

Sinclair v Brougham and Change of Position

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Introduction

*Sinclair v Brougham*¹ is a “bewildering authority”.² Critics speak positively about aspects of it. Eoin O’Dell, for example, criticised their Lordships for elements of “legal madness”;³ yet he notes that they were judges of “exceptional ability”, “with an equitable eye to a just outcome”.⁴ Conversely, Lord Wright, who believed the case to be of “first-rate importance”, concedes concerns.⁵ These include the “rever[sion] to legal antiquarianism in order to explain” why the Birkbeck Building Society was not legally indebted for the *ultra vires* borrowing nor under a personal restitutionary liability to restore it.⁶ Turning to why some believe the case is important, to paraphrase Lord Wright, it shows that in some situations the law responds to “the retention [of an enrichment], not the receipt” of one.⁷

Since *Westdeutsche Landesbank Girozentrale v Islington LBC* (*Westdeutsche*),⁸ *Sinclair v Brougham* has been regarded as overturned. This was the conclusion of the English Court of Appeal in *Haugesund Kommune v Depfa Acs Bank* (*Haugesund*).⁹ Consistent with Birks’ suggestion, that the reasoning in *Sinclair v Brougham* was influenced by the “limited weapons” then available,¹⁰ particularly the lack of a change of position defence, the *Haugesund* Court confirmed not only the existence of a personal claim in unjust enrichment to recover *ultra vires* borrowing

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¹ *Sinclair v Brougham* [1914] AC 398 (HL).

² *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 713 per Lord Browne-Wilkinson.

³ Eoin O’Dell “*Sinclair v Brougham* (1914)” in *Landmark Cases in the Law of Restitution* Charles Mitchell and Paul Mitchell (eds) (Hart Publishing, Oxford, 2006) 213 at 218.

⁴ At 213.

⁵ Lord Wright “*Sinclair v Brougham*” in *Legal Essays and Addresses* (Cambridge University Press, Cambridge, 1939) at 1 (first published (1938) 6 CLJ 305). See also Samuel Stoljar “Re-examining *Sinclair v Brougham*” (1959) 22(1) Mod L Rev 21 at 21.

⁶ Wright, above n 5, at 16.

⁷ At 21.

⁸ *Westdeutsche*, above n 2.

⁹ *Haugesund Kommune v Depfa Acs Bank* [2010] EWCA Civ 579, [2012] QB 549.

¹⁰ Peter Birks *Unjust Enrichment* (2nd ed, Oxford University Press, Oxford) at 254.

but also that the claim was potentially subject to that defence.

Sinclair v Brougham predated the judicial acceptance of ‘change of position’ into the common law by about eighty years.¹¹ Its acceptance may explain the judicial willingness to overrule the denial of the personal restitutionary claim in *Sinclair v Brougham*. As Birks observes:¹²

With the defence of change of position in place, it had become apparent that even the personal claim in unjust enrichment did not have the same content as the claim on the contract of loan.

An impetus for this paper is the belief, derived from Lord Wright, that the precedential importance of *Sinclair v Brougham* lies in its “decision”¹³ – that the depositors had a claim to recover the value of the enrichment (derived from the *ultra vires* borrowing) that remained following its unauthorised use and that of the shareholders’ funds. A premise of this paper is that this was the “just outcome” (to borrow O’Dell’s words). This article considers the ability of change of position to achieve a similar result.

A second impetus for this paper is *Haugesund*. As noted earlier it involved a consideration of change of position in the context of *ultra vires* borrowing. The Court of Appeal held that the defence was not established on the facts. A message of this paper is that care must be taken with the application of the reasoning in that case. This is because, as noted above, *Sinclair v Brougham* involved a more complex situation. In *Sinclair v Brougham* not only were the depositors’ contracts of loan void for being *ultra vires* the Society (the situation contemplated in *Haugesund* (and *Westdeutsche*)) but the subsequent use of those funds was also *ultra vires* the Society. I shall refer to the *Sinclair v Brougham* type situation as the ‘*ultra vires* borrowing and unauthorised use situation’.

A third impetus is the recent work of James Goudkamp suggesting a distinction between ‘defences’ and ‘denials’.¹⁴ In the context of an unjust enrichment claim, a ‘denial’ is directed to negating one of the elements of the claim, for example, that the defendant received a benefit or an enrichment. By contrast, a ‘defence’ assumes that all the elements have been satisfied but raises a reason why the claim should be reduced or should not succeed.¹⁵ When Goudkamp and Charles Mitchell applied this distinction to the change of position defence a confused picture emerged – in some situations change of position appears to operate as a defence but in other situations as a denial.¹⁶ Indeed, subsequently Dennis Klimchuk

¹¹ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

¹² Birks, above n 10, at 254.

¹³ Wright, above n 5, at 19.

