THE MAXIMS OF EQUITY

The maxims of equity are an attempt to formulate in short pithy phrases the key principles which underlie the exercise of the equitable jurisdiction. They are not binding rules, nor do they provide guidance for every situation in which equity operates. Nevertheless, they provide useful illustrations of some of the principal recurrent themes which can be identified within the corpus of the rules of equity.

(1) **Equity will not suffer a wrong to be without a remedy**

This maxim provides the philosophical foundation of equity, namely that wrongs should be redressed by the courts if possible. Equity developed as a response to defects of the common law to provide relief where none was available. For example, equity intervened to allow a person to escape from a contract which they had entered having been misled by a mistake of fact, even though the contract was enforceable at common law (see e.g. *Cooper v Joel* (1859) 1 De G F & J 240; *Torrance v Bolton* (1872) 8 Ch App 118). Similarly, through a trust equity enabled a beneficiary to enforce an obligation to use property in a particular way where there was no remedy at common law.
(2) **Equity follows the law**

The Court of Chancery did not override the Courts of Common Law except to remedy an injustice, and could not depart from statute. Equity does not unnecessarily depart from legal principles (*Burgess v Wheate* (1759) 1 Eden 177 at 195, per Clarke MR; *Sinclair v Brougham* [1914] AC 398 at 414-415, per Lord Haldane L.C)

(3) **Where the equities are equal the law prevails**

This maxim means that where there are two persons with competing rights to the same item of property, one with a legal right and the other an equitable right, the legal right will take priority over the equitable right even if the equitable right had pre-existed it. In *Worlet v Birkenhead* ((1754) 2 Ves Sen 571 at 574) Lord Hardwicke LC explained that this was ‘by reason of that force [the Court of Chancery] necessarily and rightly gives to the legal title’ (Compare also *Marsh v Lee* (1670) 2 Vent 337; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbothnot Factors Ltd* [1988] 1 WLR 150). In the context of land, issues of priority between competing rights, whether legal or equitable, are governed by statutory rules which have displaced the operation of this maxim and the next.

(4) **Where the equities are equal the first in time prevails**

This maxim means that if two parties have competing equitable rights in the same item of property, and neither has the legal estate, the right which was created first enjoys priority (*Willoughby v Willoughby* (1756) 1 Term Rep 763; *Brace v Duchess of Marlborough* (1728) 2 P Wms 491; *Rice v Rice* (1854) 2 Drew 73; *Phillips v Phillips* (1861) 4 De GF & J 208). This maxim mirrors the common law rule as to priority between competing legal rights.

(5) **He who seeks equity must do equity**

This maxim looks to a plaintiff’s future conduct. If a plaintiff seeks equitable relief he must be prepared to act fairly toward the person against whom it is sought (see e.g. *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300; *Solle v Butcher* [1950] 1 KB 671; *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482). For example, if a purchase is set aside in equity the purchase money must be repaid with interest (*Peacock v Evans* (1809-10) 16 Ves 512).
He who comes to equity must come with clean hands

In contrast, this maxim looks to the past conduct of the plaintiff. If the plaintiff’s conduct is tainted by illegal or inequitable conduct he may be denied the relief to which he would otherwise be entitled. For example, a tenant will not be granted specific performance of an agreement for a lease if he is in breach of the covenants it contains (Coatsworth v Johnson (1885) 54 LT 520). The maxim does not apply to conduct in general, but only that which has ‘an immediate and necessary relation to the equity sued for’ (Dering v Earl of Winchelsea (1787) 2 White & Tud LC 488 at 489). Therefore in Argyll (Duchess) v Argyll (Duke) ([1967] Ch 302) the plaintiff’s adultery, which caused a divorce, was no bar to her claim for an injunction to restrain the defendant from publishing confidential material. The rationale for this maxim, as for the parallel common law rule against illegality, is to deter persons from entering transactions which involve a dimension of illegality. However, since these rules may in practice allow one person who was party to an illegal purpose to arbitrarily retain the entire benefit of property transferred to him, because another equally guilty party is prevented from asserting any entitlement to it, the courts have systematically ameliorated their strictness through exceptions.

The operation of the equitable maxim was considered by the House of Lords in Tinsley v Milligan ([1994] 1 AC 340) where a house was purchased jointly by a lesbian couple. Only one of them was registered as the legal proprietor to enable the other to dishonestly claim social security benefits by appearing to be a mere lodger. After the breakdown of the relationship, the partner who did not enjoy a share of the legal title claimed that she was entitled to a half-share of the house in equity arising by way of a resulting trust implied from her contribution to the purchase price. The registered proprietor argued that she was prevented from asserting her equitable right because she was tainted by their illegal purpose, so that she did not come to equity with ‘clean hands’. The House of Lords held by a bare majority that she was entitled to succeed in her claim. The essential disagreement between the majority and minority was not as to the existence of the maxim ‘he who comes to equity must come with clean hands’, but how it should be applied in circumstances where a plaintiff’s claim is not itself founded on the alleged illegality. Lord Goff, who dissented (with whom Lord Keith concurred), took the view that the maxim should apply in its full force, since it was well established by authority and there was no justification for introducing a change (Curtis v Perry (1802) 6 Ves 739; Groves v Groves (1828) 3 Y & J 163; Childers v Childers (1857) 3 K & J 310; Tinker v Tinker [1970] P 136; Cantor v Cox (1976) 239 Estates Gazette 121), even though it produced an admittedly harsh result for the plaintiff (which Lord Goff recognised: [1993] 3 All ER 65 at 80). Lord Browne-Wilkinson, with whom Lord Jauncey and Lord Kowry concurred, held that the maxim should prevent a plaintiff asserting
equitable title to property only if he had to rely on his illegal conduct to establish the entitlement, thus ensuring uniformity with the common law rule against illegality as interpreted in *Bowmakes Ltd v Barnet Instruments Ltd* ([1945] KB 65). He concluded that:

‘... although there is no case for overruling the wide principle...as the law has developed the equitable principle has become elided into the common law rule. In my judgement the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction’ ([1945] KB 65 at 91).

With the operation of the maxim circumscribed in this way, the plaintiff was held entitled to succeed, since she could establish her entitlement to an equitable interest by way of a resulting trust merely by showing that she had contributed to the purchase price of the property. She did not need to rely on her illegal conduct because the underlying purpose of the purchase was irrelevant to her claim against the registered proprietor. Despite the differing approaches adopted the House of Lords rejected any wholesale change to a general ‘public conscience’ test as had been proposed by the Court of Appeal ([1992] 2 All ER 391), as this would have required the court to weigh the adverse consequences of granting relief against those of refusing relief.

The application of the maxim was further weakened in *Tribe v Tribe* ([1996] Ch 107. [1995] 4 All ER 236), where the Court of Appeal held a father entitled to assert an equitable entitlement to shares, the legal title to which he had transferred to his son as part of a scheme to defraud his creditors. Because the shares had been transferred by a father to his son there was a presumption that the father had intended to make a gift (technically, their relationship gave rise to a presumption of advancement), thereby disposing of his entire interest in them. He could only demonstrate that he had retained the equitable ownership of the shares through a resulting trust if this presumption of gift was rebutted. They underlying purpose of the transaction was clearly sufficient to rebut the presumption because there was no intention that the son should own the shares for himself, but to so rebut it would require the father to rely on the illegal purpose behind the transfer. The equitable maxim would therefore apply, preventing him from claiming any equitable entitlement. In the event, however, the feared creditors never materialised to be defrauded and the father demanded the retransfer of the shares. The Court of Appeal surprisingly held that the father was not prevented from asserting a resulting trust of the shares, on the ground that the illegal purpose had not been carried
out. This was a somewhat generous finding, since as Nourse LJ stated, this exception to the full rigour of the maxim only applied if ‘the illegal purpose has not been carried into effect in any way’, and the central act required to defraud the creditors, namely transferring the legal title of the shares to the son, had undeniably occurred. The conclusion that the illegal purpose had not been carried into effect was therefore artificial. It was merely fortuitous for the father that the perceived threat against which he had taken pre-emptive action was illusory.

(7) **Delay defeats equity**

Equity will not assist the plaintiff who has failed to assert his rights within a reasonable time. As Lord Camden LC said in *Smith v Clay*:

‘... [equity] has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing’ ((1767) 3 Bro CC 639n at 640). This is the foundation of the equitable defence of *laches*, which was recently applied in *Nelson v Rye* ([1996] 2 All ER 186; [1997] Conv 225 (J Stevens), where it was held that a musician could not claim an account of earnings wrongfully retained by his manager in breach of fiduciary duty because he had waited for more than six years before commencing an action. The operation of this defence must today be considered in conjunction with the statutory rules concerning limitation of actions under the Limitation Act 1980.

(8) **Equality is equity**

Where persons enjoy concurrent entitlement to identical interests in property, and there is no express provision, agreement or other basis as to how it should be divided amongst them, equity prescribes that equal division should occur, so that each receive an equal share in the property (*Petit v Smith* (1695) 1 P Wms 7; *Re Dickens* [1935] Ch 267; *re Bradberry* [1943] Ch 35; *Hampton & Sons v Garrard Smith (Estate Agents) Ltd* [1985] 1 EGLR 23; see also *McPhail v Doulton* [1971] AC 424). This maxim is reflected in the preference of equity for a tenancy in common, which will sometime be implied in equity even where the common law holds that there is a joint tenancy (See Stevens and Pearce, *Land Law* (3rd edn 2005), p 319), namely (See *Malayan Credit Ltd v Jack Chia-MPH Ltd* [1986] AC 549) where joint purchasers contribute to the purchase in equal shares and there I no express allocation of the
equitable interest; where persons have jointly lent money on mortgage (Morley v Bird (1798) 3 Ves 628. This applied only to where there are joint lenders, not to the more common situation of joint borrowers); and where property is acquired as part of a joint business venture (Lake v Craddock (1732) 2 White & Tud LC 876).

(9) **Equity looks to the intent rather than the form**

The principle behind this maxim was well stated by Romilly MR in Parkin v Thorold:

‘Courts of equity make a distinction between that which is matter of substance and that which is matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance ((1852) 16 Beav 59 at 66)

More recently, in Foskett v McKeown Sir Richard Scott V-C stated that:

‘The availability of equitable remedies ought...to depend upon the substance of the transaction in question.’ ([1997] 3 All ER 392 at 399.)

Therefore, equity categorises a covenant affecting freehold land as ‘restrictive’, even though worded in a positive way, if in substance it is negative (Tulk v Moxhay (1848) 18 LJ Ch 83; Rhone v Stephens [194] 2 AC 310). Similarly, equity will not grant an injunction to enforce a negative covenant entered by an employee agreeing not to work for others if in substance this would amount to an order of specific performance of their contract of employment (Page One Records Ltd v Britton [1967] 3 All ER 822), since equity will not enforce contracts of personal service (Lumley v Wagner (1852) 1 De G M & G 604). It is not necessary to use the precise word ‘trust’ to create a trust, provided that in substance the settlor intended to subject the legal owner of the property to a mandatory obligation regarding its use (Re Kayford Ltd [1975] 1 WLR 279). Similarly, equity will look to the substance, and not the wording used, to determine if a clause in a contract providing for the payment of a specific sum in the event of breach is a penalty or a genuine pre-estimate of damages (Kembel v Farren (1829) 6 Bing 141; Pye v British Automobile Commercial Syndicate [1906] 1 KB 425; Diestal v Stevenson [1906] 2 KB 345; Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd [1933] AC 20; Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd [1962] 1 WLR 34).
(10) **Equity regards as done that which ought to be done**

Where a contract is specifically enforceable, equity regards the promisor as having already done what he has promised to do, because he can be compelled to do it. Therefore, in *Walsh v Lonsdale* ([1882] 21 Ch D 9), a contract to grant a lease is treated as creating an equitable lease on the same terms. Similarly, because of the availability of specific performance, a contract for the purchase of land (*Lloyds Bank plc v Carrick* [1996] 4 All ER 630), or of unique personal property (e.g. in *Oughtred v IRC* [1960] AC 206, where there was a contract for the purchase of a beneficiary’s equitable interest in shares in a private company), will give rise to an immediate constructive trust vesting the equitable ownership in the purchaser by way of a constructive trust at the very moment that the contract is entered. The maxim also underlies the general doctrine of conversion, and the rule in *Howe v Earl Dartmouth* ([1802] 7 Vs 137) which requires that a trustee convert unauthorised investments into authorised investments. In *A-G for Hong Kong v Reid* ([1994] 1 AC 324) the maxim has been held to have the implication that a fiduciary who receives an unauthorised profit in breach of his duty of loyalty will hold the profit on constructive trust for his principal because he is subject to an equitable duty to account for the profit he received.

(11) **Equity imputes an intention to fulfil an obligation**

Equity places the most favourable construction on a man’s acts, so that if he does something which could be construed as fulfilling an obligation he owes, equity will regard it as having this effect. For example, if a debtor leaves a legacy to his creditor, this is presumed to be a repayment of the debt (*Thynne v Glengall* (1848) 2 HL Cas 131; *Chichester v Coventry* (1867) LR 2 HL 71; *Re Horlock* [1895] 1 Ch 516). The doctrines of performance and satisfaction are founded on this maxim.

(12) **Equity acts in personam**

The maxim refers to the fact that, equity enforces its decisions by means of a personal order against the defendant, for example by an order to perform a contract, observe a trust or refrain from some behaviour by means of an injunction. If the defendant breaches the order he will be in contempt of court (see *Co-operative Insurance v Argyll Stores* [1997] 3 All ER 297 at 302-303). The court may exercise jurisdiction over any person within the power of the court (i.e. someone who is within the jurisdiction or on whom the court order can served outside of it), even though the order may relate to property which is situated abroad (*Penn v Lord Baltimore* (1750) 1 Ves Sen 444; *Ewing v Orr Ewing*...
The potential extraterritoriality of the equity jurisdiction has been recognised by the Court of Justice of the European Community. In *Webb v Webb* ([1994] QB 696) a father bought a flat in Antibes in his son’s name, intending to retain the ownership. The European Court held that even though the usual rule was that matters of title to immovable property, such as buildings, had to be settled in accordance with the law of the country in which it was situated, the father was entitled to pursue his claim to a share in the property under a resulting trust through the English courts because it was a personal claim. It therefore upheld the decision, on the merits, of the English High Court ([1992] 1 All ER 17) that the son held the flat on a resulting trust for his father. In *Re Hayward* ([1997] 1 All ER 32) it was said that it was significant that the plaintiff in *Webb v Webb* was not making any claim based on legal ownership of the property concerned. In *Re Hayward* a trustee in bankruptcy claimed to be entitled to a half share in a villa in Spain which had belonged to the bankrupt and his wife in indivisible halves (the Spanish equivalent of a legal tenancy in common) but which had subsequently been transferred to the defendant by the bankrupt’s widow, who claimed to be entitled to do so in her own right and as intestate successor to her husband’s share. The property had then been registered in the name of the defendant in the property register in Minorca. The basis of the trustee in bankruptcy’s claim was that the bankrupt’s rights had vested in him so that there was nothing which should have passed to the bankrupt’s wife and thence to the defendant. The trustee in bankruptcy was therefore seeking to have the Minorcan property register rectified to show him as half owner. Rattee J held that, under Article 16 of the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (adopted as law by the Civil Jurisdiction and Judgments Act 1982), the Spanish courts had exclusive jurisdiction over the matter since the proceedings had as their object ‘rights in rem in immovable property’. Rattee J rejected the argument that a claim for an order to reverse the registration could be treated as a claim in personam. In his view, although English law did not recognise as sharply as some other jurisdictions the distinction between rights in rem and rights in personam, ‘it is difficult to contemplate any right more clearly a right in rem than a right to legal ownership such as is claimed by the trustee [in bankruptcy] in the present case’ ([1997] 1 All ER 32 at 43). The relationship of this case with *Webb v Webb* raises interesting questions. Since one of the rights of the beneficiaries under a trust is a right to call for a vesting in them of the legal estate, it is difficult to see why the claim of a beneficiary under a resulting or constructive trust (as in *Webb v Webb*) should not be seen as a right in rem, just like the claim in *Re Hayward*. On the other hand, the two cases differed in the way in which they were pleaded, and it may be that this is a sufficient (although unsatisfactory) distinction between them.
THE CREATIVITY OF EQUITY

(1) **Equity and the creation of rights and remedies**

From a historical perspective one of the outstanding characteristics of equity has been its capacity to develop new rights and remedies for the benefit of plaintiffs. The need for such creativity within English law was the very reason for equity’s genesis, and it led in particular to the evolution of the trust. Today, despite its undisputed and revered pedigree, the question has arisen whether equity retains such dynamic creative capacity. The need for ongoing creativity by equity was recognised by Jessel MR in *Re Hallet’s Estate*.

