereby enhancing the quality of decisions made by the courts and offering guidance to counsel. Their doctrinal and theoretical writings on this subject are among the works most cited in the English courts. As the <i>Times</i> put it, 'a mere footnote in a Birks article proved to be the subject of several paragraphs of reasoning in the speeches of the law lords.'</p>
2. Underpinning research <p>Building on early work by Goff and Jones in 1966, Peter Birks' important book <i>An Introduction to the Law of Restitution</i> (1985) was followed by a prolific stream of articles and books published while he was the Regius Professor of Civil Law at Oxford between 1 January 1993 and his death in 2004. Andrew Burrows' most influential work has been the three editions of his book, <i>The Law of Restitution</i> [R2] and, most recently, <i>A Restatement of the English Law of Unjust Enrichment</i> [R1] (all researched and published while he has been at Oxford (1986 to 2013), as Tutorial Fellow at Lady Margaret Hall, as Norton Rose Professor of Commercial Law and Fellow of St Hugh's, and now as Professor of the Law of England and Fellow of All Souls College).</p> <p>Birks' and Burrows' extensive research revealed [R1, R2, R4] that every claim that is properly seen as based on the event or cause of action of unjust enrichment involves four distinct questions: has the defendant been enriched ('the enrichment question')?; was the enrichment at the claimant's expense ('the at the expense of question')?; was the enrichment at the claimant's expense unjust ('the unjust question')?; and does the defendant have a defence ('the defences question')? If the first three questions are answered 'yes' and the last 'no', the claimant has a right to restitution, reversing the unjust enrichment. With that conceptual structure in place, their work goes on to articulate in detail the principles explaining what is meant by enrichment at the claimant's expense, what injustice is in play (articulated by recognising various 'unjust factors' such as mistake, failure of consideration, and duress) and what are the defences and their ingredients (most importantly the defence of change of position but also, for example, limitation) [R3, R5].</p>
3. References to the research <p>[R1] Burrows, Andrew, (assisted by an advisory group of academics, judges and practitioners), <i>A Restatement of the English Law of Unjust Enrichment</i>, 2012 (Oxford University Press) - Assisted by an advisory expert group, the Restatement and commentary were the work of Burrows (as made clear at p xi of the book).</p> <p>[R2] Burrows, Andrew, <i>The Law of Restitution</i> (1st edn, 1993 (Butterworths, London), 2nd edn, 2002 (Butterworths, London), 3rd edn, 2011 (Oxford University Press)) 1-737 - The 1st edn of Burrows' <i>The Law of Restitution</i> won the Society of Public Teachers of Law Prize for Outstanding Legal Scholarship. It was reviewed favourably in the leading law journals.</p> <p>[R3] Burrows, Andrew, 'Restitution in Respect of Mistakenly Paid Tax' (2005) 121 LQR 540-546.</p>

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[R4] Birks, Peter, *Unjust Enrichment* (1st edn, 2003 (Oxford University Press), 2nd edn, 2005 (Oxford University Press)) 1-318 - Birks' *Unjust Enrichment* was published in the Clarendon Law series and was reviewed favourably in leading law journals and was the subject matter of a colloquium of the leading scholars in the field the proceedings of which were published in the 2004 *Restitution Law Review* 260-289.

[R5] Birks, Peter, 'Change of Position and Surviving Enrichment' in *The Limits of Restitutionary Claims: A Comparative Analysis* (ed, Swadling, William, 1997, United Kingdom National Committee of Comparative Law) 36-63 – Based on a paper presented at an international conference run by the UK National Committee of Comparative Law in association with the British Institute of International and Comparative Law.

4. Details of the impact

In developing this area of the law, the English courts have expressly relied on and adopted the four-part analytic framework developed over several years by Birks and Burrows, as well as other particular aspects of their views. Their framework has been so widely endorsed by the courts and used by counsel that it left a profound mark on the law in this area. There are few fields of English law where the courts have made such pivotal and persistent use of academic research. Indeed, so entrenched has the Birks-Burrows approach become, that it is routinely described by the courts and others as the standard view of the area.