¹⁴ James Goudkamp *Tort Law Defences* (Hart Publishing, Oxford 2013).

¹⁵ James Goudkamp and Charles Mitchell “Denials and Defences in the Law of Unjust Enrichment” in Charles Mitchell and William Swadling (eds) *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing, Oxford, 2013) 133 at 139.

¹⁶ At 156–157.

has suggested that it may operate as a 'defeat' – "a claim that undercuts a cause of action without precisely denying any of its elements".¹⁷ Clearly commentators are revealing underlying complexities with the application of change of position. This diversity suggests that 'the change of position defence' is better seen as encompassing a number of 'defences'.

The conclusion reached in this paper is that change of position is able to replicate the result in *Sinclair v Brougham* but in order for it to do so its application in the *ultra vires* borrowing and unauthorised use situation needs to be seen as *sui juris*, enabling it to respond to the complexities that arise in this situation, particularly the policy considerations that underlie why the use of the funds is *ultra vires*. The policy considerations determine the circumstances in which the use of the funds is regarded as having produced a surviving enrichment.¹⁸ At its core, however, its focus is on whether the 'borrower' remains enriched following the use of the funds. The end result, as in *Sinclair v Brougham*, is that the plaintiff 'lender' can recover the surviving enrichment.

This article is divided into three substantive parts. Part One is a brief reminder of *Sinclair v Brougham*, principally its facts and the reasons that made this case such a complicated one for their Lordships. Until the work of Goudkamp, Mitchell and others, the focus on retention of the enrichment suggested by *Sinclair v Brougham* seemed contrary to current unjust enrichment theory, which instead focuses upon the fact of receipt. Part Two briefly reviews current theory in conjunction with considering *Westdeutsche* and *Haugesund*. As noted earlier, these cases, despite their apparent factual similarity to *Sinclair v Brougham*, did not involve *ultra vires* borrowing and unauthorised use, just *ultra vires* borrowing. Part Two explores this difference.

Against this background, Part Three explores the significance of the researches of Goudkamp and others to our understanding of change of position and suggests how change of position should apply in the *ultra vires* borrowing and unauthorised use situation.

Part One: *Sinclair v Brougham*

This case arose out of the 1911 collapse of the Birkbeck Bank or, more accurately, the collapse of the Birkbeck Building Society. The Society was established in 1851 under the Building Societies Act 1836. As Stoljar explains the "main task" of building societies at that time "was to bring together those willing to lend and those wishing to borrow money for the building of houses".¹⁹ In its purest form, membership of building societies was comprised of 'investing' members or shareholders (the

¹⁷ Dennis Klimchuk "What Kind of Defence is Change of Position?" in Andrew Dyson and James Goudkamp and Frederick Wilmot-Smith (eds) *Defences in Unjust Enrichment* (Hart Publishing, Oxford, 2016) 69 at 85.

¹⁸ An example may be a minor's use of borrowed funds to pay for necessities.

¹⁹ Stoljar, above n 5, at 21.

lenders) and ‘advanced’ members/shareholders (the borrowing house builders).²⁰ The Birkbeck Building Society was empowered to borrow from shareholders for its purposes as a building society.²¹

By about 1871 the Society’s business had evolved into that of a bank. It sought deposits from non-members, made loans to customers and invested in securities as if a bank.²² Indeed, the Society started trading as the ‘Birkbeck Bank’. Lord Sumner noted that “the fact that a banking business was being carried on was a matter of notoriety and even of pride”.²³ Stoljar’s researches confirmed that the Birkbeck Bank became one of London’s important smaller banks.²⁴ Both aspects of the banking business – the borrowing and re-lending/investing – were *ultra vires* the Society. This carried a number of consequences. One consequence was that the Society and its agents lacked the legal capacity to borrow from the depositors for the purposes of a banking business. Lord Parker concluded that the depositors “must have been aware” of this.²⁵ A second consequence was that the Society and its agents lacked the legal capacity to ‘lend’ that money “to customers with whom it dealt as a banker” and to “inves[t]” that money “in securities for banking purposes”.²⁶

In 1911 the public lost confidence in the ‘Bank’. Following a “run” the Society was placed into liquidation.²⁷ The key issue was the relative merits of the competing claims of the Bank depositors and the Society’s shareholders.²⁸

At trial Neville J considered that the *ultra vires* nature of the borrowing meant that the depositors could claim only against the assets, once costs, trade creditors and shareholders had been paid.²⁹ In the case of the shareholders, this included the value of their subscriptions, bonuses and interest.³⁰ As Lord Parker observed, this approach operated to identify the depositors’ money “by a process of exclusion”.³¹ The practical result was to ‘immunise’ the shareholders from the *ultra vires* activities. This result and approach was confirmed by a majority of the Court of Appeal.³²

²⁰ See further *Re Guardian Permanent Benefit Building Society* (1882) 23 Ch D 440 (CA) at 457–458 per Jessel MR.