‘It must not be forgotten that the rules of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved, and refined from time to time. In many cases we know the name of the Chancellor who invented them ... Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence; and therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases’ ((1880) 13 Ch D 696 at 710).

However, these remarks are more than a hundred years old and reflect the immediate aftermath of the Judicature Acts, and in more recent times it has been questioned whether equity retains the capacity to ‘invent’ new rights and remedies which seem appropriate to meet the justice of a plaintiff’s case. To borrow a favourite metaphor of Lord Denning, is equity ‘past the age of childbearing’?

**UNDUE INFLUENCE**

The doctrine of undue influence. The principle laid down in *Barclays Bank Plc v O’Brien* [1994] 1 A.C. 180 has been clarified and extended by the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44; [2001] 3 W.L.R. 1021. The *O’Brien* principle is that where a lender takes a third party security from a wife (or other co-habitee with the principal debtor), the lender will, unless certain
steps are taken, be on notice of the possibility that the principal debtor used undue influence or misrepresentation to obtain the surety’s consent to giving the security. Therefore, if the lender fails to take appropriate steps at the time of taking the security, and it later transpires that the wife (or other surety) was misled or coerced into providing the security, the security will be voidable at the instance of the wife against the bank or lender.

The O’ Brien principle has been extended beyond only co-habitees by the decision in Etridge. Lord Nicholls made clear (at [87]) that in the case of suretyship, the lender will be "... ‘put on inquiry’ in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety."

The steps that should be taken by a lender once it has been "put on inquiry" were set out by Lord Nicholls in Etridge, at [50]-[57]. This passage should be read, as should Lord Scott’s speech at [163]ff. In summary, however, “Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor acting for a wife that he has advised the wife appropriately” (per Lord Nicholl at [56]). (For a recent application of the principle that the Bank will usually be entitled rely on a solicitor’s confirmation that he has advised the wife, see Governor & Company of the Bank of Scotland v Hill [2002] EWCA Civ 1801; [2002] 29 E.G. 152. For an example where the solicitor’s advice was not sufficient, see Pesticcio v Huet [2003] All E.R. (D.) (Apr.), Neuberger J.; [2003] EWHC 2293 (Ch.). This case was upheld on appeal [2004] EWCAQ Civ. 372.)

The Etridge line of cases involves a three-party situation, the question most commonly being whether a creditor is affected by undue influence exercised by the principal debtor on the surety. One should not of course lose sight of the simpler two-party situation, in which a party’s consent to a transaction is procured by undue influence. (The Etridge case has been continuously applied since, for example in Aldridge v Turner [2004] EWHC 2768 (Ch): Bank of Ireland v Bongard [2003] EWCH 612; Abbey National Bank Plc v Stringer [2006] EWCA Civ 338; Birmingham City Council v Forde [2009] EWHC 12 (QB).)

Classes of undue influence. It is clear from the judgments in Etridge that the system of classification into “classes” of undue influence should be abandoned: see, for example, per Lord Clyde at [92]. In its place, the following analysis, derived from Lord Nicholls’ speech in Etridge at [13]ff. is suggested.
In broad terms, equity identified two forms of unacceptable conduct. The first “... comprises acts of improper pressure or coercion such as unlawful threats”. The second, “...arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.” (The decision of Nicholas Geoffrey Daniel v Irene Margaret Drew (2005) EWCA Civ 507 gives useful guidance. See in particular [31], where the Court of Appeal stated that: “In the broadest possible way, the difference between the two classes is that in the case of actual undue influence something has to be done to twist the mind of a donor whereas in cases of presumed undue influence it is more a case of what has not been done, namely ensuring that independent advice was available to the donor.”)

The general rule is that the burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs coupled with a transaction which calls for an explanation will usually discharge the burden of proof. In other words there is a rebuttable evidential presumption of undue influence – this is the equitable analogue of the common law principle of res ipa loquitur. To raise the rebuttable presumption, the complainant must prove that he placed trust and confidence (for a discussion of the meaning in practice of “trust and confidence” see Morley v Elmaleh [2009] EWHC 1196 (Ch) at (598) and Thompson v Foy [2009] EWHC 1076 (Ch) at [100]) in the other party and there must be a transaction which calls for an explanation. (For examples of the post-Etridge application of this presumption, see Nel (executrix of Nel) v Kean [2003] EWHC 190 (Q.B.): [2003] All E.R.(D.) (Apr.), Simon J.: Leeder v Stevens [2005] EWCA Civ 50 and Abbey National v Stringer [2006] EWCA Civ 338. However per David Richards J. in Royal Bank of Scotland v Chandra [2010] EWHC 105 (Ch); (2010) 1 Lloyd's Rep. 667 at [121] (affirmed by the Court of Appeal [2011] EWCA Civ 192 at [17]) while this presumption shifts the evidential burden, when oral evidence is given “...the issue for the Court is whether on the totality of evidence, including any appropriate inference, it finds that the transaction was in fact brought about by undue influence”.)

The above is to be “distinguished sharply” from a different presumption. This arises where a relationship between A and B is of a class such that ‘... the law presumes irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship.” It is well settled that the relationship of husband and wife does not fall into this category. Relationships to which the principle does apply are those between parent and child (Wright v Van der Plank (1855) T.K.&J. 1; Turkey v Awadh [2005] BWCA Civ 382. The latter case Turkey v Awadh is an
example of a case where it appears that the presumption of trust and confidence did arise. Rather there was no transaction which called for an explanation to give rise to the rebuttable presumption of undue influence which is a different matter); guardian and ward (Hylton v Hylton (1754) 2 Ves. Sen. 547; Taylor v Johnston (1882) 19 Ch. D. 603); uncle and niece (Archer v Hudson (1844) 7 Beav. 551); stepfather and stepdaughter (Kempson v Ashbee (1874) L.R. 10 Ch. 15. This case was applied more recently by Yorkshire Bank Plc v Tinsley [2004] EWCA Civ 816); stepmother and stepdaughter (Powell v Powell (1900) 1 Ch. 243); other relationships where the relationship conferred a power analogous to that of parental control; solicitor and client (Liles v terry [1985] 2 Q.B. 679: Willis v Barron [1902] A.C. 271; McMaster v Byrne [1952] 1 All E.R. 1362); doctor and patient (Mitchell v Homfray (1881) 8 Q.B.D. 587; Radcliffe v Price (1902) 18 T.L.R. 466); trustee and beneficiary (Ellis v Barker (1871) L.R. 7 Ch. App. 104; Beningfield v Baxter (1866) 12 Applicants. Cas. 167; religious adviser and a person to whom he gives his advice. (Reginald Sutton v Mishcon De Reya [2003] EWHC 3166; (2004) 1 F.L.R. 837 Ch it was held that claims against the defendant law firms, alleging professional negligence in connection with a deed of cohabitation made between two parties in a master/slave sexual relationship, had no prospect of success. Hart J. found that there was no loss, as although there was nothing contrary to public policy in the deed, the deed was likely to be unenforceable in any event as it was difficult to suppose that it could ever have withstood an attack on one or more of the grounds of lack of intention to create legal relations, undue influence or misrepresentation.)

Although there is no presumption in the second sense in the case of the relationship between husband and wife, the court will “…note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband.”

**Manifest disadvantage.** In cases where actual undue influence has been shown, the party influenced is entitled to a remedy (CICB Mortgages Ltd v. Pitt [1994] 1 A.C. 200. Applied by UCB Corporate Services Ltd v. Williams [2002] EWCA Civ 555) unless the right to rescind has been lost (for example) by affirmation or impossibility of restitution or change of position.

The former requirement that, for either presumption above to apply, there must be manifest disadvantage to the complainant has now been re-formulated; in particular, the phrase “manifest disadvantage” should not be employed. (But according to the Privy Council in National Commercial Bank v Hew [2003] UKPC 51 at [33] it “is always highly relevant that the transaction in question was manifestly disadvantageous to the person seeking to set it aside; although this is not always necessary”. Manifest disadvantage would therefore appear to be a sufficient but not a necessary
condition to showing an abuse of influence. Recently Lewison J. stressed the evidential value of manifest disadvantage in showing undue influence on the donor, see *Thompson v Foy* [2009] BWHC 1076 (Ch) at [99]). The proper approach is “...to adhere more directly to the test outlined by Lindley L.J. in *Allcard v Skinner* 36 Ch. D. 145, and adopted by Lord Scarman in *National Westminster Bank Plc v Morgan* [1985] A.C. 686.” Lord Nicholls quoted from Lindley L.J.’s judgment (at 185): “...if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.” And from Lord Scarman’s speech (at 704): the transaction must have “...constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it”. The phrase employed by Lord Nicholls was a transaction which “calls for an explanation”. An example of the Court of Appeal correcting the application of the former, incorrect test can be found in *Macklin v Dowsett* [2004] EWCA Civ 904; [2004] 34 E.G. 68.

It should be noted that after *Etridge*, all non-commercial contracts of suretyship fall into something of a special category, for in all such cases the creditor “...must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety.” If the creditor fails to do that, “...it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.”

The effect of independent legal advice. In order to rebut the presumption of undue influence, evidence must be adduced to satisfy the court that the donor was acting independently of any influence from the donee and with a full appreciation of what he or she was doing. (See the case of *Inche Noriah v Shaik Affie Bin Omar* [1929] A.C. 127 at 135. Independence and full appreciation are both necessary: full appreciation without independence is insufficient, see *Curtis v Pulbrook* [2009] BWHC 782 (Ch) at [143]. Note also that manifest disadvantage is irrelevant at this stage, see *Smith v Cooper* [2010] EWCA Civ 722; [2010] 2 F.C.R. 551 at [65].) The most usual though not the only way of rebutting the presumption is to prove that the complainant had competent and independent advice. Recent cases include *Joan Humphreys v Dennis Humphreys* [2004] EWHC 2201 Ch;  *Stevens v Leeder (aka Newey)* [2005] EWCA Civ 50.

The fact that the complainant received independent legal advice does not of itself show that the transaction was free of undue influence: whether the proper inference is that the advice had an emancipating effect is a question of fact to be decided having regard to all the evidence: see *Etridge*
per Lord Nicholls at [20]. (For a recent application of the principle that the Bank will usually be entitled to rely on a solicitor's confirmation that he has advised the wife, see Governor & Co of the Bank of Scotland v Hill [2002] EWCA Civ 1081; [2002] 29 E.G. 152. For an example where the solicitor's advice was not sufficient see Pesticcio v Huet [2003] All E.R. (D) (Apr.) (Neuberger J.). Pesticcio v. Huet was upheld on appeal: see [2004] EWCA Civ 372. See also Kapoor v National Westminster Bank Plc [2010] EWHC 2986 (Ch) which held the test was an objective one, namely whether a reasonable person, in the position of the lender, would find the documents satisfied it that the donor had received independent legal advice. Note also Etridge divided the test of whether a lender had avoided constructive notice between past and future transactions, and that the test applying to past transactions includes those that were in train shortly after the Etridge decision, see Royal Bank of Scotland v Chandra (2010] EWHC 105 (Ch); [2010] 1 Lloyd’s Rep. 677 at [175].

However, it is not invariably necessary for independent legal advice to have been given: Inche Noriah v Omar [1929] A.C. 127 (PC). For an example of an (unsuccessful) attempt to argue that the evidential presumption should be rebutted on the basis that the making of the gift was due to the free exercise of will on the part of the donor, see Hammond v Osborn [2002] EWCA Civ 885. See too Goodchild v Bradbury [2006] EWCA Civ 1868, where the donee was unable to rebut the evidential presumption notwithstanding the fact that the donor had stated in his witness statement that he did not think that he had come under any pressure from the donee.

If the surety-wife cases independent legal advice is critically relevant to whether the lender has constructive notice of any undue influence, “Ordinarily, it will be reasonable that a bank should be able to rely on a confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately” (per Lord Nicholls in Etridge, at [56]).

It is now clear that suggestions made in the Court of Appeal in Etridge that a solicitor should veto the wife's participation in a disadvantageous transaction are wrong: see the speech of Lord Nicholls at [61].

Position of third parties. It is essential to bear in mind that the lender (etc.) will only be affected by the exercise of undue influence over the complainant if it had actual or constructive notice of that undue influence. In many cases, the lender will have had no actual notice of the undue influence. In such cases, to make out constructive notice it is necessary to plead and prove that the lender was put on inquiry (it is worth reiterating that in all non-commercial surety cases, the lender will be put on
inquiry) that there may have been some equitable wrong. In *Mortgage Agency Services (No. 2) Ltd v. Chater* [2003] EWCA Civ 490; [2003] 15 E.G. 138, Scott Baker L.J. put the test this way (at [57]): “... the court is not concerned with what was actually happening between mother and son but with what the bank knew about it, or by making appropriate inquiries, ought to have known about it. [...] What is the information that was available to the respondent? That is the crucial question? Was it sufficient to put it on inquiry as to some equitable wrong?”

Further, in mortgage cases, it should be noted that even if the charge over the whole property fails due to undue influence exerted by one party (usually the husband) over the other (usually the wife), the charge may still take effect as an equitable charge over the husband’s interest: see s.63 of the Law of Property Act 1925; see also *First National Bank Plc v Achampong* [2003] EWCA Civ 487. (For the principles to be applied when the lender seeks an order for sale under s.l4 of the Trusts of Land and Appointment of Trustees Act 1996, see *Mortgage Corp v Shaire; Mortgage Corp v Lewis Silkin (A Firm)* [2001] 3 W.L.R. 639 (Ch. D.).

A replacement or substitute mortgage with the same lender would be avoidable if it was inseparably connected with an earlier mortgage that was voidable for undue influence and of which the lender had constructive notice: see *Yorkshire Bank Plc v Pamela Tinsley* [2004] EWCA Civ 816; [2004] 3 All E.R. 463.

The peculiar status of contracts of suretyship should be noted: if the creditor fails to take the "reasonable steps" set out in *Etridge* (see Lord Nicholl’s speech at [50]ff.), then if the complainant’s consent was procured by the exercise of undue influence or misrepresentation by the principal debtor, the contract of suretyship will be voidable as against the creditor. (See also *First National Bank Plc v Achampong* [2003] EWCA Civ 487 at [22] ff.)

In relation to independent legal advice, that the bank knows that a solicitor acts for the wife is not sufficient to avoid it being fixed with constructive notice of any undue influence – rather, the bank must have proper grounds for believing that the solicitor has properly advised the wife (whether he has or has not, in fact); conversely, absent special circumstances, it is enough that the bank knows that the wife’s solicitor has been instructed to give her independent legal advice as to the nature and effect of the transaction and has received confirmation that such advice has been given: see *Achampong* (above).
The burden of proof. It will usually be necessary for a wife (or other complainant) to plead and prove that the bank had constructive notice in O’Brien type cases, rather than that the bank has to disprove constructive notice: see Barclays Bank Plc v Boulter [1999] 1 W.L.R. 1919 HL.

However there is no distinction between facts which are said to put a bank on inquiry in a case of an abuse of a relationship of trust and confidence which would not equally put it on inquiry in the case of actual undue influence. See BCCI v Hussain Unreported December 15, 1999, Hart J., and see Bank of Scotland v Bennett [1999] Lloyds Rep. Bank 145; (1999) I F.L.R. 1115. (Bank of Scotland v Bennett [1999] Lloyds Rep. Bank 145 was overturned on appeal in Royal Bank of Scotland v Etridge (No. 2) [2001] UKHL 44 but on different grounds. Etridge likewise emphasised there was no distinction between undue influence established by inference or fact.)

