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## B. Outline of the Law of Restitution

[5] "[A]ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment," Lord Wright correctly observed in the *Fibrosa* case, decided in 1943 by the House of Lords.<sup>7</sup> The task of this preliminary chapter is to provide a short comparison of this essential branch of the law in England and Germany in order to illustrate how both legal systems approach the law of unjust enrichment.

### I. England

[6] In England questions of unjust enrichment form part of the law of restitution, which encompasses all remedies depriving the defendant of a gain, instead of awarding compensation for the claimant's loss.<sup>8</sup> For centuries the English courts granted relief in cases concerned with the skimming off of the defendant's gains on the basis of quasi-contractual remedies and implied contractual obligations (*money had and received*, *money paid*, *quantum valebat*<sup>9</sup>, *quantum meruit*<sup>10</sup>).<sup>11</sup> Although this view was doubted in the 1940s<sup>12</sup>, questions of unjust enrichment remained "a peripheral matter in contract or tort;"<sup>13</sup> the latter, restitution in the context of a tort, became acknowledged with the doctrine of "waiving the tort."<sup>14</sup> Gradually, however, the law of restitution emancipated itself. This process culminated in its recognition as a discrete body apart from contract and tort at the beginning of the 1990s with the groundbreaking judgements of the House of Lords in *Lipkin Gorman v. Karpnale Ltd.*<sup>15</sup> and *Woolwich Equitable Building Society v. IRC.*<sup>16</sup>

[7] In order to succeed with a claim in unjust enrichment one must prove that the defendant obtained a benefit at the plaintiff's expense, a benefit that is unjust for him to retain because of special circumstances<sup>17</sup> commonly referred to as "unjust factors." As with all claims there are also specific defences available for the enriched party, such as change of position. It is a matter of dispute whether the unjust enrichment principle and the law of restitution simply quadrate each other<sup>18</sup> or not.<sup>19</sup> The proponents of the latter theory argue that proprietary claims and restitution for wrongs stand separately beside claims in unjust enrichment. Yet this paper is not the right place to elaborate on this point, since the question is of no particular relevance for the topic.<sup>20</sup> At this instant we can therefore record the following: The English law of restitution as such is a relatively young branch of the law. It is characterized by the notion that every enrichment can be retained, as long as there is no recognised ground which renders it unjust.

### II. Germany

[8] The concept of "restitution" as it is understood in England does not at all exist in Germany.<sup>21</sup> After further scrutiny, however, one will find several provisions dealing with the restoration of an unjust enrichment. The two most striking legal institutions in this context are §§346 et seq. (termination of contract) and §§812 et seq. (unjustified enrichment) in the BGB. No German jurist ever had the idea to combine all these claims into one "law of restitution," because of the fixed structure of German law. That is why restitutionary remedies can be located in a contractual context, in the law of obligations imposed by virtue of the law (*gesetzliche Schuldverhältnisse*), the law of property, family and succession law and even in social security and insurance legislation as well as public law. Thus, the comparative lawyer sees himself confronted with problems in structuring his analysis; indeed, as Professor Birks observes, it "is not a subject in which it is easy to draw comparisons."<sup>22</sup>

[9] Sections 812-822 BGB form the core of the fragmented German "law of restitution." These provisions are part of the law of obligations, but belong neither to the law of contract, since obligations created by them do not arise out of contract but by virtue of law, nor to the law of delict, which deals with questions of compensation for wrongs. Nevertheless, the

systematic position of these norms between the codified law of contract (§§433 et seq.) and the law of delict and property (§§823 et seq.) indicates that there are connections to these branches of the law.<sup>23</sup> The most important basis for a claim in unjustified enrichment is §812 I 1, which mirrors the Roman *condictiones indebiti* and *sine causa*,<sup>24</sup> and it is worth stating it in full: "A person who obtains something by performance by another person or in another way at the expense of this person without legal cause is bound to give it up to him." This seems to mirror the English principle of unjust enrichment outlined above. German scholars, however, have built an intellectual edifice of considerable height around that norm since its enactment in 1900. According to the predominant view restitution rests on two pillars: a *Leistungskondiktion* (performance-based) pillar and a *Nichtleistungskondiktion* (non-performance-based) pillar.<sup>25</sup> This distinction is not completely alien to English law, since restitutionary claims are often divided into claims founded on the act of the plaintiff and those founded on the act of the defendant.<sup>26</sup>

[10] The formulation of § 812 I 1 leads us to the fundamental distinction between English and German law, which is also reflected in the semantic difference between "unjust" and "unjustified" enrichment.<sup>27</sup> In Germany, whenever a shift of wealth occurs without a juristic reason, it can be recovered. That means that every enrichment is *prima facie* unjustified under German law, unless a legal ground existed for it. The position in English law is, at least in theory, diametrically opposed. As described above, as long as there is no "unjust factor" no shift of wealth can be restored, i.e. every enrichment is *prima facie* just. The consequence of this perception is that the English law of restitution has to deal with the reasons why there is no basis for the enrichment, whereas this question is generally irrelevant in Germany.<sup>28</sup>

<sup>7</sup>Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., A.C. 32, 61 (1943).