The research of Birks and Burrows has been favourably cited in scores of decisions of the courts in England and Wales (as well as in other 'common law' jurisdictions, including Australia, Canada and Hong Kong). In these decisions, the courts gradually shaped a ground of recovery that was, in English law, entirely new. Restitution was known and recognised in the United States and some other jurisdictions. Nonetheless, seeing that there is space for, and a need for, a kind of legal remedy, is not sufficient to call it into being. Someone needs to articulate and recognise its basic principles, and to show how these can be integrated with the rest of the law of that jurisdiction. In some areas, this is work for Parliament, but in large fields of common law it falls to the courts. So it is in the law of unjust enrichment. When counsel and the courts sought guidance in developing this area of law they naturally looked to other jurisdictions. But they also looked to the work of legal researchers, and in England and Wales, very extensively to the work of Birks and Burrows. Their arguments reached the courts by their frequent citation by academic writers, through the work of counsel who actively sought out research that offered guidance that could be useful developing arguments, and by more than a decade of direct engagement with the legal profession in seminars at Oxford and elsewhere, including Professor Burrows' work in judicial education through the Civil Committee of the Judicial Studies Board.

In the period 2008-2013, the courts made specific use of the post-1993 publications of Birks and/or Burrows in many leading cases, including the following:

(i) Arden LJ in *Benedetti v Sawiris* [2010] EWCA Civ 1427, having just cited a passage from Burrows **[R2]**, immediately went on to say 'I would add ... at this point that the writings of scholars are of great importance in the development of the law of restitution ... I have found [them] helpful as background in resolving some of the novel issues on this appeal.' The case concerned the question of how one should value services rendered where there is no binding contract between the parties. The decision of the Court of Appeal was upheld by the Supreme Court (see (v) below) **[C1]**.

(ii) Aikens LJ in *Haugesund Kommune v Depfa Bank* [2012] 2 WLR 199 had to decide whether the best interpretation of the law was that one House of Lords decision had been overruled by another. Having cited at [86] Birks' **[R4 and R1]** he went on in the next paragraph to reach a conclusion relying on their analysis **[C2]**.

(iii) In *Test Claimants in the FII Group Litigation v HMRC* [2012] 2 WLR 1149, which concerned restitutionary claims for several billions of pounds of overpaid corporation tax, Lord Walker at [61] cited Burrows **[R3]** at 544] as being 'generally supportive' of the earlier case of *Phillips-Higgins* before going on to say that, contrary to what he had indicated in a previous case, he now thought that '*Phillips-Higgins* was rightly decided'. On the separate question of whether one needed a demand for a *Woolwich* claim, his Lordship, at [73], cited Burrows **[R2]**, at 507-8] along with other writers arguing that a demand was not needed before saying in the next paragraph, 'This is a formidable volume of

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distinguished academic opinion' and then going on, at [79], to restate the law as not needing a demand, authoritatively settling an important and controversial point of law [C3].

(iv) In *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch) at [38]-[39], which dealt with restitution of incorrectly charged VAT, Henderson J said the following: 'It has now become conventional to consider the question whether English law recognises a right to restitution by reference to the four questions ... namely:

- a) Has the defendant been benefited, in the sense of being enriched?
- b) Was the enrichment at the claimant's expense?
- c) Was the enrichment unjust?
- d) Are there any defences?

As Professor Andrew Burrows QC says in *The Law of Restitution*, 3rd edition (2011), at p.27, if the first three questions are answered affirmatively, and the fourth negatively, the claimant will be entitled to restitution. He adds that these four elements "constitute the fundamental conceptual structure of an unjust enrichment claim". While reminding us that this is a framework for analysis, Henderson J continued, 'I have no quarrel with this basic conceptual structure.'