Affirmation. A transaction entered into as a result of undue influence is voidable and not void. The right to rescind on the ground of undue influence may be lost either by express affirmation (see the case of Ryder v. Nicholl [2000] E.M.L.R.) of the transaction by the alleged victim (Mitchell v Homfray (1881) 8 Q.B.D. 587; Morse v. Royal (1806) 12 Ves. 355) or by estoppel or by delay amounting to proof of acquiescence. (Allcard v Skinner, op. cit.; Turner v Collins (1871) L.R. 7 Ch. App. 329) Estoppel requires a clear and unequivocal representation that the claimant would not seek to set the agreement aside which is intended to be acted on and in fact acted on by the other party to his detriment or in such a way that it would be inequitable to allow the claimant to go back on that representation. The affirmation must in any event take place after the influence has ceased if it is to be of any value. Lapse of time in itself does not constitute a bar to relief (Hatch v Hatch (1804) 9 Ves 292, Re Paulings Settlement Trust [1964] Ch. 303) but it will provide evidence of acquiescence if the victim fails to take any steps to set aside the transaction within a reasonable time after he is freed from the undue influence. (Allcard v Skinner, op. cit. cf. Bullock v Lloyds Bank Ltd [1995] Ch. 317).

For the possible effects of seeking inconsistent remedies (wife’s taking of transfer of husband’s share of property coupled with continuing to advance an undue influence claim), see First National Bank Plc v Walker [2001] F.L.R. 505; [2001] Fam. Law 182 CA.

SPECIFIC PERFORMANCE

Specific performance of a contract is granted where:

(i) damages for breach of the contract are an inadequate remedy to the innocent party;
(ii) the obligations of the defendant under the contract are sufficiently clear to permit an order for its performance (for example, building works defined in detailed plans);

(iii) the interest of the claimant in the subject matter is sufficiently substantial, because “equity does nothing in vain”: abut a licence to occupy land for a period as short as two days has been enforced: *Verrall v Great Yarmouth BC* [1981] Q.B. 202.

It was formerly said that the court would not order specific performance of contracts requiring constant supervision. The basis of the discretionary grant of specific performance is that it will be ordered if the contract obliges the defendant to secure a defined result (e.g. the provision of a resident porter in a block of flats: *Posner v Scott-Lewis* [1987] Ch. 25; the construction of a defined building or other work: *Wolverhampton Corporation v Emmons* [1901] 1 Q.B. 515) but not if the defendant’s obligation is to carry on an activity, such as the conduct of a particular business: *Co-operative Insurance v Argyll Stores* [1998] A.C. 1 at 13.

Orders of specific performance are most frequently made in relation to contracts for the sale and purchase of land. Although the vendor of land can normally be compensated in damages for the purchaser’s failure to take the land, specific performance is granted as a matter of course to vendor and purchaser alike, because the court will not grant the equitable remedy solely in favour of one party to the contract. Orders for specific performance can also be made in respect of contracts for the sale of other property, provided that the property is not obtainable in the open market (so that damages will be a sufficient remedy to buyer or seller). Thus, a contract for the sale of a share listed on the Stock Exchange will not be specifically enforced (as the buyer can obtain substitute shares in the market), but contracts for joint ventures involving private companies may be so enforced.

Damages can be awarded instead of specific performance (Chancery Amendment Act 1858 s.2 re-enacted as Senior Courts Act 1981 s.50) and the court may award damages for breach of contract at common law in addition to granting specific performance.

**General Principles**

The court’s jurisdiction to grant specific performance is based upon the inadequacy in some circumstances of the remedy of common law damages. Where damages constitute an adequate remedy, specific performance will not normally be granted. However, in circumstances where
damages are not an adequate remedy, specific performance may be granted. It is remedy entirely within the discretion of the court. Given that it is a more drastic remedy than those available at law, its availability is proscribed by factors that will be discussed below.

**Application for specific performance**

The county court may hear an application for specific performance of any agreement for the sale, purchase or lease of land where the purchase price or value of the property does not exceed £30,000 (CCA 1984, s.23; County Courts Jurisdiction Order 1981 (S1 1981/1123)). However, where the county court limit is exceeded, jurisdiction may be conferred by agreement between the parties (CCA 1984, s.24). The jurisdiction is not limited to land transactions. Where an application is made for a declaration that a deposit is forfeited, the court’s jurisdiction is limited by the county court limit – the application is treated as that for partial specific performance (*Devries v Smallridge* [1928] 1 K.B. 482). No order for specific performance may be made against the Crown. The failure to state in the claim that specific performance is sought does not preclude the claimant from seeking that remedy if so entitled (CPR, r.16.2(5)). Therefore, a defence based upon a claimant’s failure to state the remedy is unlikely to succeed.

**Order granted**

Once an order for specific performance is made, the directions of the court supersede the provisions of the contract for the purposes of the machinery of completing the transaction (*Austins of East Ham Limited v Macey* [1941] Ch 338; *Singh v Nazeer* [1979] Ch 474). However, this does not extinguish the provisions of the contract in any other respect (*Johnson v Agnew* [1980] AC 367). The process between the making of the order and completion of the contract is governed by the court. The governance includes the making of inquiries and taking of accounts. Inquiries are most likely to be concerned with the ability of a vendor to give a good title to the property. Accounts will assess the precise amount payable under a contract.

**Obligations which are specifically enforceable**

**Contract for sale of land**

The law takes the view that a buyer of land or of a house is not adequately compensated by damages (Note the favourable position of the tenant exercising the statutory right to buy pursuant to s.138(3))
of HA 1985, where no discretion to refuse specific relief where statutory requirements are satisfied: *Taylor v Newham London Borough Council* [1993] 1 W.L.R. 444.) However, the purchaser may elect to claim damages instead (*Maintenance Engineer Leong Development Pte Limited v Jip Hong Trading Co Pte Limited* [1985] A.C. 511). The purchaser may also claim performance and damages where for instance, delay in completion has caused the purchaser loss (*Ford-Hunt v Ragbhir Singh* [1973] 1 W.L.R. 1406) or the purchaser is put to expense in discharging an encumbrance on the title (*Grant v Dawkins* [1973] 1 WLR 1406).

**Contractual licence**

Despite creating no interest in land, the right to occupy under a contractual licence may be specifically enforced (*Verrall v Great Yarmouth Borough Council* [1981] Q.B. 202).

**Building work**

In many cases, damages will be an adequate remedy for a contractor’s failure to build, as an alternative builder may be contracted. However, where:

1. damages are not adequate given the interest of the client;
2. building work is sufficiently defined; and
3. the defendant builder is in possession of the land so that employment of an alternative builder would amount to trespass;

specific performance may be granted (*Wolverhampton Corporation v Emmons* [1901] 1 K.B. 515; *Molyneux v Richard* [1906] 1 Ch 34).

**Leasehold covenants**

The court may specifically enforce a lessor’s repairing covenant (*Jeune v Queens Cross Properties Limited* [1974] Ch 97]). The court may specifically enforce a landlord’s repairing covenant notwithstanding any equitable rule restricting the scope of the remedy (LTA 1985, s7). In circumstances where specific performance is the only appropriate remedy (for instance because a lease does not provide for forfeiture in event of breach), specific performance of a tenant’s repairing obligation may be granted (*Rainbow Estates v Tokenhold Limited* [1998] 1 W.L.R. 980; see Case
comment: Mark Pawlowski and James Brown [1998] 62 Conv 495). However, where the tenant’s obligation is not sufficiently precise, the court will refuse an order for specific performance (Co-operative Insurance v Argyll Stores Limited [1998] A.C. 1 (keep-open clause in retail lease); and see, in the Scottish context, Retail Park Investments v Royal Bank of Scotland 1996 SC 227 (Inner House)).

Obligations which are not specifically enforceable

Contract requiring constant supervision

A contract requiring constant supervision is sometimes cited as an example of a non-specifically enforceable contract (Snell’s Equity (30th edn) para 40-23). However, the ‘rule’ is riddled with exceptions. Contracts of this type will not be specifically enforced where there is difficulty in defining exactly the scope of the obligations or where because of the inconvenience, damages are a more suitable remedy.

Contract involving personal services

The prohibition on specific enforcement of a contract involving personal services is given statutory recognition by the Trade Union and Labour Relations (Consolidation) Act 1992, s.236 of which prevents any court from compelling an employee, by reason of a contract of employment, to do any work or attend at any place of work. However, the reality of modern industrial practice is that an employee/employer relationship is rarely a personal one. Recent authority suggests that the courts are unwilling to grant injunctions effectively compelling employers to employ employees they do not wish to employ (Alexander v Standard Telephones and Cables plc [1990] I.R.L.R. 55). It is possible that the court’s decision may turn on whether the dismissal or threatened dismissal of the employee is the result of mistrust (which it usually is not in redundancy situations) (Anderson v Pringle of Scotland Limited [1998] IRLR 64). The principle applies to all contracts involving personal services even though they are not strictly contracts of service. An agreement to enter into a partnership is not specifically enforceable, although the court may order the execution of a partnership agreement in order to determine the terms agreed (England v Curling (1844) 8 Beav 129).

Defences to claim for specific performance

In many cases, a defence to a claim for specific performance is, in effect, a claim for rescission of the contract. A claim that an agreement is vitiates on the grounds of misrepresentation or mistake can
be made by a defendant to a claim for specific performance as well as by a claimant seeking to rescind a contract.

Absence of writing

All terms of a contract for the sale or disposition of land entered into after 26 September 1989 must be in writing and incorporated in one document (Law of Property (Miscellaneous Provisions) Act 1989, s2(1). There is an exception for a lease for not more than 3 years at the best rent reasonably obtainable (Ibid, s 2(5)(a); LPA 1925, s54(2)). Furthermore, a disposition or sale of land not in writing may be enforced where it gives rise to a constructive trust (Yaxley v Gotts [1999] 3 W.L.R. 1217, CA).

Misdescription of property

Under this head of defence, the defendant claims that by virtue of a misdescription of the property, the defendant has purchased a property that he did not intend to purchase. The court may make an order for specific performance with abatement of the price (where the misdescription is significant, but the purchaser elects to proceed) (Mortlock v Buller (1804) 10 Ves 394) or compensation (where the misdescription is insignificant, and at the suit of vendor or purchaser) (McQueen v Farquhar 1805) 11 Ves 467; Re Fawcett & Homes’ Contract (1889) 42 Ch D 150).

Failure of the Claimant to perform obligations under agreement

A claimant must demonstrate that he has performed, or has been willing to perform, all terms and conditions of the contract and that he remains willing so to perform. However, a claimant purchaser does not have to demonstrate that he was in a position to complete (by having the price ready) between repudiation and the order (Davis v Spalding (1974) 231 EG 373). A failure to perform may also be tantamount to delay evidencing an abandonment of the contract, preventing him from obtaining specific performance (Cornwall v Henson [1900] 2 Ch 298).

Vendor lacking good title

Lack of good title is a complete defence to a claim for specific performance and the defendant is entitled forthwith to be discharged from the contract. However, the claimant will be entitled to specific performance if the title is perfected before repudiation of the contract (Re Hailes and Hutchinson’s Contract [1920] 1 Ch 233).
Want of mutuality

The court may (but not must) refuse to make an order at the suit of one party when it could not order it at the suit of the other party. There is no necessity for mutuality of remedy at the time of contracting – the crucial time is that of the hearing. The court will consider all the circumstances of the case in assessing whether the defendant should be entitled to raise want of mutuality as a defence (Price v Strange [1978] Ch 337).

The procedure for summary judgment under CPR, Pt 24 is modified in the case of claims for specific performance. By PD 24.7, if the remedies sought by the claimant include a claim for specific performance of an agreement (in writing or not) for the sale, purchase, exchange or charge of any property or the grant for assignment of a lease or tenancy of any property, with or without a claim for damages, then:

(i) The claimant may apply for summary judgment at any time after the claim form has been served, whether or not the defendant has acknowledged the claim form and whether or not particulars of claim have been served.

(ii) The application notice must have attached to it the text of the order sought by the claimant.

(iii) The time for service of evidence in support of the application and any exhibit is not less than four days before the hearing (instead of 14 days as provided by CPR Pt 24.4(3)).

RECTIFICATION

Rectification is the process by which the court makes a written instrument to conform with the true agreement between the parties, where the instrument, by a mistake does not express that agreement. Rectification will be granted if:

(1) There is no other effective remedy. If the contract put forward by the claimant can be enforced as a separate contract, collateral to the main contract, there will be no need to rectify the main contract. If the parties agree that their contract should be rectified, the court will not make an order for rectification, even though the retrospective operation of the court’s order will confer some advantage, such as a tax advantage: Whiteside v Whiteside [1950] Ch. 65.
The true contract cannot be ascertained by the process of construing the written instrument. This process may include the correction of the obvious errors of expression in the written document itself, such as ignoring the word “not”, or correction of mistakes of nomenclature: *Nittan (UK) Ltd v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep. 633.

There has been a mistake which justifies the intervention of the court. The mistake must normally be common to both parties. In some cases of bilateral contracts, the mistake may be the mistake of only one party, if (a) the other party has been guilty of fraud; or (b) one party knows that the other is labouring under the mistake and has not corrected it, in circumstances which amount to “sharp practice” or which has not corrected it, in circumstances which amount to “sharp practice” or which “affect the conscience of the party who has suppressed the fact that he has recognised the mistake” (*Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505). If the transaction is unilateral, such as a declaration of trust, the instrument may be rectified on proof of a mistake by the maker of the instrument alone (*Butlin’s Settlement Trusts, Re* [1976] Ch. 251).

In relation to trust deeds, rectification is a remedy designed to “put the record straight” and bring a trust document into line with the true intentions of the settlor. Accordingly, where the settlor had executed the settlement he had intended to execute but was mistaken as to its tax consequences, such a mistake was not capable of being remedied by rectification (*Allnut v Wilding* [2007] EWCA CIV 412).

There is no limit to the amount of “red ink” or verbal rearrangement or correction which the court is allowed in order to get as close as possible to the meaning which the parties intended. All that is required is that it should be clear what a reasonable person would have understood the parties to have meant (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 would apply only in rare cases.

The claimant proves that there has been a prior agreement between the parties. This need not itself be an enforceable contract; a common intention is sufficient, provided that it continues up to the time of the making of the instrument, and is proved by some external expression of accord between the parties (oral or written). If the parties deliberately omit a term from the written instrument in the belief that it is not necessary, the requisite continuity of intention will not be present. Likewise, if the parties deliberately include a term in the instrument which has an effect different from that which they believe it has, rectification
cannot be granted. Where rectification is not available but it is clear that the words had been 
omitted and what the gist of those words was the court can supply the omission as a matter of construction (KPMG v Network Rail Infrastructure Ltd [2007] EWCA Civ 363).

(5) There is clear and unambiguous evidence that the instrument does not, or probably does not, 
express the parties’ true intention. The matter to be inserted or substituted in the written 
document does not need to have been expressly formulated in words, provided that the 
parties had and have a common intention as to the substance of their agreement (Grand 
Metropolitan Plc v The William Hill Group Ltd [1997] 1 B.C.L.C. 390) See also Swainland Builders 
Ltd v Freehold Properties Ltd [2002] EWCA Civ 560 and Bradbury Investments Ltd v Hicklane 
Properties Ltd [2008] EWCA Civ 691.

Evidence in a rectification claim must be convincing, which means that, although the ordinary standard 
of proof on the balance of probabilities applies, the evidence must be sufficient to overcome the 
inherent probability that a written document signed or acknowledged by a party contains a text with 
which that party agreed.

Evidence of pre-contractual negotiations is admissible to establish that a fact which may be relevant 
as background was known to the parties or to otherwise support a claim for rectification (Chartbrook 
Ltd v Persimmon Homes Ltd [2009] UKHL 38).

Common mistake

A claim for rectification applies only to agreements in, or that have been reduced to, writing. It is a 
general rule that a document may be rectified only where:

(4) there was some prior agreement between the parties;

(5) this common intention was still effective at the time when the instrument was executed;

(6) by a mistake common to both parties the written instrument fails to record the actual 
agreement of the parties; and
(7) if rectified the instrument is capable of carrying out the agreement (May v Platt [1900] 1 Ch 616 at 623; United States v Motor Trucks Limited [1924] A.C. 196 PC; Riverlate Properties Limited v Paul [1975] Ch 133).

Prior concluded agreement

It has been confirmed by the Court of Appeal in Joscelyne v Nissen ([1970] 2 Q.B. 86) that it is unnecessary for a party seeking rectification to show that there was a binding agreement prior to the execution of the inaccurate written document. What is necessary is a common intention up to the time of execution of the written instrument together with some ‘outward expression of accord’ (Ibid, at p.98).