²¹ *Sinclair v Brougham*, above n 1, at 446 per Lord Parker.

²² At 425 per Viscount Haldane LC.

²³ At 456 per Lord Sumner.

²⁴ Stoljar, above n 5, at 21.

²⁵ *Sinclair v Brougham*, above n 1, at 439 per Lord Parker.

²⁶ At 425 per Viscount Haldane LC. See also 445–446 per Lord Parker.

²⁷ Stoljar, above n 5, at 21.

²⁸ By consent it had been agreed that costs, and the claims of trade creditors (which were “inconsiderable in number and value”: *Sinclair v Brougham*, above n 1, at 427 per Lord Dunedin) and some of the members/shareholders that had reached a compromise agreement with the depositors would be paid first.

²⁹ *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch 183.

³⁰ *Sinclair v Brougham*, above n 1, at 411–412.

³¹ At 445.

³² *Re Birkbeck Permanent Benefit Building Society*, above n 29.

As identified by Lord Parker, however, a logical difficulty with this approach is that the shareholders were legally entitled to all of the Society's assets once prior claims (such as trade creditors) had been satisfied.³³ This would suggest that the depositors had no claim.

Fletcher Moulton LJ dissented. He thought that the logic of *ultra vires* required the depositors to be paid first. He reasoned that the shareholders were entitled to participate only in the distribution of the Society's assets. To determine this, the depositors' claim needed to be first satisfied.³⁴ It was only once the depositors had recovered their deposits that the Society's assets could be identified and then distributed to the shareholders.

A common feature of the approach of Neville J and the members of the Court of Appeal is that the shareholders' claim was seen as arising from the fact of their shareholding in the Society. This overlooks the fact that the *ultra vires* banking business had completely overshadowed or dominated the Building Society. In 1910 *ultra vires* deposits exceeded shareholder funds by a factor of ten.³⁵ Reflecting this dominance, the activities of the Building Society had been incorporated into or absorbed into that of the bank. The result was that not only borrowings from the depositors but also shareholder funds had been used in the banking business. The amount was unclear, but as Viscount Haldane LC observed, "[a] large part" of the shareholders' funds had "probably been applied *ultra vires* in the acquisition of the assets of the banking business",³⁶ assets to which the Society was not entitled to.³⁷ This is a third consequence flowing from the *ultra vires* banking business. The lack of legal capacity extended to the misuse of the Society's own funds (contributed by the shareholders) in the banking business. As Viscount Haldane observed, "The agents of the society ... have acted *ultra vires* in the application not only of the depositors' but of the society's own money".³⁸

The result was that both depositors and shareholders had similar claims – for unauthorised use of their funds. This was recognised in their Lordships' application of the proprietary claim to both depositors and shareholders (as residual claimants to the Society's property). Since the claims of the other claimants, such as trade creditors, had been satisfied, the balance remaining represented the remnants of the funds misused by the Society's agents. The end result was the *pari passu* distribution of the remaining assets (or surviving enrichment) between depositors and shareholders.

³³ *Sinclair v Brougham*, above n 1, at 445.

³⁴ At 413. See further Stoljar, above n 5, at 25.

³⁵ At 411.

³⁶ At 423 per Viscount Haldane LC. See also 425 per Viscount Haldane LC and 445–447 per Lord Parker.

³⁷ At 445–446 per Lord Parker.

³⁸ At 425 per Viscount Haldane LC.

Part Two: The current orthodox response

Background: unjust enrichment theory – a focus on receipt subject to defences

Over the last few decades the law of unjust enrichment has received express recognition by the House of Lords and the Supreme Court.³⁹ Perhaps more significantly this has included recognition and use of the now orthodox four-question enquiry to evaluate unjust enrichment claims:⁴⁰

1. Has [the defendant] benefited or been enriched?
2. Was the enrichment at the expense of [the plaintiff]?
3. Was the enrichment unjust?
4. Are there any defences?

Inherent in this enquiry is the assumption that a claimant who satisfies the first three questions is ordinarily⁴¹ entitled to recover the value of the enrichment received by the recipient defendant.⁴² Until recently it has been assumed that the function of the fourth question is to determine if this *prima facie* entitlement should be relaxed.

Assuming satisfaction of the first three questions, the result, which Birks suggested is “the only acceptable regime”, is one of “strict liability” arising from receipt, tempered by defences.⁴³ Of course when describing and discussing this regime Birks was thinking of his ‘core case’⁴⁴ of unjust enrichment, the mistaken payment case of *Kelly v Solari*.⁴⁵ A feature of this core case is that it involves the receipt of money. Money is the universal medium of exchange, so typically its receipt constitutes evidence of an enrichment.⁴⁶

³⁹ In *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL), for example, Lord Steyn confirmed at 227: “... unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations”.