<sup>8</sup>Virgo, *The Principles of the Law of Restitution* 3 (Clarendon Press 1999). See also, Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 O.J.L.S. 413 (1995).

<sup>9</sup>"As much as it was worth." When there is a sale of goods without a specified price, the law implies a promise from the buyer to the seller that the former will pay the latter as much as the goods were worth.

<sup>10</sup>"As much as he has deserved." When a person renders a service without a specified price, there is an implied promise from the employer to the worker that he will pay him for his services, as much as he may deserve or merit.

<sup>11</sup>Zweigert & Kötz, *An Introduction to Comparative Law* 551 (T. Weir trans., Oxford University Press 3rd ed. 1998); [Gallo, \*Unjust Enrichment: A Comparative Analysis\*, 40 A.J.C.L. 431 \(1992\).](#)

<sup>12</sup>United Australia Ltd. v. Barclays Bank Ltd., A.C. 1, 26 (1941). (Lord Atkin); Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., A.C. 32, 63 (1943). (Lord Wright).

<sup>13</sup>Dickson, *The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law*, 36 I.C.L.Q. 752 (1987).

<sup>14</sup>See, Hambley v. Trott, 98 E.R. 1136 (1776). (Lord Mansfield); Martinek, *Der Weg des Common Law zur allgemeinen Bereicherungsklage. Ein später Sieg des Pomponius?*, 47 RabelsZ 289 (1983).

<sup>15</sup>2 A.C. 548 (1991).

<sup>16</sup>A.C. 70 (1993).

<sup>17</sup>[Goff & Jones, \*The Law of Restitution\* para. 1-016](#) (Sweet & Maxwell 6th ed. 2002); Virgo, *The Principles of the Law of Restitution* 9 (Clarendon Press 1999); Chen-Wishart, *Unjust Factors and the Restitutionary Response* 20 O.J.L.S. 557 (2000); Dickson, *Unjust Enrichment Claims: A Comparative Overview* 54 C.L.J. 105 (1995).

<sup>18</sup>[Lipkin Gorman \(A Firm\) v. Karpnale Ltd., 2 A.C. 548, 578 \(1991\).](#) (Lord Goff); Goff & Jones, *The Law of Restitution* para. 1-001 (Sweet & Maxwell 6th ed. 2002); Birks, *An Introduction to the Law of Restitution* 17 (Clarendon Press 1985) (but see my next fn.); Hedley, *A Critical Introduction to Restitution* 11 (Butterworths 2001).

<sup>19</sup>Virgo, *The Principles of the Law of Restitution* 6-17 (Clarendon Press 1999); Birks, "Misnomer" in Cornish et al. (eds.), *Restitution: Past, Present and Future - Essays in Honour of Gareth Jones* 1 (Hart 1998); The idea of "quadrature" stems from Birks in *An Introduction to the Law of Restitution*. Birks, *An Introduction to the Law of Restitution* 17 (Clarendon Press 1985).

<sup>20</sup>Nevertheless, for the sake of simplicity "restitution" and "unjust enrichment" will be used synonymously in this paper.

<sup>21</sup>Cf., Dickson, *The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law*, 36 I.C.L.Q. 760 (esp. fn. 42) (1987).

<sup>22</sup>Birks, *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, Oxford U. Comparative Law Forum 1 <http://ouclf.iuscomp.org>, after n. 4 (2000).

<sup>23</sup>Markesinis et al., *The German Law of Obligations. Volume 1. The Law of Contracts and Restitution* 711 (Clarendon Press 1997).

<sup>24</sup>Zimmermann and du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, *Restitution Review* 18 (1994).

<sup>25</sup>*Id.* at 24; Larenz and Canaris, *Lehrbuch des Schuldrechts. Zweiter Band. Besonderer Teil. 2. Halbband* 129 (C.H. Beck 13th ed. 1994).

<sup>26</sup>*E.g.*, Goff & Jones, *The Law of Restitution* (Sweet & Maxwell 6th ed. 2002); Virgo, *The Principles of the Law of Restitution* (Clarendon Press 1999); Cf., Zweigert and Kötz, *An Introduction to Comparative Law* 555 (T. Weir trans.,

Oxford University Press 3rd ed. 1998).

<sup>27</sup> Cf., Krebs, *In Defence of Unjust Factors*, Oxford U. Comparative Law Forum 3 <http://ouclf.iuscomp.org> 3, after n. 12 (2000).

<sup>28</sup> Cf., Zweigert and Kötz, *An Introduction to Comparative Law* 557 (T. Weir trans., Oxford University Press 3rd ed. 1998); Riesenhuber, *Englisches Restitutionsrecht "in einer Nussschale"*, Juristische Ausbildung (Jura) 659 (2002). But, see also §§817, 819 II.

## Referring Principles:

IX.1 - Basic rule