Common intention

A party seeking rectification will have to prove that the written agreement mistakenly failed to carry out those terms actually agreed between the parties. The court should only consider what the intention of the parties actually was at the time that the written instrument was executed rather than what would have been the intention of the parties had they been alerted to the consequences of what they had done upon execution (Tucker v Bennett (1887) 38 Ch D 1 at 16, per Lopes L.J.). The question of whether the mistake must be one of fact rather than law before the instrument may be rectified is not clear. Whilst it has been held by the House of Lords in Midland Great Western Railway of Ireland (Directors, etc) v Johnson ((1858) 6 H.L. Cas 798 at 811, H.L) that the mistake must be one of fact and not law, it was held, albeit obiter by Evershed MR in Whiteside v Whiteside ([1950] 1 Ch 65 at 74) that ‘if the mistake has arisen from the legal effect of the language used that may provide a ground for the exercise of the court’s reforming power [rectification]’. Further, the House of Lords in Klienwort Benson Limited v Lincoln City Council ([1999] 2 A.C. 349) has recently held that the rule that only a mistake of fact would entitle a party to claim restitution on the grounds of mistake is not part of English law. Whilst the effect of the Kleinwort Benson decision on claims for rectifications based upon a mistake of law remains unclear, it is submitted that it has important implications for the extent to which equity will now relieve against mistakes of law. A document will not be rectified if it simply fails to mention a matter that was overlooked by the parties because the parties will have had no intention at all (Harlow Development Corporation v Kingsgate (Clothing Productions) (1973) 226 EG 1960; Olympia Sauna Shipping Co Saturday v Shinwa Kaiun Kaisha Limited (The Ypatia Halcoussi) [1985] Lloyd’s Rep 364). In such a case, the document will be construed as it stands.
Literal disparity

There must be a literal disparity between the terms of the prior agreement and what is actually written down by the parties in the written instrument. It is not sufficient if the parties are mistaken as to the effect of the use of a particular word or phrase. Thus, it was held by the Court of Appeal in the leading case of *Frederick E Rose (London) Limited v William H Jnr & Co Limited* ([1953] 2 QB 450) that where the parties to an oral agreement for the purchase of horsebeans had recorded the oral agreement in a written agreement containing identical terms believing that horsebeans were the same as feveroles, rectification would be refused because there was no literal disparity between the oral and written agreements.

The agreement must be capable of being rectified so as to reflect the true intention of the parties

Rectification will be refused by the court if the agreement once rectified is incapable of representing the true agreement between the parties (*Fowler v Fowler* (1859) 4 De G & J 250 at 265).

Unilateral mistake

An agreement may be rectified where the mistake is unilateral if one party has actual knowledge of the mistake but fails to inform the mistaken party (see for example *Thomas Bates & Son v Wyndhams Limited* [1981] 1 WLR 505.) It appears to be a requirement that knowledge of the other party’s mistake must be actual rather than suspected or constructive (*Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba)* [1984] 1 Lloyd’s Rep 353; *Commission for New Towns v Cooper Great Britain* [1995] Ch 259). Where a party has contributed to the other party’s mistake, rectification will not be ordered unless that party has *knowingly* contributed (*Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba)* [1983] 2 Lloyd’s Rep 333 at 344). An agreement may be rectified where a party puts forward the written instrument in such a way that he is taken to represent that it reflects a prior agreement and the other party foreseeably relies upon this (ibid, [1984] 1 Lloyd’s Rep 353 at 365). However, it has been held in *Taylor Barnard v Tozer* ([1984] 269 EG 225) that where it was reasonable for the other party to inspect the draft document, rectification will not be granted.

Evidence

The burden of proof is on the party seeking rectification. The standard of proof is particularly high. A party seeking rectification must establish his case by ‘strong irrefragable evidence’ (*Countess of*
Shelburne v Earl of Inchiquin (1784) 1 Bro CC 338 at 341, per Lord Thurlow LC. See also Re H (minors) [1996] A.C. 563, in which the House of Lords considered the differing standards of proof that might be required in civil proceedings. There must be ‘convincing proof’ (Joscelyne v Nissen [1970] 2 Q.B. 86 at 98) of the mistake and the fact that the written agreement does not represent the true intention of the parties at the date that the agreement was executed. Therefore, an insistence by a defendant that the written agreement does represent the prior agreement between the parties is likely to be fatal to a claim for rectification. However, it may be possible to undermine such a defence by reliance on documentary evidence that proves what the common intention of the parties was at the date of execution (Mortimer v Shortall (1842) 2 Dr & War 363 at 374). Oral evidence is admissible to prove that a written agreement mistakenly fails to represent the true intention of the parties. Oral evidence is also admissible to rectify a written agreement that pursuant to statute must be in writing (Craddock Bros v Hunt [1923] 2 Ch 136, CA; United States v Motor Tricks Limited [1924] A.C. 196, PC). The parole evidence rule that applies to actions concerning the construction of written agreements does not apply in claims for rectification (Lovell and Christmas Limited v Wall (1911) 104 L.T. 85). It is particularly difficult to discharge the burden of proof in cases where the claimant is seeking to rectify a deed of settlement (Mortimer v Shortall (1842) 2 Dr & War 363) and even more so in a case of voluntary settlement (Bohote v Henderson [1895] 1 Ch 742; affirmed [1895] 2 Ch 202). A court will hesitate to rectify a voluntary settlement merely on the oral evidence of a settlor, many years after execution, that it does not represent his true intention. If, however, that evidence is supported by contemporaneous written instructions, there is a greater likelihood that relief will be granted. Other than oral and written evidence used to support a claim for rectification, a party may also rely upon the conduct of the parties where they have acted consistently with the true agreement and not the words of the written agreement (McCormack v McCormack (1877) 1 L.R. I r.119).

RESCISSION

Rescission is sought where one party to a transaction wishes to set aside the transaction and be restored to his previous position. Although this is strictly a remedy exercised by a party, the court will be called upon to make a declaration as to the legitimacy of a party’s claim for rescission and to order that restitution of property, handed over as a result of the transaction, be made. That in turn may require the exercise of the court’s power to order an account and inquiry, for instance, into the depreciation of the value of property handed over. Rescission as an equitable remedy should be distinguished from the right to rescind resultant upon a breach of condition or inominate term in a contract.
Equity intervenes to rescind contracts in two different sets of circumstances. The first is where, from the formation of a contract, it is voidable at the election of the aggrieved party; for example where the contract is procured by fraudulent misrepresentation or duress. Equity will rescind the contract ab initio. The second set of circumstances is the situation where equity intervenes because a disposition or transaction has been improperly procured through innocent but material representation, equitable fraud, undue influence, breach of fiduciary duty or other unconscionable conduct.

Rescission is the process by which a party reverses the effect of a contract on the ground of fraud by the other party, innocent misrepresentation, constructive or equitable fraud (such as undue influence or overreaching), mistake, or misdescription of land the subject of a contract for sale. It is regarded as an equitable remedy because the common law courts could not, while the courts of equity could, provide the machinery (such as taking of accounts, see below) which rescission required.

Rescission may also be effected as a consequence of a term of the contract conferring an express right to rescind, for example if the purchaser of land persists in an objection to faith: the vendor will not be permitted to rely on a rescission clause if he has knowingly entered into the contract without any title to the property or part of it, and there must have been no failure of the vendor to act in good faith in relation to the contract. The vendor must not, for example, attempt to keep the right of rescission in suspense while attempting to resell the property to a third party: Smith v Wallace [1895] 1 Ch. 385.

The right to rescind may also arise from the breach by one party of the duty of utmost good faith (uberrima fides) which is imposed on parties to contracts of insurance, contracts for family settlements, and contracts of partnership.

The use of the term “rescission” may be used to describe the process which follows the acceptance of a repudiatory breach of contract or the discharge of an order of specific performance on the ground of non-compliance, but such use may be misleading. In those events, the innocent party remains entitled to enforce secondary liabilities of the offending party to pay damages at common law: Johnson v Agnew [1980] A.C. 367. Where the remedy of rescission properly so called is invoked, the contract is discharged about initio (from the beginning). Money paid and property transferred pursuant to the contract is restored to the payer or transferor, with a view to restoring both parties to the position in which they were before the contract was made (restitutio in integrum). Damages at common law or pursuant to statute may be claimed in addition to rescission:
(i) where the defendant is guilty of fraud;

(ii) where the contract was induced by the defendant’s innocent misrepresentation, and the defendant fails to prove that he had reasonable grounds to believe, and did believe, up to the time when the contract was made, that the representation was true: Misrepresentation Act 1967 s.2(1). In that event, the defendant is liable for damages as if the representation had been made fraudulently;

(iii) where the court decides pursuant to Misrepresentation Act 1967 s.2(2) that it is equitable to declare the contract still subsisting notwithstanding that the claimant was induced to enter into it by the misrepresentation of the defendant. The court must have regard to the nature of the misrepresentation and balance the loss which would be caused to the claimant if the contract were upheld with the loss which would be caused to the defendant if it were rescinded.

The right to rescind may be lost:

(i) Where the party claiming rescission has knowledge of the facts giving rise to the right to rescind and the existence of the right, and has affirmed the contract or waived the right to rescind. Such affirmation may occur if the claimant demands further performance of the contract by the other party. Waiver may be inferred if the claimant delays making his claim after acquiring knowledge of the right to rescind, particularly in the case of a sale of shares or other property whose market value is volatile: Scottish Petroleum Co (No. 2), Re (1883) L.R. 23 Ch.D. 413 (14 days too long).

(ii) Where the parties cannot be restored to their original positions (restitutio in integrum is impossible). This may occur if the performance of the contract has substantially altered the subject matter, or if the conduct of one of the parties has made restitution impossible. The court does not, however, require exact restitution. A person who has agreed to become a partner in a business on the faith of misrepresentation as to its value may rescind even though the business has become worthless in the meantime; a party who has enjoyed benefits from the contract may be required to compensate the other party for the value of the benefits by making a payment.
Where a third party has acquired rights in relation to the subject matter of the contract for value. Thus, where a shareholder wishes to obtain rescission of the allotment of shares to him on the ground of fraudulent misstatements in the prospectus, he must repudiate the contract before the company is wound-up, as the company’s creditors will be treated as purchasers of the company’s assets for value: Oakes v Turquand (1867) L.R. 2 H.L. 325. On the other hand, a third party’s rights will not prevent rescission if they were not acquired for value. A defendant would not be entitled to resist rescission of a sale to him of property on the ground that he had transferred the property to the trustees of a settlement as a gift to the beneficiaries. Equally, a trustee in bankruptcy of the defendant is not a purchaser for value of the property of the bankrupt: Eastgate Ex p. Ward. Re [1905] 1 K.B. 465.

ACCOUNTS AND ENQUIRIES

By an order for an account, the court compels the defendant to produce the documents and records his dealings with the relevant property and explain such dealings by sworn witness statement.

The essential feature of the cause of action for an account is that the defendant is an “accounting party”, someone who is or has been in such a relation to the claimant that he is obliged to render an account. Such a person may be an agent, a broker, a trustee, or a person who has rendered himself liable to account as a constructive trustee by reason of his dealings with property the subject of a trust or fiduciary obligation. The circumstances in which an account may be ordered are almost infinitely variable.

An order that a party prepare and file accounts relating to the dispute is included in the list of interim remedies which may be granted before trial of an action: CPR, Pt 25.1(1)(n).

The remedy of account is particularly well-suited to achieve practical justice between the parties when a transaction is rescinded about initio. Thus, unlike in law, it is not necessary to re-establish the identical status quo ante if equity can achieve what is practically just between the parties. The taking of accounts and inquiries is now governed by CPR PD40, supplementing CPR Part 40, judgments and orders. The provisions of CPR Sch 1, RSC Ord 44 (proceedings under judgments and orders: Chancery Division) also apply in the county courts in relation to proceedings for:

(8) administration of the estate of a deceased person;
(9) execution of trust;

(10) sale of property; and

(11) in any other proceedings in the exercise of equity’s jurisdiction (CPR PD40, para 9.1).

Verifying the account

Verification of an account is by witness statement or affidavit (CPR PD40, para 2).

Objection

Any party can object to any amount received or claimed by another party by informing the accounting party of his objection in writing (Ibid, para 3.1). The objection should:

(12) specify the amount by which it is said the account understates the amount received;

(13) state the amount that the party objecting contends should have been received;

(14) state the respects in which the account is inaccurate; and

(15) state the grounds upon which such a contention is made. (Ibid, para 3.2).

RECEIVERS

The court has a statutory jurisdiction to appoint a receiver if it is considered just and convenient to do so (SCA 1981, s.37(1)). Both the High Court and the county court have jurisdiction to make such appointments (CPR Sch 1, RSC Ord 30, rA1). Such an application must be made by an application notice (CPR Sch 1, RSC Ord 30, r1(1)). In the High Court, the application, it is possible to join an application for an injury which is ancillary or incidental to the appointment (CPR Sch 1, RSC Ord 30, R1 (2)). In the context of such an application, a Master or district judge only has jurisdiction to grant an injury in connection with, or ancillary to, an order appointing a receiver by way of equitable execution (CPR PD2B – Allocation of Cases to Levels of Judiciary, para 2.3(c). Paragraph 3 specifies the circumstances in which an injunction may be granted by a Master or a district judge. The application may be made with or (in the appropriate circumstances) without notice.
The evidence in support will need to explain the standing of the claimant in respect of the property and the ground on which it is contended that the appointment of a receiver is just and convenient. In addition, it will also be necessary to have evidence as to the fitness of the person sought to be appointed.

A receiver is a person appointed to recover property for the benefit of persons adjudged by the court to be entitled to it. The appointment prevents other parties from getting in assets which the receiver has been appointed to receive.

The general principle governing the decision to appoint a receiver is to secure the protection or preservation of property which is the subject of litigation, pending the trial of the proceedings. There is not an exhaustive list of circumstances in which a receiver can be appointed. The following are examples.

(16) If it is inevitable that a partnership will be dissolved, then it used to be stated that there would be little difficulty faced in having a receiver appointed (Re A Company (No 00596 of 1986), above) but that is no longer the law (Toker v Akgul [1996] CLY 4540, CA). It is a matter of discretion for the court and there is no presumption in favour of appointment. A receiver will be appointed regardless of dissolution if the partnership assets are in jeopardy or there is misappropriation by a partner. If the assets are not in danger, then no appointment will be made. A breach of a dissolution agreement may be justification for such an appointment.

(17) A receiver may be appointed in respect of the assets of a company if it is the subject of a petition under s.459 of the Companies Act 1985 (CA 1985) or based on the just and equitable ground and is to be viewed as a ‘quasi-partnership’ (Re A Company (No 00596 of 1986), above). The court will do so in such circumstances if it considers that the company is not being run properly. The court will also act if the business of a company is in jeopardy because its affairs not being administered correctly. For example, if there is dissension between the directors, a receiver may be appointed with a view to enabling the management of the company to be restored to a proper footing (Stanfield v Gibbon [1925] WN 11). A receiver may be appointed by way of an interim order to assist with the enforcement of a freezing injunction against a company (Derby & Co Limited v Weldon (Nos 3 and 4) [1990] 1 Ch 65). In an appropriate case the court may even look the corporate veil and appoint a receiver of a Company’s assets company has been controlled by a defendant for the purposes of a fraud scheme (Re H and Others (Restraint Order: Realisable Property) [1996] 2 All ER 391.)
A landlord suing for possession may obtain the appointment of a receiver pending trial if there is a risk to the premises and there is a probability of success at the trial (Carrington & Co Limited v Camp [1902] 1 Ch 386, which concerned licensed premises and the receiver was appointed to preserve the licence when the tenant abandoned the public house.)

The court will order the appointment of a receiver in favour of a claimant seeking to recover land if the court considers that there is a good chance of success at trial and it is just and convenient to do so (John v John [1898] 2 Ch 573).

If there is no probate action on foot, a creditor or beneficiary may apply for the appointment of a receiver of an estate.

The appointment of a receiver is a flexible remedy which enables the court to appoint its own officer to safeguard and administer property pending a dispute, or to give effect to the court’s judgment after a trial. The effect of the appointment of a receiver depends on the specific terms of the order of appointment, but the following general propositions apply:

(i) The receiver has no authority to manage a business over which he is appointed unless the order of appointment so provides.