⁴⁰ At 227 per Lord Steyn. See also *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 at [10] per Lord Clarke. In *Banque Financière* at 234 Lord Hoffmann preferred a three question enquiry (“[F]irst, whether the defendant would be enriched at the plaintiff’s expense; secondly, whether such enrichment would be unjust and thirdly, whether there are nevertheless reasons of policy for denying a remedy”).

⁴¹ *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399 at [116] and [121] per Lord Toulson.

⁴² Above n 41. *Portman Building Society v Hamlyn Taylor Neck (A Firm)* [1988] 4 All ER 202 at 207 per Millett LJ (“... the cause of action for money had and received is complete when the plaintiff’s money is received by the defendant” and “[i]t does not depend on the continued retention of the money by the defendant”).

⁴³ Birks, above n 10, at 7.

⁴⁴ At 7.

⁴⁵ *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24 (Exch).

⁴⁶ *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) at 798 per Goff J.

Moving beyond mistaken payments, a question for the law of unjust enrichment has been whether a personal restitutionary remedy is available in the situation of an *ultra vires* loan. Given the ordinary requirements for an unjust enrichment claim and the nature of money, the assumption is that the claim should be available. Questions 1 and 2 of the now standard enquiry would appear to be satisfied by the transfer of funds to the 'borrower'. And, because the contract of loan is legally unenforceable, there has been a total failure of consideration for that money, thereby satisfying question 3. The onus would then appear to shift to the defendant to establish a defence.

Until the House of Lords reconsidered this matter in *Westdeutsche*, however, the dominant authority was *Sinclair v Brougham*. And, as we have seen, 'its' answer was that a personal unjust enrichment claim would not be available.

In reaching this conclusion their Lordships were influenced by the fact that both depositor and shareholder funds were misused in the bank. Additionally, the recognition that the depositors had a personal restitutionary claim to recover the amount of the deposits would "strike at the root of the doctrine of *ultra vires*",⁴⁷ which, in this context, had the "purpose ... [of] protect[ing] the shareholders against *ultra vires* dealings".⁴⁸

Indeed, if successful in their personal claim, the depositors would have recovered the value of their deposits, despite the subsequent loss of, at least, some of that money in the *ultra vires* banking business. It would have been the shareholders who would have to bear the full consequences of that loss, albeit theoretically tempered by potential claims against their agents for exceeding their authority. This result still seems "repugnant".⁴⁹

Sinclair v Brougham is overruled

Westdeutsche involved *ultra vires* swap agreements and the issue before their Lordships was whether compound interest was recoverable. In the course of deciding this issue Lord Browne-Wilkinson stated that *Sinclair v Brougham* should be regarded as overruled, in that "a claimant for restitution of moneys paid under an *ultra vires*, and therefore void, contract has a personal action at law to recover the moneys paid".⁵⁰

Haugesund also involved an *ultra vires* swap agreement, this time involving two Norwegian local authorities. Unlike the situation in *Westdeutsche*, the issue whether a lender under an *ultra vires* contract of loan could recover the value of that money through a personal restitutionary claim was raised directly⁵¹ and answered. Concluding "that the majority [in *Westdeutsche*] ... did depart from the decision in *Sinclair*

⁴⁷ *Sinclair v Brougham*, above n 1, at 414 per Viscount Haldane LC.

⁴⁸ Stoljar, above n 5, at 24.

⁴⁹ Birks, above n 10, at 7.

⁵⁰ *Westdeutsche*, above n 2 at 714.

⁵¹ *Haugesund*, above n 9 at [63] per Aitken LJ.

v Brougham”,⁵² the Court of Appeal went on to find that the money ‘lent’ pursuant to an *ultra vires* borrowing contract was recoverable. The Court also recognised that the claim “must be subject, where appropriate, to any available restitutionary defences”,⁵³ principally change of position. To better critique the Court’s consideration of the change of position defence two matters need to be explored.

‘Receipt’ and ‘authorised use’

The first matter involves the issue of ‘receipt’. It will be recalled that question 1 of the four-question theoretical structure is directed to determining whether the defendant has been ‘benefited or enriched’. This requires the defendant to have received the benefit or the enrichment – either directly or indirectly (for example when money is paid to a third party for the defendant’s benefit). ‘Ordinarily’, for example, when the claim involves Birks’ ‘core case’ of the mistaken payment of money, this is not an issue.⁵⁴ In *Kelly v Solari*⁵⁵ the insurance payout was made to and knowingly received by the recipient widow.⁵⁶ Typically receipt requires evidence that the defendant has requested, accepted or otherwise chosen to receive that benefit⁵⁷ but as *Kelly v Solari* also indicates, in the context of mistaken payments, the subsequent use or retention of the payment suffices.

