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UNJUST ENRICHMENT: IS THERE A GENERAL, UNDERLYING THEORY?

QUEENS' COLLEGE LECTURE

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Introduction

1. In 1939, a twice-weekly series of lectures was given, each two-hours long and unscripted, not far from here in a turret room, no doubt, in King's College, just along the Backs from here. They were given by the Austrian philosopher Ludwig Wittgenstein, on the foundations of mathematics. Amongst many others, they were attended by another of the great minds of the 20th century: Alan Turing.

2. Tonight I want to adopt the approach that Wittgenstein took in those lectures to the question whether there is an underlying general theory of restitution.

3. Specifically, I argue that the law of restitution in English and Welsh law does not have a single underlying essence, but that it does demonstrate what Wittgenstein called family resemblance. That restitution's conceptual coherence stems from that and that it gains its rule-based force from, for instance, the 'four questions' that we ask when a claim for restitution of unjust enrichment is made. Those questions act as rule-governing sign-posts that ground our application of the subject.

4. Linked to this I want to suggest that the task for lawyers and academics where restitution and unjust enrichment are concerned may be that of conceptual clarification rather than unification of the subject. I intend to do this by looking at past attempts to produce a unifying theory and how Wittgenstein might have approached the issue.

5. Before doing so, it is worth reflecting for a moment on what happened in those lectures. Turing got better treatment than Karl Popper, whom Wittgenstein famously threatened with a poker when they were discussing similar issues.[1] No, Wittgenstein was much milder with Turing. The two of them questioned the use of language; one of Wittgenstein's favourite subjects. The specific issue was whether it made sense to treat 'I have found a new analogy

[1] D. Edmonds & J. Eidinow, *Wittgenstein's Poker*, (Faber & Faber, 2005).

between mathematical shapes' in the same way as you would treat 'I have found a white lion'. For Wittgenstein it made sense to say you could find a white lion. It made no sense to say you could *find* a new kind of analogy between mathematical shapes: how exactly would you search for it? What kind of map would you need? For Wittgenstein, pursuing questions was like setting out to find the east pole: the form of the question misfires.[2]

6. Wittgenstein's answer was one that would become the hallmark of his later philosophy. It was a methodological point. Philosophy's task was to show how we were misled into thinking that the verb 'to find' was being used in the same way in both situations. It was to show us how the words were actually used; in that way we would have a clearer view of their meaning. Philosophy was thus '*a battle against the bewitchment of our intelligence by means of language*.'[3] Using words in different contexts as if they were the same was how philosophers were led astray.

7. For Wittgenstein, the consequence of this was stark. If meaning turns on the use of words, then philosophical theories that purport to discover the essence of mind or knowledge, or, we could say restitution, are problematic. They risk sending '*language . . . on holiday*'.[4] What the philosopher should do - instead of taking a break from reality (as desirable as that might sometimes be) - is to apply their rigour to method; to bring to light conceptual clarity about the use of words and the context in which that takes place. Once that clarity was obtained, philosophical problems would dissolve; they would be exposed as nonsensical, quasi-problems: as chimerical east poles.

8. This Wittgensteinian attention to use and context has echoes in jurisprudence. It sounds in Hart's development of open-textured rules in *The Concept of Law*.[5] It sounds in statutory interpretation, as Lord Sales has recently argued.[6] And, it could provide us with a means of thinking about unjust enrichment and restitution, my focus tonight.

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[2] L. Wittgenstein, *Wittgenstein's Lectures on the Foundations of Mathematics – Cambridge 1939*, (ed. C. Diamond) (UCP, 1975) at 63-64. For an outline of his approach see, P.M.S. Hacker, *Insight & Illusion* (Anthem Press reprint, 2021), Chap. 6.
[3] L. Wittgenstein, *Philosophical Investigations*, (Blackwell, 1989) at s.109; L. Wittgenstein, *The Blue and Brown Books*, (Blackwell, 1992) at 27.
[4] L. Wittgenstein (1989) at s.38.
[5] H.L.A. Hart, *The Concept of Law*, (OUP, 2012) at 128.
[6] Lord Sales, *Purpose in Law and in Interpretation*, (November 2024) at 6 and following, which is available at: https://www.bailii.org/uk/other/speeches/2024/CUN0K.pdf.

9. Before turning more specifically to what Wittgenstein might tell us about unjust enrichment, let me first provide a brief history of doctrinal approaches to the subject. I then introduce the mainstream approach, one which searches for a unifying essence of unjust enrichment. I then turn to what could be called the anti-essentialist approach to the subject. I finally look at why a Wittgensteinian approach, founded on his development of family resemblance concepts and rule-following, might be a better one for understanding the conceptual coherence of unjust enrichment - as well as more accurately tracking what courts actually do.