(ii) The appointment of the receiver operates as a kind of injunction against any other intermeddling with the assets the subject of the appointment, so that interference with the performance of the receiver’s duties is a contempt of court.

(iii) The receiver will usually be obliged to provide security for the due performance of his duties, but he may be authorised to act before giving security, or without providing any security at all, by the terms of the order of appointment.

(iv) The receiver has no recourse to the parties to the action or the party securing the appointment for his remuneration, costs and expenses, but he is entitled, like a trustee, to be indemnified out of the assets where he has acted for the benefit of the property.

(v) The receiver is personally liable to those with whom he contracts in the course of the receivership.
The critical matter which determines whether the court should appoint a receiver is whether the Claimant has shown a claim to assets which are in jeopardy either from depredations by the Defendant or by reason of deterioration over time. Receivers have been appointed by the court to protect partnership assets, the assets of joint ventures, and deteriorating leasehold property.

**Application**

Applications for the appointment of a receiver are usually made when the subject-matter of the dispute is partnership, mortgages, equitable execution or vendor and purchaser-related.

**Partnership**

A receiver will be appointed where the parties cannot agree as to the payment of debts but agree to the preservation of assets pending the court’s taking of partnership accounts. (Chancery Guide, Section B, paras 22.1-22.5). The court will be slow to appoint a receiver when there is a real doubt whether or not the partnership will be dissolved. The effect on the business of the partnership, should a receiver be appointed, must be assessed. A judgment creditor may apply to the court for the appointment of a receiver of a partner’s property (CPR Sch 1, RSC Ord 81, r10).

**Mortgages**

There is little necessity for a legal mortgagee to apply for the appointment of a receiver. The legal mortgagee is empowered by statute to appoint a receiver (LPA 1925, ss.101(1)(iii) and 109). Furthermore, a mortgagee is more likely to exercise its right to take possession. Although equitable mortgagees or charge holders have no recourse to remedies at law, most company securities will confer an express power on a charge to appointment a receiver.

**Equitable execution**

A receiver will be appointed by way of equitable execution only where the court believes it just and convenient to do so having regard to:

(21) the amount claimed by the judgment creditor;

(22) the amount likely to be obtained by the receiver; and
CONSTRUCTIVE TRUSTS AND TRACING

The claims considered in this section are claims for dishonest assistance in a breach of trust or fiduciary duty (also referred to as accessory liability) and for knowing receipt of funds against fraud (and other breaches of trust or fiduciary duty) by making any person sufficiently implicated in the fraud (or other breach of trust or fiduciary duty) accountable in equity. They are commonly referred to as cases of constructive trust liability, although this expression has been described as misleading for there is no trust and usually no possibility of a proprietary remedy. Expressions “constructive trust” and “constructive trustee” in this context have been said to be “nothing more than a formula for equitable relief” and it has been suggested that English law should discard the words “accountable as constructive trustee” in this context and substitute the words “accountable in equity”: Paragon Finance Plc v DB Thakerar & Co [1999] 1 All E.R. 400 at 409; Dubai Aluminium Company Ltd v Salaam [2003] 2 A.C. 366 at paras 141-142.

A. Knowing Receipt

The essential ingredients for a claim in knowing receipt which the claimant must plead and prove are:

(a) a disposal of his assets in breach of trust of fiduciary duty;

(b) the beneficial receipt by the defendant of assets which are traceable as representing the claimant’s own assets;

(c) knowledge on the part of the defendant that the assets are traceable to a breach of fiduciary duty or breach of trust.

(See El Ajou v Dollar Land Holdings Plc [1994] 2 All E.R. 685 at 700.)
Liability for knowing receipt of trust property is a personal liability which extends to a liability to account for property or its value which the knowing recipient no longer has. If the recipient has retained it, or if he has retained property which is an identifiable substitute for the original trust property, then the Claimant is entitled simply to assert his proprietary rights in that property. He does this by invoking the principles of following and tracing. If the original recipient has passed on the property or its substitute to another person then, subject to any defence which that other may be entitled to raise, the principles following or tracing continue to apply to the property or its substitute in the hands of that other. A proprietary claim can be maintained against anyone in possession or control of the trust property or its traceable proceeds except a bona fide purchaser for value without notice. If a recipient has not retained the trust property, and its proceeds are no longer identifiable, then the claimant may have a personal remedy against the recipient in knowing receipt: See the discussion in *Ultraframe (UK) Ltd v Fielding* [2006] F.S.R. 17 at para. 1486.

**Company property.** In consequence of the fiduciary character of their duties, the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust: In *Lands Allotment Company, Re* [1894] 1 Ch. 616, 638 per Lindley and Kay LJJ. Similarly, a person entrusted with another person’s money for a specific purpose has fiduciary duties to the other person in respect of the use to which those monies are put: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347 at para.34. So where the company’s property has been misapplied by its directors in breach of fiduciary duty, third parties who receive that property with the requisite knowledge of the breach of duty will be liable for knowing receipt: *Belmont Finance Corp. v Williams Furniture Ltd (No. 2)* [1980] 1 All E.R. 393 at 405. This is equally the case when a company’s funds are misapplied by any person whose fiduciary position gave him control of them or enabled him to misapply them: *Agip (Africa) Ltd v Jackson* [1990] Ch. 265 at 290.

Confidential information and a corporate opportunity may be regarded as trust property for these purposes, although there may be difficulties in tracing them into any resulting chose in action: *Satnam Investments Ltd v Dunlop Heywood* [1999] 3 ALL E.R. 652; *Ultraframe* at para. 1491. So where a director diverts a corporate opportunity away from the company to a third party, the contracts entered into by third party enabling it to exploit that opportunity may be regarded in law as the property of the company or the traceable proceeds of the property of the company, being the business opportunity available to the company, for the purposes of a knowing receipt claim against the third party: *Crown Dilmun v Sutton* [2004] 1 B.C.L.C. 468 at paras 202-204; *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at paras 193-194.
Unauthorised profits acquired by a fiduciary. Following the Privy decision in Attorney General for Hong Kong v Reid [1994] 1 A.C. 324 there has been support for the view that under English law unauthorised profits acquired by fiduciaries in breach of fiduciary duty are held upon constructive trust for the principal: Daraydan Holdings Ltd v Solland International Ltd [2005] Ch. 119; Ultraframe at para. 1490. So bribes have been held to be trust property for the purposes of a knowing claim: Dyson Technology Ltd v Curtis [2010] EWHC 3289 (Ch). However, the Sinclair Investments UK Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347 the Court of Appeal declined to follow the Privy Council decision in Reid and held that, at least in the present state of English law, a beneficiary of a fiduciary’s duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a bid in breach of his duties to the beneficiary, unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary. So unauthorised profits made by a company director otherwise than by acquiring and exploiting property formally owned (or treated as owned) by the company itself give riser only to a personal obligation to account. This is insufficient for a claim in knowing receipt. This approach was followed in Apcoa Parking (UK) Ltd v Galhenage Aruna Sathyajith Perera (t/a Arun Perera) (Ch., David Donaldson QC, October 14, 2010) where it was held that because such profits are not held on trust, the fiduciary is free to dispose of them without restriction and receipt by a third party gives rise to no liability.

Constructive trust. Knowing receipt claims may also arise where there is no pre-existing trust or fiduciary relationship between the wrongdoer and the victim of fraud but property has been stolen or obtained by fraud in circumstances where equity imposes a constructive trust on the wrongdoer: see e.g. Twinsectra Ltd v Yardley [1999] Lloyd’s Rep. Bank 438 CA; Papamichael v National Westminster Bank Plc (No.2) [2003] 1 Lloyds Rep. 341; Bank of Ireland v Pexxnet Ltd [2010] EWHC 1872 (Comm).

There is support for the view that when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient, at least in the absence of a supervening barrier such as a contract which was not itself the instrument of fraud. In the case of a non-consensual transfer (such as theft) it has been said that equity imposes an immediate constructive trust on the transferor. Where property is transferred pursuant to a contract voidable for fraudulent misrepresentation no trust arises unless and until the transferor elects to avoid the transaction. A constructive trust may also arise where money is paid under a mistake to a third party who seeks to retain the money after it has learned of the mistake. See Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669 at 714, 716; Halley v The Law Society [2003] EWCA Civ 97; Commerzbank AG v IMB Morgan Plc [2005] 1 Lloyd’s Rep. 298; London Allied Holdings Ltd v Lee [2007] EWHC 2061 (Ch) but compare Halifax Building
Disposal of assets in breach of trust or fiduciary duty. This requirement is readily satisfied in most cases of commercial fraud, since the embezzlement of a company's funds almost inevitably involves a breach of fiduciary duty on the part of one of the company's employees or agents: *Agip* at 290. However, liability in knowing receipt does not require that the breach of trust of fiduciary duty should be fraudulent or dishonest: *Agip* at 292; *Polly Peck International Plc v Nadir (Asil) (No.2)* [1992] 4 All E.R. 769 at 777.

Liability for knowing receipt may arise where in breach of fiduciary duty the directors cause a company to make a transfer which is contrary to company law or under a contract which is void for want of authority: *Belmont V Williams (No 2); Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch. 447;; *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyds Rep. Bank 511. However, if in breach of fiduciary duty the directors cause the company to make a transfer under an agreement which is binding on the company questions of knowing receipt do not arise. If under the principles of agency and company law the agreement is valid and not set aside then so far as the recipient is concerned there can be no question of the assets having been misapplied since they were acquired from the legal and beneficial owner under a valid agreement: *Criterion Properties Plc v Stratford UK Properties LLC* [2004] 1 W.L.R. 1846 at para.4; but compare *Rolled Steel Products (Holdings) Ltd v British Steel Corp.* [1986] Ch. 246 at 298.

Receipt. The claimant must establish in accordance with the normal rules of tracing in equity that the trust property or its substitute was received by the defendant: *Boscawen v Bajwa* [1996] 1 W.L.R. 328 at 334. The receipt must be a direct consequence of the alleged breach of trust or fiduciary duty of which the defendant is said to have knowledge: *Brown v Bennett* [1999] B.C.L.C. 649, at 655. The creation by a contract of contractual rights does not constitute a “receipt” of assets in the sense that a “knowing receipt” involves a receipt of assets: *Criterion* at para.27.

Receipt by an agent is the equivalent of receipt by the principal since the agent has no interest of any kind in the property himself and must simply account to his principal for it: *Uzinterimpex JSC v Standard Bank Plc* [2008] 2 Lloyd's Rep. 456 at para 39. A court is also entitled to “pierce the corporate veil” and recognise the receipt of a company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of
those individuals: *Trustor AB v Small Bone (No.4)* [2001] 1 W.L.R. 1177. Similarly, receipt by companies controlled by the defendant which he caused to be paid over in breach of trust may be regarded as receipt by a nominee of the defendant and therefore receipt by the defendant personally for the purposes of personal liability for knowing receipt: *Pulvers (A Firm) v Chan* [2008] P.N.L.R. 9 at para.379. But the mere fact that a fiduciary has a substantial interest in a company which knowingly receives trust property does not make a fiduciary personally accountable for the receipt: *Ultraframe* at para. 1576; *National Grid Electricity Transmission Plc v McKenzie Harbour Management Resources Ltd* [2009] EWHC 1817 (Ch.) at para. 118.

Receipt by the defendant should be for his own benefit or in his own right in the sense of setting up a title of his own to the property so received: *Trustor* at para. 19. In the case of banks a distinction has been drawn between a bank collecting money for a customer whose account is in credit (where the bank is said to receive funds merely as agent of its customer and not in any beneficial capacity) and a bank collecting money for a customer whose account is overdrawn so that it receives the money for its own benefit: *Agip* at 292. This distinction has been criticized on the grounds that the nature of the relationship between banker and customer is such that the bank always has the benefit of using the customer’s money for its own purposes until such time as it is called upon to repay the debt see e.g. *Uzinterimpex* at paras 38-40. A bank will receive money beneficially where it is transferred to it for the purpose of foreign exchange transactions: *Polly Peck v Nadir (No. 2)* at 776.

**Knowledge.** Although a knowing recipient will often be found to have acted dishonestly, dishonesty is not a prerequisite to liability under knowing receipt. In order to be liable for knowing receipt the recipient’s state of knowledge of the circumstances of the payment must be such as to make it unconscionable for him to retain the benefit of the receipt *BCCI (Overseas) Ltd v Akindele* [2001] 1 Ch. 437; *Charter Plc v City Index Ltd* [2008] Ch. 393. Knowledge for that purpose is to be distinguished from mere notice, and requires at least “a clear suspicion”: see *Uzinterimpex* at para.44. Even where the defendant’s knowledge did not go so far as to show that funds were traceable to a breach of fiduciary duty, dishonest receipt of funds in circumstances where they were in fact traceable to a breach of fiduciary duty makes it unconscionable for the recipient to retain the benefit. *Papamichael* at para.248

Lord Neuberger of Abbotsbury (sitting in the Hong Kong Court of Final Appeal) has recently stated that, in a commercial context, the test which equity applies to a claim in knowing receipt of an asset is effectively identical to the test of want of honest or rational belief (which includes turning a blind eye and being reckless) which the common law would apply to determine whether there was reliance
on the apparent authority of an alleged agent to commit the principal to handing over the asset. So if a recipient’s reliance on the alleged agent’s apparent authority, when accepting the asset from the alleged agent on behalf of the principal, was dishonest or irrational it would be unconscionable for the recipient to retain the asset against the wishes of the principal. If the reliance was negligent, then I understand that it is doubtful that the unconscionability test would normally be satisfied: Thanakharn Kasikorn Thai Chamkat (Maha Chon) v Akai Holdings Ltd [2010] HKCFA 64 at paras 135-137.

A volunteer who receives funds bona fide and without notice of trust but who has retained funds or their traceable proceeds and subsequently acquires knowledge of the breach of trust at a time when the funds (or their traceable proceeds) are still in his or her hands will become liable for knowing receipt thereof at the time he or she acquires that knowledge: Diplock, Re [1948] Ch. 465; Sansom v Gardner [2009] 3369 (Q.B.).

Allegations of knowledge must be specifically set out in the particulars of claim: CPR PD 16 para.8.2.

Remedies. The claimant has a personal remedy for an account against the knowing recipient for any benefit he has received or acquired as a result of the knowing receipt. A knowing recipient is liable to restore or make good the money or value of the property received and to account for any profit he has made from the assets received, but not to account for a benefit received by someone else: Ultraframe para.1577.

Where the assets received consist of property such as shares which were subsequently sold by the defendant, equitable compensation for knowing receipt may be assessed not by reference to the value of the shares as at the date of receipt but by reference to the proceeds of sale of the shares. So the claimant would be entitled to elect between receiving a sum equal to the proceeds of sale of the shares or (unless it is impossible to obtain them) an equivalent number of shares: Thanakharn Kasikorn Thai Chamkat (Maha Chon) v Akai Holdings Ltd [2010] HKCFA 63 at paras 148-155.

Where the assets received consist of property such as shares which were subsequently sold by the defendant, equitable compensation for knowing receipt may be assessed not by reference to the value of the shares as at the date of receipt but by reference to the proceeds of sale of the shares. So the Claimant would be entitled to elect between receiving a sum equal to the proceeds of sale of the shares or (unless it is impossible to obtain them) an equivalent number of the shares: Thanakharn Kasikorn Thai Chamkat (Maha Chon) v Akai Holdings Ltd [2010] HKCFA 63 at paras 148-155.
B. Dishonest assistance

The claimant must plead and prove:

(a) that there has been breach of trust or fiduciary obligation owed to the claimant;

(b) in which the defendant has assisted or which she/he has procured;

(c) the defendant has acted dishonestly;

(d) resulting loss to the claimant.

(See Barnes v Addy (1873-74) L.R. 9 Ch. App. 244 at 251-252; Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378.)

Breach of trust or fiduciary obligation. It is not necessary that the trustee or fiduciary was acting dishonestly, although –this will usually be so where the third party who is assisting him is acting dishonestly: Royal Brunei Airlines Sdn Bhd v Tan at 392. Nor is it necessary that the breach of duty should involve property held on trust or its misapplication or misappropriation: Fiona Trust v Privalov [2010] EWHC 3199 (Comm) at para.61; JD Wetherspoon Plc v Van de Berg & Co Ltd [2009] EWHC 639 (Ch) at para.518.