Sinclair v Brougham illustrates that receipt may become an issue in the context of an *ultra vires* loan. As Lord Sumner reasoned, “receipt is an essential”⁵⁸ and because of the *ultra vires* doctrine the Society could not request, accept or receive the deposits. And while the Society’s agents may have ‘factually’ received the deposits, legally they were unable to ‘receive’ them on behalf of the Society.⁵⁹ The end result was that at the most the Society acquired a sort of possession of the deposits (and their proceeds) and this was not enough to constitute receipt to justify the imposition of a personal liability upon the Society to pay their value.

So why was ‘receipt’ (or more precisely its absence) not an issue in

⁵² At [87] per Aitken LJ and at [148] per Etherton LJ.

⁵³ At [87] per Aitken LJ.

⁵⁴ Circumstances can be envisaged when it may become an issue, for example, when the payer unilaterally deposits the funds directly into the recipient’s bank account.

⁵⁵ *Kelly v Solari*, above n 45.

⁵⁶ But see Stephen A Smith “A Duty to Make Restitution” (2013) 26(1) CJLJ 157 and Klimchuk, above n 17 at 77 (raising the issue whether the cause of action may also require that the recipient be aware of the circumstances that might give rise to an obligation to restore the value of the enrichment).

⁵⁷ *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 (CA) at 248 per Bowen LJ: “Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will”.

⁵⁸ *Sinclair v Brougham*, above n 1, at 452 per Lord Sumner.

⁵⁹ At 452–453 per Lord Sumner: “If it was *ultra vires* for the society ... to borrow the money on its promise to repay, it was *ultra vires* for it to authorise its officers to do so on its behalf”.

Haugesund? One answer is that, post-*Sinclair v Brougham*, courts have developed a distinction between receipt (in a consensual sense) and the fact of receipt (typically evidenced by a swelling of assets). As Lord Browne-Wilkinson observed in *Westdeutsche*:⁶⁰

... although it was *ultra vires* the society [in *Sinclair v Brougham*] to enter into a contract to repay the moneys, it was not *ultra vires* the society to receive moneys.

It is unclear what authority “to receive moneys” entails but this reasoning provides a means of recognising the important ‘receipt’ requirement while addressing the logic that was accepted in *Sinclair v Brougham*, that an *ultra vires* borrower cannot receive the loan.

As noted earlier the fact situation in *Haugesund* (and in *Westdeutsche*) is different from that in *Sinclair v Brougham*. It will be recalled that in *Sinclair v Brougham* the subsequent use of those deposits in conjunction with shareholders’ funds in the bank were also *ultra vires* the Society. In contrast, in *Haugesund* the lack of capacity applied only to the borrowing of the funds. There was no suggestion in that case that agents of the local authorities employed the funds in ways that were *ultra vires*.

This leads to the second matter – ‘authorised use’. In *Sinclair v Brougham* Lord Parker recognised that even though the Society lacked authority to borrow, if that money was used by the Society (or its agents) for “legitimate purposes” (ie purposes that were within the Society’s power to use the money for), that legitimate use would justify the imposition of liability upon it.⁶¹

An immediate parallel can be drawn with *Re Cleadon Trust Ltd*.⁶² Although not an *ultra vires* borrowing case, it gives guidance on the similar issue of liability for *intra vires* but unauthorised acts. The case involved a claim to prove in the winding up of an insolvent company. The dominant director and shareholder, Mr Creighton, had paid money directly to creditors in purported discharge of company debts (or those of a wholly owned subsidiary, the repayment of which had been guaranteed by the company). These payments caused to be problematic, simply because they were not made in response to any valid request by the company. Mr Creighton’s claim was rejected by a majority of the court.

Applying an equity that has its origins in unauthorised borrowings by agents⁶³ and married women,⁶⁴ and borrowings by companies that had

⁶⁰ *Westdeutsche*, above n 2, at 713 per Lord Browne-Wilkinson.

⁶¹ *Sinclair v Brougham*, above n 1, at 446: “... if the agents of a society, having power to borrow, borrow money intending, to the knowledge of the lenders, to apply it for an illegitimate purpose, but in fact apply it for the legitimate purposes of the society, there seems no reason, either in law or in equity, why the loan to the extent to which it is so utilized should not be treated as valid”.

⁶² *Re Cleadon Trust Ltd* [1939] Ch 286 (CA).

⁶³ *Bannatyne v D & C MacIver* [1906] 1 KB 103 (CA).

⁶⁴ *Jenner v Morris* (1861) 3 DE G F & J 45, 45 ER 795 (Ch).

exceeded their borrowing limits (with the result that the new borrowing is *ultra vires*),⁶⁵ the majority of the Court of Appeal considered that Mr Creighton's claim would have been successful if the payments had been used by an agent of the company "who had authority from the company either to make the particular payment or generally to make payments".⁶⁶

Returning to *Haugesund*, the subsequent use of these borrowed funds by the local authorities' agents for authorised purposes engaged the *Cleadon Trust* 'equity'. The result is that the local authorities obtained the benefit of these funds.