And later at [74], he said, 'The next question is whether the enrichment of HMRC at the expense of the claimants was unjust. As Professor Burrows explains in *The Law of Restitution* 3rd edition (2011), chapter 5, the traditional common law approach to this question requires the claimant to establish the existence of an "unjust factor" which caused the payment that the claimant seeks to recover.'

The primary issue in the case was a question on the meaning of 'at the expense of'. Having looked at various views, he set out the view of Burrows, saying at [54] that Burrows occupied 'a somewhat intermediate position' before going on at [67] to decide that that intermediate position was the correct approach to apply [C4].

(v) Perhaps most importantly of all, on the appeal to the Supreme Court in *Benedetti v Sawiris* [2013] UKSC 50, Lord Clarke giving the leading judgment relied very extensively on the work of Burrows. There are favourable references to Burrows [R2] at [16], [18-20], [22], [25] and to Burrows [R1] at [28] and [31-32]. Indeed at [31]-[32], the very detailed examples set out in Burrows [R1] are repeated and the conclusions Burrows put forward on their basis are regarded as correct [C5].

The broad general impact of Birks' research is fairly summarised by a passage in his obituary in *The Times* (July 9, 2004) [C6]: 'By now [the late 1990s] his work was inspiring not only other academics but was also influencing practitioners and judges. He came to be held in great esteem by many senior judges who admired the power of his analysis in pointing the way to a principled decision. The respect afforded to his views reached the point where, in one case, even a mere footnote in a Birks article proved to be the subject of several paragraphs of reasoning in the speeches of the law lords.' That was a case in 1996. But this is not mere background: given the way the common law works, decisions reached on the law of unjust enrichment in the period 2008-2013 continue to rely on prior decisions that were directly influenced by Birks, as well as on current decisions such as those detailed above invoking the work of Burrows. For example, in *Haugesund Kommune v Depfa Bank* [2010] EWCA Civ 579 at [152] Etherton LJ relied again on the case of *Dextra Bank Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 in which the Privy Council said at [45], 'Their Lordships find themselves to be in agreement with Professor Peter Birks who, in his article [see 4 above on change of position] at p 49 rejected the adoption of the criterion of relative fault in forthright language.'

The enormous impact of this research is acknowledged throughout the legal profession. A leading QC says '[T]he work done in this area of law by Professors Birks and Burrows has been absolutely pivotal, forming not only the core of the submissions by Counsel as to what the law is or should be, but (perhaps more significantly) also underpinning the decisions actually made by the courts which are, of course, littered with citations to both Professor Birks' and Professor Burrows' works'. [C7] And one of Britain's most senior judges, now retired, says 'Their works made a major contribution to the development of the law by the House of Lords judges during this period.' And 'I regarded the Professors' work as essential and extremely useful background reading when I was preparing my judgment in that case. This is because understanding the structure of the English law in this field is extremely important to its future development, and it is important that the judges get this right when writing their judgments. I found the clarity and accessibility of their exposition of the subject of very great assistance.' [C8]

The impact of this research endures; it affects everyone in England and Wales who might have a claim

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in unjust enrichment, or who might have to answer such a claim, and everything from a phone bill inadvertently paid twice, to disputes involving millions of pounds in mistakenly paid tax. It has profoundly shaped an entire area of our law.

5. Sources to corroborate the impact

[C1] Arden LJ in *Benedetti v Sawiris* [2010] EWCA Civ 1427.

[C2] Aikens LJ in *Haugesund Kommune v Depfa Bank* [2010] EWCA Civ 579.

[C3] Lord Walker in *Test Claimants in the FII Group Litigation v HMRC* [2012] 2 WLR 1149.

[C4] Henderson J in *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch) at [38]-[39].

[C5] Lord Clarke in *Benedetti v Sawiris* [2013] UKSC 50.

[C6] Obituary of Peter Birks, *The Times* (July 9, 2004).

[C7] Letter on file from leading Queen's Counsel who works extensively in this field.

[C8] Letter on file from one of Britain's most senior judges, now retired.