Assistance. There can be dishonest assistance after the original breach of trust. In those cases where the breach consists in misappropriation of assets the breach will not end when assets have been initially removed from the trust fund but when they have been hidden away beyond the reach of the beneficiaries who might seek their recovery: OJSC Oil Co Yugraneft v Abramovich [2008] EWHC 2613 (Comm) at para.390. Liability for dishonest assistance is not restricted to those who assist in the original disposal of funds in breach of assistance is not restricted to those who assist in the original disposal of funds in breach of trust or fiduciary duty. It extends to everyone who consciously assists in the continuing diversion of the money. Most of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money: Twinsectra Ltd v Yardley [2002] 2 A.C. 164 at para. 107.

The assistance must have had some causative significance. In Brink’s Ltd v Abu-Saleh [1996] C.L.C. 133 a wife accompanying her husband on trips to Switzerland to bank monies pursuant to what they
thought was a tax evasion exercise was not “assisting” because she was merely going to keep him company and to visit Switzerland and not to provide cover for his trip. The defendant will not be liable if he did not assist in the alleged breach but only in a later transaction which was not itself in breach of trust: *Brown v Bennett* [1999] 1 B.C.L.C. 649.

To plead a claim in dishonest assistance the particulars of claim should identify what it was the defendant did to assist the breaches of fiduciary duty: *Ultraframe* at para. 1761.

**Dishonesty.** In the context of accessory liability, dishonesty simply means not acting as an honest person would in the circumstances. This is an objective standard, requiring an assessment of the circumstances known to the defendant at the time (as distinct from what a reasonable person would have known or appreciated) his personal attributes such as his experience and his intelligence and the reason why he acted as he did: *Royal Brunei Airlines Sdn Bhd v Tan* at 391.

The decisions of the House of Lords in *Twinsectra* and of the Privy Council in *Barlow Clowes International Ltd (in Liquidation) v Eurotrust International Ltd* [2006] 1 W.L.R. 1476 gave rise to some uncertainty as to whether in addition to the defendant’s conduct being dishonest by the ordinary standards of reasonable and honest people (an objective test), it was necessary to show that the defendant was aware that his conduct would be regarded as dishonest by those standards (a subjective test): see the discussion in *Abou-Rahmah v Abacha* [2007] 1 Lloyd’s Rep. 115. In *Barlow Clowes* the Privy Council advanced an objective test alone (se paras 10 and 16); “If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards”. The test required “consciousness of those elements of the transaction which made participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about what those standards were”. This approach has since been followed by the English courts: see eg *Al Khudairi v Abbey Brokers Ltd* [2010] P.N.L.R. 32 at para.134; *Aerostar* para.184; *Fiona Trust* at para. 1437. Just as the subjective understanding of the person concerned as to whether his conduct is dishonest is irrelevant so also is it irrelevant that there may be a body of opinion which regards the ordinary standard of behaviour as being set too high: *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314 at para.32.

The defendant’s knowledge of the transaction must have been such as to render his participation contrary to normally acceptable standards of honest conduct. Such a state of mind may involve knowledge that the transaction is one in which he cannot honestly participate (e.g. a misappropriation of other people’s money), or it may involve suspicions combined with a conscious decision not to make
enquiries which might result in knowledge: *Barlow Clowes* at paras 10 and 15. It is not necessary to show that the defendant knew of the existence of the trust or even the facts giving rise to the existence of the trust—someone can know and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means: *Barlow Clowes* at para. 28; *Abou-Rahmah* at paras 38-39; *Agip* at 295.

**Loss.** In *Grupo Torras SA Al-Sabah (No. 5)* [1999] C.L.C. 1469, Mance L.J. said that the requirement of dishonest assistance relates not to any loss or damage which may be suffered but to the breach of trust or fiduciary duty. The relevant enquiry is what loss or damage resulted from the breach of trust or fiduciary duty which has been dishonestly assisted.

**Remedies.** The accessory is liable in equity to make good any loss which the beneficiary suffers as a result of the breach of trust or fiduciary obligation which has been dishonestly assisted or procedure.

It is now established that an account of profits is available under English law against one who dishonestly assists or procures a breach of fiduciary duty, at least as a personal not proprietary remedy: *Fiona Trust* at paras 62-66; *Sinclair Investment Holdings Saturday v Versailles Trade Finance Ltd (In Administrative Receivership)* [2007] EWHC 915. The dishonest assistant is only liable to disgorge profits which he himself has made rather than profits made by the fiduciary or others from the scheme which was assisted: *Ultraframe* para. 1600. There is some uncertainty as to whether the dishonest assistant can be made accountable for profits not derived personally but diverted to a third party (see the discussion in *Fiona Trust* at paras 1533-1540). When assessing the profit of an accounting party liable for knowing receipt or dishonest assistance the court does not examine or seek to determine whether he would have profited in any event even if he were not at fault: *Fiona Trust* at para. 67.

**C. Tracing**

Any facts relied on to support a tracing “claim” should be fully and properly pleaded. *Grabowski v Scott* [2002] EWCA Civ 1885, CA.

In the context under discussion here, the claimant may need to seek to trace or follow assets in order to make the personal claim in knowing receipt, and, in addition, to assert an equitable proprietary interest in the assets received. An exercise in tracing or following assets with a view to establishing an equitable interest, if successful, enables the claimant to make a claim which is proprietary, rather than personal, in nature which fixes on the asset traced. An equitable proprietary claim entitles the
claimant to assert beneficial ownership to the contribution his property made to the traceable asset: *Hallet’s Estate, Re* (1879-80) L.R. 13 Ch. D. 696. In *Boscawen v Bajwa* [1996] 1 W.L.R. 328 at 334-335 Millett L.J. treated every case in which the court would treat the defendant as holding the property on a constructive trust. If the asset, whether property or investment, into which the trust property is traced has increased in value, the proprietary claim to that asset or a share in that asset is worth more to the Claimant than the personal claim against the knowing recipient of the monies paid in consideration for the purchase of the asset. In the event of the defendant’s insolvency, in contract to a personal claim, the proprietary claim has priority over the defendant’s general creditors. Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset: *Foskett* at para. 138.

Where the claimant asserts a proprietary claim, he may be able to obtain orders before proceedings are instituted, or before trial, which are designed to preserve the property and to facilitate the tracing exercise: *A v C (No.1)* [1981] Q.B. 956, referring to *London and Counties Securities v Caplan* (unreported, May 26, 1978, CA) and *Mediterrania Raffineria Siciliana Petroli S.p.A v Mabanaft GmbH* (unreported, December 1, 1978, CA (Civil Division). Transcript No. 816 of 1978.

The beneficiary’s proprietary claims to the trust property or its traceable proceeds can be maintained against the wrongdoer and anyone who derives title from him except a bona fide purchaser for value without notice of the breach of trust. The same rules apply even where there have been numerous successive transactions, so long as the tracing exercise is successful and no bona fide purchaser for value without notice has intervened: *Foskett* at para.130.

In *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2010] EWHC 1614 (Ch) Lewison J. Held that where the issue is whether an equitable proprietary interest can be enforced against a person in possession of property or its identifiable substitute the test is lack of notice rather than the more stringent test of unconscionability that applies in knowing receipt (but compare *Polly Peck International Plc v Nadir (Asil) (No.2)* [1992] 4 All E.R. 769 at 776 and 781-2). The notice required is notice of a right, rather than a mere claim. Notice includes both notice of the facts on which a claim is based and of the law applicable to those facts and includes both actual notice and constructive notice. Constructive notice means notice of those things that would have been discovered if proper
steps had been taken but what are proper steps is dependent on the context in which the question arises. In a commercial context it must be obvious that the transaction was probably improper: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347 at paras 97-108.

In *Compagnie Noga D’importation et D’Exportation SA v Australia and New Zealand Banking Group* [2005] EWHC 225, Langley J. expressed the view that it was a “nice question” as to whether, where property has passed through a purchaser, a claimant must make an allegation of bad faith or whether he may wait to see if good faith is asserted in a defence.

The right to trace will be lost where the asset or its proceeds are no longer identifiable. When asserting a legal right, money cannot be traced at law through a mixed fund: *Agip (Africa) Ltd v Jackson* [1990] Ch. 265 at 285. The general rule is that an equitable right is also lost upon payment of monies into an overdrawn account: *Goldcorp Exchange, Re* [1995] 1 A.C. 74; *Bishopsgate Investment Management v Homan* [1995] Ch. 211; [1995] 1 All E.R. 347, CA, and, where monies are paid into a mixed fund and some are later dissipated, the equitable right can only be traced into the remaining balance and not into any further funds subsequently deposited, unless it is shown that those funds were intended to restore the trust: *Roscoe v Winder* [1915] 1 Ch. 62; *Campden Hill Ltd v Chakrani* [2005] own funds, the onus is on the fiduciary to establish on the balance of probabilities that part, and what part, of the mixed fund is his property. So a proprietary claim will not be lost simply because the defaulting fiduciary has paid money held on trust into a maelstrom account: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347 at paras 135-141.

**RESTITUTION**

Restitutionary claims involve the enrichment of a defendant at the expense of a claimant in circumstances where it is unjust for the defendant to retain that enrichment. The two elements of unjust enrichment require separate consideration. (See, generally, *Golf & Jones: The Law of Unjust Enrichment* (2011), Ch. I.)

The enrichment of a defendant may arise in one of three different ways: (There is also a head of restitution known as “free acceptance” which at one and the same time satisfies both elements of unjust enrichment. This has yet to receive explicit judicial recognition as a cause of action, although a number of courts have discussed its availability in principle: *Chief Constable of the Greater Manchester

(1) Where the enrichment is in the form of money. Being a medium of exchange and store of value, the receipt of money incontrovertibly benefits a defendant.

(2) Where the enrichment is in the form of a non-money benefit. Because different values can be placed on non-money benefits (so-called subjective devaluation), (“Subjective devaluation” can operate either to show that the recipient has not received any benefit or to reduce the value of the benefit that she has received. There is as yet no authority that the value of a benefit can be subjectively increased, although conceptually this may be possible: Benedetti v Sawiris [2010] EWCA Civ 1427 at [143]-[146]) a claimant must prove, before his claim can succeed, that the defendant has been “incontrovertibly benefited”. (The term “incontrovertible benefit” was adopted with approval by Hirst J. in Procter & Gamble v Peter Cremer GmbH [1988] 3 All E.R. 843 at 855. Even if he has not realised the financial value of the benefit and has no intention of doing so, a defendant who has received a benefit which is readily returnable but who chooses not to retransfer it on request can hardly deny that he has been enriched by it: Cressman v Coys of Kensington (Sales) Ltd [2004] EWCA Civ 47 at [37]-[40]; [2004] 1 W.L.R. 2775 at 2791A-2792C. A similar approach has influenced the consideration of “free acceptance”. The cases discussing this principle state that acceptance will only arise where the recipient has had an opportunity to reject the benefit advanced, but has decided to keep it: Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd [2008] EWCA Civ 1449; (2009) 1 W.L.R. 1580 at [47]; Benedetti v Sawiris [2010] EWCA Civ 1427 at [105]-[106] and [118]-[120]).

(3) Where the enrichment takes the form of a benefit conferred on the defendant by virtue of a wrong committed by the defendant against the claimant. The “wrong” in question can be tortious. (Such cases are often described as cases where the claimant “waives the tort”. See further Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086; [2009] 3 W.L.R. 198; although it was held in that case that no claim in restitution can arise from a non-proprietary tort.) (exceptionally) a breach of contract (See Att. Gen. v Blake [2001] 1 A.C. 268. A breach of contract will only fall into this exceptional category where there is a special need for protection of the claimant’s rights: Vercoe v Rutland Fund Management
Cases (1) and (2) may be described as “unjust enrichment by subtraction”, in that the enrichment of the defendant can be related to a corresponding loss of the claimant. Case (3) represents “unjust enrichment by wrongdoing”, where the enrichment of the defendant arises by virtue of the commission of a legal or equitable wrong against the claimant. Not all enrichments are "unjust". The law of restitution recognises certain categories of "unjust" enrichment. For the purposes of this section, these categories are as follows:

1. Mistake, where an enrichment is conferred on the claimant by reason of the claimant’s mistake.
2. Contracts discharged by breach where the claimant seeks to recover a benefit that was conferred by him as part of his contractual performance the contract itself having been discharged by breach of either the claimant or the defendant.
3. Contracts discharged by frustration, where the claimant seeks to recover a benefit that was conferred by him as part of his contractual performance, the contract itself having been discharged by frustration.
4. Void, voidable or otherwise ineffective transactions, where the claimant seeks to recover a benefit that was conferred by him pursuant to a transaction that is unenforceable (e.g. incapacity, misrepresentation, duress, undue influence, illegality, ultra vires demands).
5. Claims for recovery of money (or recovery of a non-money benefit) where the claimant has discharged the defendant’s debt.
6. Restitution for "wrongs".

UNJUST ENRICHMENT

A party who has wholly or in part performed his side of the contract and has not received the agreed counter-performance in full may sometimes be entitled to restitution in respect of his own
performance. Where this consists of a payment of money, the payor will simply seek to get it back; where it consists of some other benefit he will claim recompense in respect of it (still often referred to as quantum meruit where the benefit is in the form of services and quantum valebat if in the form of goods supplied).

At the outset, it is important to stress that this chapter is not concerned with any aspect of the law of contract as such; it is concerned with a cause of action which may arise when a contract has failed (the type of claim considered in this chapter must also be distinguished from what is sometimes referred to as “restitutionary damages” which may be available for breach of a valid and enforceable obligation: see above, para 20-009 et seq). Before any claim for restitution may be allowed on this basis (claims in restitution may be made on other bases where there is a subsisting contract between the parties, e.g. a claim based on a mistaken payment made pursuant to a contract), it must first be established that the payments made, or work done, never were, or are no longer, regulated by a contractual obligation (Goodman v Pocock (18500 15 Q.B. 576; Thomas v Brown (1876) 1 Q.B.D. 714; Kwei Tek Choo v British Trafers & Shippers Ltd [1954] 2 Q.B. 459: Re Richmond Gate Property Co Ltd [1965] 1 W.I.R. 335; The Trident Beauty [1994] 1 WLR 161 and 166: “it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract”; Costello v MacDonal [2011] EWCA Civ 930; [2012] QB 244. For apparent exceptions to this requirement, see Miles v Wakefield DC [1987] A.C. 539; Tang Hang Wu 23 J.C.L. 201; Barnes v Eastenders Group [2014] UKSC 26; [2015] A.C. 1; cf. Roxborough v Rothmans of Pall Mall Australia Ltd [2001] H.C.A. 68.) i.e. the contract is void, or incomplete, or unenforceable, or it has been discharged for frustration or terminated for breach.

Recovery of Money Paid

An action lies to recover back money paid under a contract or purported contract.

“Total failure of consideration”. A contracting party can recover back money paid under a contract if there is a “total failure of consideration”, i.e. if no part of the performance for which he bargained has been rendered (Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 W.L.R. 574 at 587, 600; above, para 20-154 (the test is whether the performance has been rendered, not whether it has been received)).

Money paid under a void contract
In general. The law starts with the assumption that money paid under a void contract can be recovered back (e.g. Re London County Commercial Reinsurance Office [1922] 2 Ch. 67; cf. Colesworthy v Collmain Services [1993] C.C.L.R. 4; aliter if the contract or relevant term is only unenforceable: Boddington v Lawton [1994] I.C.R. 478). Thus in Bell v Lever Bros Ltd ([1932] A.C. 161; Landon 51 L.Q.R. 650; Taylor 52 L.Q.R. 27; Landon 52 L.Q.R. 478; Hamson 53 L.Q.R. 118) it is was clearly assumed that the money paid by the claimants under the compensation agreements could have been recovered back, had those agreements been void for mistake. Where a contract was void because one of the parties was a company not yet in existence when the contract was made, it was similarly held that instalments paid under it could be recovered back by the payor (Rover International Ltd v Cannon Films Ltd (No.3) [1989] 1 W.L.R. 912; Birks 2 J.C.L. 227). The same rule has been applied where money was paid under an ultra vires contract (Westdeutsche Landesbank Girozentrale v Islington LBC [1994] 1 W.L.R. 938) and where money was paid under a contract which was void by statute (see the discussion in Westdeutsche Landesbank Girozentrale v Islington LBC at the first instance and in the Court of Appeal [1994] 4 All E.R. 890 at 921-924; [1994] 1 W.L.R. 938 at 946, 952 of the cases on contracts made void by Grants of Life Annuities Act 1777 (17 Geo. 3 c.26) s 1. This is presumably the “annuity bill” to which Sir Peter Teazle refers in Sheridan’s The School for Scandal, III.1 (first produced in 1777)).