Application of change of position in Haugesund

While a relatively new 'judicial' development, the common law change of position defence is of fundamental importance for the law of unjust enrichment or, perhaps more accurately, for its expansion. As Virgo notes:⁶⁷

The recognition of the defence is of vital importance to the development of the law of restitution. For, by recognizing that changes in the defendant's position after he or she has received a benefit is relevant to the success of the restitutionary claim, it is possible to adopt a wider interpretation of the underlying cause of action, particularly the grounds of restitution for purposes of the action founded on the reversal of the defendant's unjust enrichment.

Even in the Birksian 'core case' of unjust enrichment – mistaken payments – *Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd*⁶⁸ shows an early association between the recognition of this defence and an expansion in recovery, there beyond 'liability' mistakes to include 'causative' mistakes. And it will be recalled that Birks associated the recognition of this defence with the judicial reconsideration in *Westdeutsche* of the consequences of *ultra vires* borrowing.⁶⁹

Against this background it is not surprising that change of position was raised in *Haugesund*. There the funds were invested in financial instruments that "proved disastrous".⁷⁰ The local authorities sought to offset the loss against their restitutionary liability to pay the amount of the loan. The Court of Appeal concluded that the defence was not available. In so doing it distinguished two types of situations giving rise to restitutionary liability. One is where the "defendants obtains ... money

⁶⁵ *Re Cork and Youghal Railway Co* (1869) LR 4 Ch App 748 (CA); *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 Ch D 61 (CA).

⁶⁶ *Re Cleadon Trust Ltd*, above n 62, at 321 per Clauson LJ. See further 321–325 for a discussion of the underlying principle.

⁶⁷ Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2015) at 679–680.

⁶⁸ *Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd* [1980] QB 677 (QB).

⁶⁹ Birks, above n 10, at 254.

⁷⁰ *Haugesund*, above n 9, at [6] per Aikens LJ.

in circumstances where he understands, in good faith, that it is his to keep and do what he likes with".⁷¹ An example is a mistaken payment to a recipient who is unaware of the payer's mistake. In this situation the defence is potentially available.

The second situation arises:⁷²

... where a defendant obtains money and, at the time of receipt, he understands that he will have to repay that sum at some stage in the future, which point has usually been identified between the payer and the payee, usually in a contract or what was, at the time, thought to be a valid contract.

In this situation the defence is said to be not available.

The facts in *Haugesund* brought it within the second situation. Despite the *ultra vires* nature of the underlying transaction, the local authorities were treated as understanding that the funds would need to be repaid and by investing the funds they "took the risk" that the investment might perform poorly.⁷³ Underlying this conclusion is the fact that there was no suggestion that the local authorities lacked the legal capacity to invest its funds in financial instruments.

In the context of a solvent defendant, that had the authority to invest funds in financial investments (and by so doing, can be said to have benefitted from the funds), this conclusion seems appropriate. But outside those parameters, especially if the use of the funds is *ultra vires*, there is a 'niggling' issue of whether this approach is consistent with public policy underlying why the use of the funds is declared to be *ultra vires*. We turn to this situation.

Part Three: Change of position and *ultra vires* transactions

Denials and defences

As was noted in the Introduction, through the work of Goudkamp and Mitchell we now understand that "rules governing the imposition of liability for unjust enrichment" fall into two categories – 'denials' and 'defences'.⁷⁴ It will be recalled that a denial is directed to negating one of the elements of the unjust enrichment claim, for example, that the defendant received an enrichment. By contrast a defence assumes that all the elements have been satisfied but raises a reason why the claim should be reduced or should not succeed.

Goudkamp and Mitchell concluded that the change of position defence could operate as either a denial or as a defence. This is significant. An immediate important practical difference between a defence and a denial involves the burden of proof. As Goudkamp and Mitchell observe, some arguments that are commonly advanced for the recognition of

⁷¹ At [123] per Aikens LJ.

⁷² At [123] per Aikens LJ.

⁷³ At [124]–[126] per Aikens LJ and [153] per Etherton LJ.

⁷⁴ Goudkamp and Mitchell, above n 15, at 133.

defences to unjust enrichment claims – such as “situations in which justice favours the defendant’s retaining a benefit” and/or emphasise security of receipt⁷⁵ – may be better achieved by “collapsing” them “into the elements of [the] action”⁷⁶ or, in other words, by regarding them as denials. “This is because the claimant bears the burden of proving the elements of his action”.⁷⁷ Applying this distinction to change of position, as recognised and advanced by the American Law Institute in *The Restatement Third: Restitution and Unjust Enrichment*,⁷⁸ Goudkamp and Mitchell concluded that the defence or denial status of change of position turned on whether the enrichment element in the cause of action focuses on the time of receipt (when change of position operates as a defence) or time of retention (when it operates as a denial).⁷⁹

The status of change of position has been considered further by Dennis Klimchuk.⁸⁰ He recognises that the concern of change of position, with the defendant’s disenrichment, mirrors the element in the unjust enrichment action – that the defendant be enriched. In turn, this can provide the foundation for a “plausible” argument that it is a denial.⁸¹ But he concludes that requirements associated with a successful plea of change of position indicate that it operates as a defence. These include the defendant’s “good faith”, and that:⁸²

... the good faith expenditure have been either extraordinary or have been such as to leave the defendant in the position that full restitution would make her worse off relative to the status quo ante.

These requirements are not mirrored in the elements of the action.

This analysis seems correct in the context of the ‘core case’ of unjust enrichment (or to use Klimchuk’s phrase – the “paradigmatic cases of the liability-mistaken payment”)⁸³ and the “paradigmatic cases of change of position” where the defendant “will have done something” with the enrichment.⁸⁴

But what about its potential application in the *ultra vires* borrowing and unauthorised use situation? First, the variations in *ultra vires* transactions should be noted.

⁷⁵ At 143 (referring to arguments advanced by Graham Virgo *The Principles of the Law of Restitution* (2nd ed, Oxford University Press, Oxford, 2006) at 665–667).

⁷⁶ Goudkamp and Mitchell, above n 15, at 144.

⁷⁷ At 144.

⁷⁸ American Law Institute *Restatement Third: Restitution and Unjust Enrichment* (American Law Institute Publishers, Saint Paul (Minn), 2011).

⁷⁹ Goudkamp and Mitchell, above n 15, at 156–158.

⁸⁰ Klimchuk, above n 17 at 69.

⁸¹ At 75.

⁸² At 76.

⁸³ At 79.

⁸⁴ At 79.

The range of ultra vires transactions

Ultra vires transactions can arise in a range of situations; in each, underlying public policy may differ. Indeed, in *Haugesund* Aitken and Etherton LJ agreed that public policy underlying the conferral of limited authority may be an important consideration for an unjust enrichment claim. They differed, however, in how it would be considered.

Prompted by *Westdeutsche*, Aitken LJ concluded that:⁸⁵

... there is no longer any general public policy rule of English law that either prevents or restricts the right to claim restitution of money advanced under a borrowing contract that is void as being *ultra vires* the borrower.

But if the above “general public policy rule” in favour of recovery was “inconsistent with the express provisions of a statute or ... its clear intention”,⁸⁶ Aitken LJ considered that it would have to concede priority to that specific policy; this would be achieved through a public policy defence.⁸⁷

Etherton LJ also appeared to accept that for the purposes of establishing the claim all *ultra vires* borrowing is all the same, but unlike Aitken LJ he thought that specific policy issues relating to that transaction could be relevant considerations for the purposes of change of position.⁸⁸ In this respect Etherton LJ is not alone.

Commentators also have suggested that policy considerations should influence the application of change of position. For example, the recognition by Aitken LJ in *Haugesund* that public bodies may be able to raise a change of position defence has been questioned as being “too generous to their taxpayers”.⁸⁹ It is said that in this situation the public (in whose interests the public body is acting) and not the lender should bear the cost of the public body’s *ultra vires* act,⁹⁰ presumably because the funds will have been expended on authorised purposes.

In contrast, when the *ultra vires* borrower is a minor the consensus appears that “there is no doubt that the policy of the law is to protect the minor”⁹¹ from “burdensome debt howsoever arising”,⁹² even if, as it

⁸⁵ *Haugesund*, above n 9, at [96] per Aikens LJ.

⁸⁶ At [96] per Aikens LJ.

⁸⁷ At [92]–[96] per Aikens LJ. In *Haugesund* it was unsuccessfully argued that the Norwegian Local Government Act 1992 required the recognition a public policy defence that would restrict liability to the amount recovered from the investments. This was rejected as having no factual basis (at [102]).

⁸⁸ At [151] per Etherton LJ.

⁸⁹ Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016) at [34–38] (footnote omitted).

⁹⁰ At [34–38], referring to arguments raised in [27–61] to [27–63].

⁹¹ Birks, above n 10, at 254.

⁹² At 255.

has been suggested, this requires modifications to the typical application of change of position. So, while Lord Goff considered that the defence “is not open to one who has ... paid away the money with knowledge of the facts entitling the plaintiff to restitution”,⁹³ the current editors of *Goff & Jones*⁹⁴ suggest that a minor should be allowed to:⁹⁵

... rely on the change of position defence in a wider set of circumstances than would normally be permitted, so that he can escape liability for that portion of the value which he has consumed or otherwise disposed of by the time of the action, even if he was aware of the circumstances entitling the claimant to restitution.