Mistake. Where money is paid under a void contract, the payment will often be made in the mistaken belief that the contract was valid. Such a mistake was not formerly a ground on which the payor was entitled to the return of this money since the mistake was one of law and it had been held that there was no right to recover back money paid under a mistake of law (as opposed to one of fact). The authorities which had supported this view (Bilbie v Lumley (1802) 2 East 469; Brisbane v Dacres (1813) 5 Taunt. 143; Kelly v Solari (1841) 9 M. & W. 54.) were, however, overruled by the House of Lords in Kleinwort Benson Ltd v Lincoln CC ([1999] 2 A.C. 349; Nurdin & Peacock Plc v D B Ramsden & Co Ltd [1999] 1 All E.R. 941), where moneys had been paid by a bank to local authorities under interest rate swap contracts which were believed to be valid but which were actually void. It was held that the bank was entitled to recover the moneys on the ground that they had been paid under a mistake of law (The claimant may choose to recover either on the basis that the contract is void, or for mistake of law: Deutsche Morgan Grenfell Group Plc v IRC [2006] UKHL 49; [2007] 1 A.C. 558. The potential benefit of the latter is the more extensive limitation period applied under the Limitation Act 1980, s.32(1); cf. Test Claimants in the Franked Investment Income (FII) Group Litigation v Her Majesty’s Commissioners for Customs & Excise [2012] UKSC 19; [2012 2 A.C. 337]. It was further held that this
right was not barred by the fact that the contract had been fully performed by both parties. The cases which supported the latter proposition where the claim was based, not on mistake, but simply on the fact that the contract was void (e.g. Westdeutsche Landesbank Girozentrale v Islington LBC [1994] 4 All E.R. 890; [1994] 1 W.L.R. 938; [1996] A.C. 669; Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC [1999] Q.B. 215) were referred to with approval, thus further supporting the view that money paid under a void contract is recoverable by the payor even though the circumstances are not such as would have given rise, if the contract had been valid, to a total failure of consideration. The reason for this conclusion was that the policy of the rule making the contract void might be defeated if full or partial performance of the contract were a bar to recovery e.g. if a local authority were precluded by such a bar from recovering ultra vires payments made in the mistaken belief that they were intra vires and hence legally due (Kleinwort Benson Ltd v Glasgow CC [1999] 2 A.C. 349 at 3897, 415-416).

Recovery of non-money benefits

Here we are concerned with cases which a party claims a reasonable recompense for some benefit (since the basis of liability is the unjust enrichment of the other party, work done which does not benefit that party will not suffice, as in, e.g. Regalian Properties Plc v London Dockland Development Corp [1995] 1 W.L.R. 212; below, para 22-023) (other than a payment of money) conferred by him under contract or a purported contract: quantum meruit where the benefit is in the form of services and quantum valebat if in the form of goods supplied. In those cases where there is a contract between the parties, there may be an express provision for remuneration on specified events (e.g. payment only upon competed performance of an entire obligation: see below, para 22-023) and, where that is the case, the general rule is that the court cannot award any other remuneration on those events, nor can it award any remuneration if they do not occur (Wiluszynski v Tower Hamlets LPC [1989] L.C.R 493). To allow quantum meruit claims in such cases would contradict the agreement reached by the parties, and the courts will do this only if there are special circumstances justifying such interference.

Contracts not providing for remuneration. A party can claim a sum for work done or a price for goods delivered under a contract which does not expressly provide how much he is to be paid, or which makes some, but not a full, provision for payment (Sir Lindsay Parkinson & Co Ltd v Commissioners of Works [1949] 2 K.B. 632; cf. Steven v Bromley & Son [1919] 2 K.B. 722; The Gregos [1985] 2 Lloyd’s Rep. 347; The Saronoikos [1986] 2 Lloyd’s Rep. 277; Cooke v Hopper [2012] EWCA Civ 175). This will be the case where the whole agreement is implied from conduct (Paynter v Williams [1833] 1 C. & M. 810;
No concluded contract (Barker 29 J.C.L. 105; Edelman in Burrows & Peel (eds), Contract Formation and Parties (2010)). Work may be done and a quantum meruit awarded to the party who has done the work where the parties believe that there is a contract but this is not the case because there was never a clear acceptance of an offer (Peter Lind & Co Ltd v Mersey Docks & Harbour Board [1972] 2 Lloyd’s Rep. 234; above, para 2-020). Such an award may also be made where work is done, under an agreement which lacks contractual force for want of contractual intention (Galliard Homes Ltd v Jarvis Interiors Ltd [2000] C.L.C. 411) in anticipation of a formal contract which fails to materialise for want of execution of the requisite formal document (Galliard Homes Ltd v Jarvis Interiors Ltd [2000] C.L.C. 411). This was accepted by both parties (though doubted by Evans LJ)); and where one party does work at the request of the other during negotiations which are expected to lead to a contract between them but are broken off before its conclusion (William Lacey (Hounslow) Ltd v Davis [1957] 1 W.L.R. 932; BSC v Cleveland Bridge & Engineering Co Ltd [1984] 1 All E.R. 504; Ball 99 L.Q.R. 572; Marston Construction Co v Kigass (1990) 15 Con L.R. 116; Key 111 L.Q.R. 576; Countrywide Communications Ltd v ICL Pathway Ltd [2000] C.L.C. 324; Cobbe v Yeoman’s Row Management Ltd [2008 UKHL 55; [2008] 1 W.L.R. 1752; Whittle Movers Ltd v Hollywood Express Ltd [2009] EWCA Civ 1189; [2009] 2 C.L.C. 771;
Davies 126 L.Q.R. 175; Benourad v Compass Group Plc [2010] EWHC 1882 (QB) at [106]; Killen v Horseworld Ltd [2011] EWHC 1600 (QB)). But no such award will be made where the party doing the work takes the risk that the negotiations may fail. This was held to be the position where one party to an agreement “subject to contract” (see above, para 2-094) incurred expenses without any request form, and without benefitting, the other but solely for the purpose of securing (and then of performing) the contract (Regulation Properties Plc v London Dockland Development Corp [1995] 1 W.L.R. 212, where Marston Construction Co v Kigass (990) 15 Con. L.R. 116 was at 229 described as a “surprising decision”; cf. Blue Haven Enterprises Ltd v Tully [2006] UKPC 17, MSM Consulting Ltd v Tanzania [2009] EWHC 121 (QB); 123 Con L.R. 154 at [171](d).

**Contract void:** In Craven-Ellis v Canons Ltd ([1936] 2 K.B. 403; Denning 55 L.Q.R. 54) the claimant worked for the defendant company as managing director. His service agreement with the company was void as neither he nor those who appointed him held the necessary qualification shares (See now Companies Act 2006 ss.40, 41; above, para 12-069). Thus he could not recover his agreed pay (cf. Re Bodega Co [1904] 1 Ch. 2676; if he is paid his contractual remuneration he must pay it back.) But the Court of Appeal held that he was entitled to a quantum meruit. The position is the same where a contract with a company is void because the company was not yet in existence or had been dissolved (See above, para. 16-073) when the contract was made (Rover International Ltd v Cannon Films Ltd (no.3) [1989] 1 W.L.R. 912; Cotonic (UK) Ltd v Dezonie [1991] B.C.I.C. 721; above, para 16-073. For pre-incorporation contracts with limited liability partnerships, see Limited Liability Partnerships Act 2000 s.5(2); above, para.16-066). A similar principle may apply where goods have been supplied under a contract of sale which is void for a mistake as to the identity of the buyer (e.g. on the facts of Boulton v Jones (1857) 27 L.J. Ex. 117; for the exact nature of the appropriate remedy in such a situation, see above para. 8-045).

**Contract unenforceable.** Work done under a contract which is unenforceable, e.g. for want of formality (Scarisbrick v Pattison (1869) 20 L.T. 175; cf. Pulbrook v Lawes (1876) 1 Q.B.D. 284; Deglman v Guaranty Trust Co of Canada and Constantineau [1954] 3 D.L.R. 785; Pavey & Matthews Ltd v Paul (1987) 69 A.J.R. 577), or because it is in restraint of trade (Proactive Sports Management Ltd v Rooney [2011] EWCA Civ 1444; [2012] 1 A.C. 384 at 398; Landsam v Beachcroft LLP [2011] EWHC 1451 (Ch); [2011] 3 Costs L.O. 380 at [253]).
In the second edition of his book *Unjust Enrichment*, (See Birks, *Unjust Enrichment*, 2nd edn (2005), Chs 5-6) the late Professor Birks suggested that the list of categories of “unjust” enrichment represented a wrong turn, and that the true basis for a restitutionary remedy lay (as is civilian jurisdictions) in the fact that an enrichment had been conferred for no legally recognisable reason or “without basis” (Birks, *Unjust Enrichment*, 2nd edn (2005), pp. 102-103):

“They [i.e. civilian jurisdictions] begin from the proposition that every enrichment at another’s expense has an explanation known to law or has not. Enrichments are received with the purpose of discharging an obligation or, if without obligation, to achieve some other objective as for instance the making of a gift, the satisfaction of a condition, or the coming into being of a new contract. These outcomes succeeding, the enrichment is sufficiently explained. An enrichment which turns out to have no such explanation is inexplicable and cannot be retained. The recipient is not entitled to it. The shorthand for this, in Latin, is ‘sine causa’. The inexplicable enrichment lacks a causa. In English that reduces to ‘no basis’. Enrichment *sine causa* is enrichment with no explanatory basis.”

This approach is obviously controversial, and cannot be said to represent English law as it stands at the moment. It was considered by Lord Hoffmann in Deutsche Morgan Grenfell Group Plc v IRC, [2007] 1 A.C. 558) who felt it unnecessary to reach a concluded view, although his speech has subsequently been held to have confirmed the traditional approach. (Albeit with a more flexible application; see Marine Trade SA v Pioneer Freight Futures Co Ltd BVI [2009] EWHC 2656; [2009] 2 C.L.C. 657 at [62]-[65]). Nonetheless, given the extent to which restitution in English law has been developed through academic work – particularly the work of Professor Birks – it cannot be overlooked. (A pleading basis on this ground would simply involve an averment that there was “no basis” for the payment or other enrichment conferred.

**Mistake**

Originally, (see, generally, Goff & Jones, *The Law of Unjust Enrichment*, 8th edn (2011), para. 9-01) restitution for a mistakenly conferred benefit was restricted in two ways. First, it was necessary for the claimant to satisfy a “supposed liability” test, (See Aiken v Short (1856) 1 H. & N. 210 at 215: “In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; where, if true, it would merely make it desirable that he should pay the money.”) that recovery would only be sanctioned
where the claimant’s mistake was such that (if true) he would have been liable to make the payment. Secondly, a claimant could only recover for a mistake of fact, rather than a mistake of law. (The rule in *Bilbie v. Lumley* (1802) 2 East. 469).

Neither of these restrictions exists any longer. The distinction between mistakes of law and mistakes of fact was abrogated by the decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* ([1999] 2 A.C. 349). The “supposed liability” test has (probably been replaced by a “causation” test: the claimant must establish that the benefit conferred by him was conferred as a result of his mistake, irrespective of whether the claimant believed himself to be liable to confer the benefit (This was the approach taken by Robert Goff J in *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] Q.B. 677; see also *Nurdin & Peacock Plc v DB Ramsden & Co. Ltd* [1999]) (and whether or not the benefit was conferred as a result of a mistake of law).

However, there are two other requirements that restrict the type of mistake that will give rise to a remedy in restitution. First, mere doubt as to the legal or factual position will not in general amount to mistake; if the payer is uncertain as to his liability, he will be taken to have assumed the risk that a payment was wrongly made. (*Brazzill v Willoughby* [2010] EWCA Civ 561; [2010] B.C.L.C. 259 at [90]-[91]; although it has been suggested that in some cases a payer’s belief that payment was probably due would be sufficient: *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656; [2009] 2 C.L.C. 657 at [76]). Second, if the restitutionary claim is brought in equity, the mistake must be of sufficient gravity as to make it unjust for the payee to retain the benefit. (See *Pitt v Halt* [2011] EWCA Civ 197; [2011] 2 All E.R. 450 at [210]; note that if the claim is brought at common law then this requirement is fulfilled simply by showing that there was a mistake and that it caused the payment: *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656; [2009] 2 C.L.C. 657 at [65]).

Moreover, in *Barclays Bank v Simms*, ([1980] Q.B. 677.) Robert Goff J. made it clear that recovery in mistake cases would be precluded where:

1. the claimant intended that the payee should have the benefit at all events (whether the premises for the payment was correct or incorrect);

2. the payment was made for good consideration (particularly if the money discharged a debt owed by the defendant);
(3) the defendant had changed his position. (A defence considered further below).

It is clear law, however, that negligence in the conferring of the benefit does not prevent recovery. (See *Kelly v Solari* (1984) 90 M. & W. 54.)

It is unclear whether a right of restitution exists where a benefit has been conferred by ignorance rather than mistake. (See Goff & Jones, *The Law of Unjust Enrichment*, 8th ed. (2011), paras. 9-32 et seq.) In terms of pleading such a case, however, precedents 108-Z1 and 108-Z2 would be appropriate.

**Contracts discharged by breach**

In order for such a claim to succeed, (Goff & Jones, *The Law of Unjust Enrichment*, 8th ed. (2011), paras. 12-16 et seq.) it is necessary for the claimant to demonstrate:

1. That the contract has been brought to an end. Where breach of contract is alleged, it is necessary to show that there has been a breach of condition, or a breach of an innominate term going to the root of the contract.

2. That there has been a total failure of consideration. At its most stringent, this requires that the claimant has received no part of the benefits which the claimant bargained for under the contract, a rule that can operate harshly. It is now clear, however, that the English courts will not apply this rule stringently, and will allow a restitutionary claim at least in those cases where apportionment can be carried out without difficulty. (See Goss v Chilcott [1996] A.C. 788; Golf & Jones, *The Law of Unjust Enrichment*, 8th edn (2011), paras 12-26 et seq. Nonetheless, an illustration of the difficulties still created by this doctrine is found in *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB). In that case, Stadlen J. made every effort to apportion consideration so as to facilitate the restitutionary claim: see [304]. He also held that, when assessing local failure of consideration, benefits provided under a contract can be disregarded if they do not go to the essential bargain (following *Rover International Ltd v Cannon Film Sales Ltd* [1989]1 W.L.R. 912). However, the restitutionary claim still failed, leading Stadlen J. to express his dissatisfaction with the present state of the law in this area: [267]).
The claimant may be either the "innocent" or the "guilty" party to the contract. (See for instance, *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724). The claim may be for recovery of a money or a non-money benefit. (See precedents 108-Z4 and 108-ZS.)

**Contracts discharged by frustration**

The Law Reform (Frustrated Contracts) Act 1943 (See Goff & Jones, *The Law of Unjust Enrichment*, 8th edn (2011), Ch.15.) governs restitutionary claims arising where a contract is discharged by frustration. The operation of this statute was extensively considered by Goff J. in *BP Exploration (Libya) Ltd v Hunt (No. 2)*. ([1979] 1 W.L.R. 783. Note that a frustrated contract may still be used as the basis for valuing a consequent quantum meruit claim: *Benedetti v Sawiris* (2010) EWCA Civ 1427 at [63].)

Essentially, the act provides for the recovery of money paid and valuable non-money benefits conferred pursuant to a contract that has been frustrated. (See, in particular, s.1(2) dealing with recovery of payments, and s.1(3) dealing with non-money benefits.) (See precedent 108-Z6).

**Benefits conferred pursuant to unenforceable transactions**

The reasons (See Goff & Jones, *The Law of Unjust Enrichment*, 8th edn (2011), Chs 12 and 13) why a transaction may be unenforceable are varied. They include: lack of capacity, (See for example *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2010] 1 C.L.C. 770) “vitiating factors”, such as misrepresentations, distress and undue influence; (See *Smith v Cooper* [2010] EWCA Civ 722; [2011] 1 P. & C.R. DG1 at [110] for a recent case of undue influence which underscores the need for restitution to do practical justice between the parties); fraud; (See *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347 [2011] Bus. L.R. 1126.) and illegality. (See *Gratton Plc v HMRC* [2011] UKFTT 31 (TC) at [46], where such a claim was pleaded in parallel to a mistake-based restitutionary claim.)

Often, the unenforceable, void or ineffective transaction in question is a contract. However that need not necessarily be the case: a benefit can equally well be conferred under duress or undue influence where there is no contract. (See precedent 108-Z7).

**Recoupment and contribution**
A restitutionary (See Goff & Jones, *The Law of Unjust Enrichment*, 8th edn (2011), Chs 19-21) remedy lies against a debtor (or joint debtor) whose debt has been discharged by the claimant. To succeed in such a claim (known as a claim for recoupment or contribution), the claimant must show:

(1) that he was compelled, or was compellable, to make the payment;

(2) that he did not "officiously" expose himself to the liability to make the payment; and

(3) that his payment discharged a liability of the defendant. It should be noted that payment to a creditor by a third party does not necessarily discharge a debtor's obligations. As a general rule, under English law, a person who makes a voluntary payment intending to discharge another's debt will not do so. (Goff & Jones, *The Law of Unjust Enrichment*, 8th edn (2011), para. 5-57 et seq., and the authorities there cited; see also *Fortis Bank SA/NV v Overseas Indian Bank* [2011] EWHC 538; [2011] 2 Lloyd's Rep. 190 at [55]).

So far as common liabilities are concerned, sureties, joint-contractors, trustees, directors, partners, insurers, mortgagors and co-owners can generally claim contribution from their co-obligors if they satisfy more than their proper share of the common debt.

Recoupment arises where (in the words of Cockburn C.J. in *Moule v Garrett* ((1872) L.R. 7 Ex. 101 at 104.)

"the plaintiff has been compelled by law to pay, or being compellable to by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

**Restitution for wrongs**

At common law, (See Burrows, *The Law of Restitution*, 3rd edn (2010), Chs 23-25) a person upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is sometimes said to “waive the tort”. The decision to bring a restitutionary claim does not in any sense affirm the tort as rightful, but merely represents one of two alternative remedies available to the
claimant, the other being a right to compensation in tort. (See *United Australia Bank Ltd v Barclays Bank Ltd* [1941] A.C. 1).

Clearly, a tort can only be “waived” where the tortfeasor has received some identifiable benefit. Thus, a restitutionary claim will lie where a defendant has converted the claimant’s property, (e.g. *United Australia Bank Ltd v Barclays Bank Ltd* [1941] A.C. 1) or trespassed on his land (e.g. *Powell v Rees* (1837) 7 Ad.& E.426). There is some doubt as to whether a restitutionary remedy would be available in cases of nuisance (See *Forsyth-Grant v Allen* [2008] EWCA Civ 505; [2008] Env. L.R 41, where the Court of Appeal noted that there was no decided case where an account of profits had been awarded in lieu of damages for nuisance and held that the trial judge had been entitled to reject such a claim on the basis that it was not an available remedy for nuisance) or deceit, however.

Even at common law, restitution for wrongs extends beyond torts. In *Att. Gen. v Blake* ([1998] Ch. 439 at 457) the Court of Appeal stated (obiter) that:

“[i]f the court is unable to award restitutionary damages for breach of contract, then the law of contract is seriously defective. It means that in many situations the plaintiff is deprived of any effective remedy for breach of contract because of a failure to attach a value to the plaintiff’s legitimate interest in having the contract duly performed ... [T]he law is now sufficiently mature to recognise a restitutionary claim for profits made from a breach of contract in appropriate circumstances. The difficult question is not whether restitutionary damages should ever be available for breach of contract, but in what circumstances they should be made available.”

The House of Lords in *Att. Gen. v Blake*, ([2001] I A.C. 268) Lord Hobhouse of Woodborough dissenting, stated that such a remedy would only arise in exceptional circumstances.

The House of Lords described ([2001] 1 A.C. 268 at 284H) as unhappy the expression “restitutionary damages” used by the Court of Appeal, ([1998] Ch. 439 at 456-459) and said that it preferred to avoid it, but held that in exceptional circumstances where the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, would not provide an adequate response, an account of profits is a possible remedy for a breach of contract. It said that a useful general guide to whether this would be appropriate is whether the claimant had
a legitimate interest in preventing the defendant’s profit-making activity and hence in depriving him of his profit. (But this factor alone will not be decisive. See *Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC Ch 458; [2001] All E.R. (D) 324, where Morriss v. C. ordered an account of profits in a commercial context. That was considered in *Experience Hendrix LLC v PPX Enterprise Inc* [2003] EWCA Civ 323; [2003] 1 All E.R.(Comm) 830, in which the Court of Appeal did not consider the circumstances were exceptional to the point where the court should order a full account of all profits, although: (1) the breach was deliberate; (2) the claimant would have difficulty in establishing financial loss; and (3) the claimant had a legitimate interest in preventing the defendant’s profit-making activity carried out in breach of its contractual obligations (para. 58). The Court of Appeal emphasised (at para. 38) that unlike in *Esso v Niad* it was not shown that PPX’s breaches went to the root of Experience Hendrix’s programme or gave the lie to its integrity. See Burrows, *Remedies for Torts and Breach of Contract* 3rd edn (2004), pp.405-407).

In Devenish Nutrition Ltd v Sanofi-Aventis SA (France) Ltd [2008] EWCA Civ 1086; [2009] 3 W.L.R. 198, the Court of Appeal followed *Att. Gen. v Blake* in holding that a “restitutionary damages” did not require the infringement of a property right, (Note that a distinction was made in this respect between breaches of contract and torts. While it is established that a breach of contact not involving a proprietary right can give rise to “restitutionary damages”, this is not presently true for non-proprietary torts: at [76] and [80]-[82]) nor need the award of such damages be purely compensatory. Nevertheless, it was reiterated that an award of such damages should only exceptionally be made. (See also *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch); [2010] Bus. L.R D141 at [341]-[343]; *Jones v Ricoh UK Ltd* [2010] EWHC 1743 (Ch) at [88]-[89]; and *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch) at [55]. The emphasis in these cases is that there must be a special need for protection of the Claimant’s interests.)

Inequity, the rules are more wide-ranging. Thus, a trustee who purchases trust property or a beneficial interest for his own gain, exploits trust property or diverts an opportunity which would otherwise have accrued to his beneficiaries will be held to account. (See precedents 108-Z10 and 108-Z11.)

**Defences**

Essentially, the following are defences to a restitutionary claim:

(1) *estoppel* (see precedent 108-Z12);
There is a close relationship between estoppel and change of position. For the defence of estoppel to succeed, a defendant must show that a representation of fact was made by the claimant to the defendant, in reliance upon which the defendant has so changed his position that it is inequitable for the claimant to go back on his representation. Provided the defendant could demonstrate the existence of the representation and his reliance thereon, he had a defence to the entirety of the claimant’s claim, although the absoluteness of this defence is not as secure as it once seemed. In both Scottish Equitable Plc v Derby [2001] EWCA Civ 369; [2001] 3 All E.R. 818 and National Westminster Bank Plc v Somer International (UK) Ltd [2001] EWCA Civ 970; [2002] Q.B. 1286, the trial judges and the Court of Appeal all held that the facts fell within “the exception recognised by all three members of [the Court of Appeal] in the Avon CC v Howlett case [1983] 1 W.L.R. 605” so that the establishment of a defence of estoppel did not on the facts enable the defendant “to rely upon an estoppel ... to achieve a result which can fairly be regarded as unconscionable”.

Even before the defence of change of position was recognised by the English courts, estoppel was only rarely successful as a defence to restitutionary claims. The defence of change of position is likely to make a successful estoppel defence still rarer. It was accepted by the House of Lords in Lipkin Gorman (a firm) v Karpnale Ltd ([1991] 2 A.C. 548) that change of position was a general defence to restitutionary claims. In order to establish a change of position defence there is no need to establish any representation on the part of the claimant. It is sufficient to show that the defendant has bona fide (The submission that in cases in which the defendant invokes the defence of change of position it is necessary to balance the respective faults of the two parties was rejected in Dextra Bank & Trust Co Ltd v Bank of Jamaica [2002] I All E.R. (Comm) 193, PC at paras. 40-46, the Privy Council regarding good faith on the part of the recipient as a sufficient requirement in this context. In Niru Battery Manufacturing Co v Milestone Trading Ltd [2002] EWHC 1425; [2002] 2 All E.R. (Comm) 705, Moore-Bick J. said that bad faith extended beyond subjective dishonesty and “is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself.” This statement was endorsed on appeal: [2003] EWCA Civ 1446 at [164]; [2004] Q.B. 985 at 1004E; and the principle was approved in Haugesund Kommune v
Depfa ACS Bank [2010] EWCA Civ 579; [2010] 1 CLC 770 at [122]. In Barros Mattos Junior v MacDaniel Ltd [2004] EWHC 1188; [2005] 1 W.L.R. 247, Ch, Laddie J. held on a summary judgment application that defendants who were assumed for the purposes of the application to have been “wholly innocent of the illicit source of the funds supplied to them” but whose change of position consisted in paying those funds away in transactions which were illegal in Nigeria under Nigerian foreign exchange regulations were deprived in English law of the defence of change of position (by reason of the public policy of international comity): “If the recipient’s actions of changing position are treated here as illegal, the court cannot take them into account. The recipient cannot put up a tainted claim to retention against the victim’s untainted claim for restitution. It may be ... that in some cases the illegality will be so minor as to be ignored on the de minimis principle. This is not such a case.” The judgment has been questioned in academic commentaries (Goff & Jones, The Law of Unjust Enrichment, 8th edn (2011), para. 27-42 and Tettenborn (2005) L.M.C.L.Q. 6) and appears doubtful. In terms of pleading a claim against such a defendant, it would be preferable to plead the defendant’s illegality in the particulars of claim (thereby forcing him to plead to it) rather than in the reply) changed his position as a result of the enrichment he has received from the claimant. (The change of position can be anticipatory: Dextra Bank & Trust Co Ltd v Bank of Jamaica [2002] I All E.R. (Comm) 193 PC at paras 35-39). To the extent that the defendant would be prejudiced by having to restore the enrichment, the defendant will have a defence to the claim.

The scope of the defence of change of position was considered in Abou-Rahmah v Abacha (2006) EWCA Civ 1492 (2007) 1 Lloyd’s Rep. 115. More recently, in The Test Claimants in the FII Group Litigation v Commissioners for Her Majesty’s Revenue and Customs [2008] EWHC 2893 (Ch) [2009] S.T.C. 254, it was held that the defence was available to public authorities in a mistake claim, but not in a Woolwich-type claim (i.e. where money is paid to, and sought to be recovered from, the revenue or a public authority pursuant to an ultra vires demand) (Although note that the Court of Appeal refused to comment on the accuracy of this position on appeal: [2010] EWCA Civ 103; [2010] STC 1251 at [189]-[193].) By contrast, the change of position defence will not be available where a defendant has taken the risk of not being able to repay the sums that are the subject of the claim. (See Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579; [2010] 1 C.L.C. 770 at [124]-[125]; where sums advanced under ultra vires loans had been invested and lost by the Kommunes, and it was held that the Kommunes had borne the risk of being unable to repay the loans.)

The defence of “ministerial receipt” may be seen as an early example of the change of position defence. It arises where an agent (the defendant) has received an enrichment from the claimant, but
has passed that enrichment on to his principal. In such cases, the defendant has a defence to the claimant’s claim. (See Jones v Churcher [2009] EWHC 722 [2009] 2 Lloyd’s Rep. 94 at [67]-[69]; note that the defence is only available once the sums have been irreversibly paid over from the agent to the principal, not simply where the agent has made the funds available.)

Lastly a new defence of public policy was recognised in *Haugesund Kommune v Depfa ACS Bank* (2010) EWCA Civ 579. This defence operates to defeat a claim for restitution where that claim is contrary to public policy, such as where it runs counter to the objective of a statute which had rendered a contract void. ([2010] EWCA Civ 579; [2010] 1 C.L.C. 770 al [92]-[96] and [150]-[151]). This principle will even extend to foreign statutes. ([2010] EWCA Civ 579; [2010] 1 C.L.C. 770 at [97]-[102]; although the statute will be judged in light of English public policy).

**Tracing and proprietary restitution**

Tracing is a process whereby assets are identified. (Lord Browne-Wilkinson, *Foskett v McKeown* [2001] 1 A.C. 102 at 109D) The House of Lords has recently reviewed the processes of tracing and following, and their relationship to the law of unjust enrichment, in *Foskett v McKeown* [2001] 1 A.C. 102.

Lord Millett, speaking for the majority, stated (Lord Millett (with whom Lords Browne-Wilkinson and Hoffmann agreed) in *Foskett v McKeown* [2001] 1 A.C. 102 at 127B) that:

“tracing and following ... are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old”.

On that authority, tracing is the process by which a claimant identifies proceeds which represent his property, and which he can substitute for the original asset as the subject matter of his claim. Traditionally, it has been thought that there are different legal and equitable rules in relation to tracing, and in particular that while in equity money can still be traced once it has been mixed with other money, in common law it cannot. That understanding has been criticised academically (e.g. by Professor Birks in “The Necessity of a Unitary Law of Tracing” in Making Commercial Law, Essays in Honour of Roy Goode (1997).) In *Foskett v McKeown* their Lordships (obiter) commented (Lord Millett
at 128G, Lord Steyn at 113D-E, Lord Browne-Wilkinson in *Foskett v McKeown* [2001] 1 A.C. 102 at 109D) forcefully that there is nothing inherently legal or equitable about the tracing exercise and no sense in maintaining different rules: “One set of tracing rules is enough”. (Lord Millett at 128G).

Specialist works (e.g. Dr Lionel Smith, *The Law of Tracing* (1997) should be consulted in relation to the detailed rules as to the extent to which a claimant can trace into an attachment, mixture or newly created product.

Academics have suggested that if the claimant can identify particular chattels which he owned before and after they were received by the defendant his claim is probably not best considered as being part of the law of restitution. By contrast, it has been argued that a claim can be viewed as a restitutionary one where the claimant asserts a proprietary right over property which did not originally belong to him but which (by using the tracing rules) he can show is a substitute for an asset which he did previously own in equity.

*Foskett v McKeown* represents a set-back for that expansionary view of the role of restitution. The majority of their Lordships considered that:

“The transmission of a claimant’s property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. ... the plaintiffs seek to vindicate their property rights, not to reverse unjust enrichment. ... The two causes of action have different requirements and may attract different defences. A plaintiff who brings an action in unjust enrichment must show that the defendant has been enriched at the plaintiff’s expense, for he cannot have been unjustly enriched if he has not been enriched at all. But the plaintiff is not concerned to show that the defendant is in receipt of property belonging beneficially to the plaintiff or its traceable proceeds. The fact that the beneficial ownership of the property has passed to the defendant provides no defence; indeed it is usually the very fact which founds the claim. Conversely, a plaintiff who brings an action like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. He may for example, have paid full value for the property, but he is still required to disgorge it if he received it with notice of the plaintiff’s interest. Furthermore, a claim in unjust enrichment is subject to a change of position defence, which usually operates by reducing or extinguishing the element of enrichment. An action like the
present is subject to the bona fide purchaser for value defence, which operates to clear the defendant’s title.” (Lord Millett at 127E, 129D-G.)

Irrespective of whether restitutionary proprietary claims are best classified as part of the law of property or as part of the law of unjust enrichment, it should be noted that the creation of such proprietary interests, whether in the form of constructive trusts or equitable liens/charges, is contentious primarily because the creation of proprietary rights of this sort over the assets of an insolvent defendant removes those assets from the general pool available for distribution to creditors.

For a tracing precedent, the reader should see precedent 42-K5 in Section 42. A defence of bona fide purchase is set out below at 108-Z16.

Interest. In Sempra Metals Ltd v IRC [2007] UKHL 34; [2008] I A.C. 561 a majority of the House of Lords held that where a payment of money was recoverable, the benefit conferred on the defendant was the opportunity to use the money paid by the claimant. Accordingly, the claimant was entitled to recover for the value of the money paid and for the use of that money, compound interest being the normal measure for the value of that use. See, further, C. Mitchell, “Recovery of Compound Interest as Restitution or Damages” (2008) 71 M.L.R. 290.