Both Birks and the editors of *Goff & Jones* justify the special protection of minors only to the extent that the minor does not remain enriched at the time of the claim. “[P]rotection of the minor is not subverted by making him give up still surviving enrichment”.⁹⁶ Underlying this is the suggestion that at its core, or at least in this context, change of position is responding to the loss of the original enrichment; the recipients disenrichment.

A sui juis change of position?

Klimchuk may be correct that in its paradigmatic case, change of position operates as a defence. But, it appears that there is a growing recognition that in certain situations, policy considerations should shape the application of change of position. Indeed, once the focus turns to the fact of disenrichment, change of position starts operating as a denial.

Further support for this ‘denial’ version comes from an unlikely source – commentators, such as Elise Bant, who objected to Birks’ attempt to link change of position with disenrichment. One of Bant’s concerns is that a disenrichment focus means that “the change of position enquiry must mirror the enrichment element of the cause of action”,⁹⁷ thereby potentially limiting its scope.⁹⁸

Most would agree with Bant’s criticism of disenrichment as “an incomplete and problematic explanation” of the change of position

⁹³ *Lipkin Gorman*, above n 11, at 580 per Lord Goff.

⁹⁴ Mitchell, Mitchell and Watterson, above n 89.

⁹⁵ At [34–17].

⁹⁶ Birks, above n 10, at 255. See also Mitchell, Mitchell and Watterson, above n 89, at [34–16].

⁹⁷ Elise Bant “Change of Position: Outstanding Issues” in Andrew Dyson and James Goudkamp and Frederick Wilmost-Smith (eds) *Defences in Unjust Enrichment* (Hart Publishing, Oxford, 2016) 133 at 142.

⁹⁸ Bant’s researches reveals an evolving Australian jurisprudence that suggests that the courts should look beyond surviving enrichment to consider if there has been an irreversible change in the defendant’s position, for example a decision to cease work and commence university studies. If so, “to require the defendant to make restitution ... would be to place her in an entirely different position from the one she occupied prior to his receipt”. Bant, above n 97, at 147 (citing *Gertsch v Atsas* [1999] NSWSC 898, (1999) 10 BPR 18 431).

defence. But this does not mean that in some situations the defence is not, and cannot be, disenrichment-focused. The immediate result is the recognition that what we have referred to as change of position is in fact a term for a category containing a range of different responses.⁹⁹

We return to Klimchuk. He recognised that there are some non-paradigm examples of the change of position, for example the situation of a mistaken payment that is then stolen by a thief. Because the enrichment is lost through the actions of a third party, as opposed to those of the recipient, this situation does not fit the paradigm model. Klimchuk saw this situation as “akin to but not quite a denial”.¹⁰⁰ He described it as ‘defeat’ – by which he meant “a claim that undercuts a cause of action without precisely denying any of its elements”.¹⁰¹

A twist with the *ultra vires* borrowing and unauthorised use situation is that the funds are used in an unauthorised way. As noted earlier, in *Sinclair v Brougham* the Society and its agents lacked any authority to lend money to bank customers or to invest it.¹⁰² It may be that the application of change of position in this situation operates as a defeat. This may be important for the purposes of the burden of proof. By virtue of the reasoning in *Westdeutsche* the receipt of the enrichment cannot be denied, but the subsequent disenrichment through unauthorised use ‘undercuts the cause of action’.

Conclusion

Despite all that to modern eyes, appears ‘wrong’ with *Sinclair v Brougham*, it is suggested that the case should not be put “on one side in a pile marked ‘not to be looked at again.’”¹⁰³ Rather in the *ultra vires* borrowing and unauthorised use situation, typified by that case, its result is sound. Recovery for the depositors (and shareholders) was limited to the surviving enrichment. The current theoretical focus on receipt subject to change of position can replicate that result, but to do so the application of the change of position doctrine in this situation should be seen as being *sui juris* – that it is moulded by both the underlying policy considerations that make the use of the funds *ultra vires* and the fact of the disenrichment.

⁹⁹ Klimchuk, above n 17, at 85: “If, as we might reasonably enough hold, two claims that occupy different places in the taxonomy of defences cannot properly speaking be the same defence, I think the conclusion to draw is that ‘change of position’ collects two defences”.

¹⁰⁰ At 85.

¹⁰¹ At 85.

¹⁰² *Sinclair v Brougham*, above n 1, at 425 per Viscount Haldane LC. See also 445–446 per Lord Parker.

¹⁰³ *Re King (decd)* [1963] Ch 459 (CA) at 483 per Lord Denning MR. These comments were not directed to *Sinclair v Brougham*.