(2) Starting Points – Mainstream approaches to conceptual unity

10. Restitution of unjust enrichment as a discrete subject can fairly be said to have entered the arena in 1966, although restitutionary claims were well-known under different guises throughout the history of English law: actions for money had and received, quantum meruit, quantum valebat and so on. That year, however, saw the publication of the first edition of Goff & Jones, the leading practitioner text on the subject. It set the agenda, gave the new subject a name, and provided the basis and no doubt impetus for restitution's acceptance by the House of Lords in *Lipkin Gorman v Karpnale* in 1991.[7] The conceptual question that it brought sharply into view is what, if anything, unifies the various claims that come under the umbrella of the subject it now acknowledged existed separately from other areas of private law.

11. The mainstream approach has since then attempted to show that there is a grand unifying theory or principle of restitution. Depending on your perspective, this theory either explains that there is a single law of restitution, which encompasses restitution for unjust enrichment, restitution for wrongs, and proprietary restitution, or simply encompasses restitution for unjust enrichment.[8]

12. Initially, this unificatory approach focused on the search for a single essence that explained why restitution was the correct response to a range of different events, including where payments were made because the payer was not under a liability to pay or where they arose

[7] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, esp. at 577-578.

[8] See, for instance, R. Goff & G. Jones, *The Law of Restitution*, (Sweet & Maxwell, 1966), which first developed the idea that this was a subject that, as Lord Burrows put it, '*was coherent and principled*' (A. Burrows, *Understanding the Law of Obligations* (Hart, 1998), at 47); and see, P. Birks, *An Introduction to the Law of Restitution*, (Clarendon, 1985); G. Virgo, *The Principles of the Law of Restitution*, (OUP, 2024) at 7-20, 54-65.

from the defendant's wrongdoing. The search for that unifying essence was first pursued by Peter Birks in *An Introduction to the Law of Restitution*.[9] As Stevens summarises it, Birks took

> '*. . . the formulation that a claim for restitution concerned the 'defendant's enrichment at the expense of the claimant' and subject it to rigorous linguistic analysis, showing what the elements of this phrase meant in ordinary speech and revealing how this was reflected in the law. His scheme is elegant.*'[10]

13. While restitution may be '*perhaps one of the most theorised subjects in the private law of obligations*'[11], that formulation remains at the heart of the subject today. It is captured in the four questions that provide the structure of claims for restitution of unjust enrichment. They are '*. . . i) Has the defendant been enriched? ii) Was the enrichment at the claimant's expense? iii) Was the enrichment unjust? iv) Are there any defences?*'[12] As Birks originally conceived it, the real essence of restitution was to be found in the third question: was the enrichment unjust? As he put it,

> '*whatever adjective was chosen to qualify 'enrichment', its role was only to identify in a general way those factors which, according to the cases themselves, called for an enrichment to be undone'*.[13]

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[9] P. Birks (1985).

[10] R. Stevens (2023) at 4. Also see S. Hedley (2001) at 9-10. He puts it in a similar fashion, '*Birks strongly supported unjust enrichment . . . he argued that any claim in restitution depended on proof that the defendant was unjustly enriched at the claimant's expense. But he injected a stiff dose of rigorous logical analysis.*' There is an interesting comparison here to Wittgenstein. His philosophical work too is divided into two periods: early and later. His later work repudiated his earlier work, which could also be said to have set out an elegant scheme concerning the relationship between language and reality. Although there is one key difference: Wittgenstein's many students and those who followed him remained and remain committed to his later rather than his early views.

[11] *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149; [2022] 1 All ER (Comm) 1244 at [51]. Also see *Barton v Morris* [2023] UKSC 3; [2023] AC 684.

[12] *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149; [2022] 1 All ER (Comm) 1244 at [55]. Also see *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 234, and more recently *Barton v Morris* [2023] UKSC 3; [2023] AC 648 at [228].

[13] P. Birks (1985) at 19.

14. This was thus a search for a conceptual unity. It focused on identifying why it was unjust for a defendant to retain the enrichment. Identify the relevant factor or factors that justified such a reversal and the essence of restitution would stand revealed. Where those factors were present, there was restitution of unjust enrichment. Where they were absent, you were dealing with something else.

15. This search was not, however, straightforward. There was no map with X marking the spot. Birks first excluded proprietary restitution at the outset of the search on the basis that that was a matter for property law.[14] He also later concluded that restitution for wrongs could not properly fall within his explanatory schema.[15] He also came to a more nuanced view of unjust factors. He concluded that they could not provide the conceptual unity, the essence of restitution, he had sought. As he put it,

> '*Had unjust enrichment clung to its list of unjust factors, it would have been an untidy heap, like tort . . .*'[16]

16. The true essence of restitution, he ultimately concluded, was not the unjust factors.[17] They pointed to the real essence: that there was an absence of a legal basis that justified the defendant's retention of the enrichment. The unjust factors explained why there was an absence of basis, which then provided the conceptual unity – the essence – of restitution for unjust enrichment.[18]

17. An alternative approach to the search for an essence is associated with Graham Virgo. He takes a more expansive view of restitution than Birks did. He treats restitution as encompassing restitution for unjust enrichment, restitution for wrongs, and proprietary restitution. The search for unification is thus a much broader task than it was for Birks. As a consequence, the essence cannot lie in unjust factors, nor can it lie in absence of basis. Rather, as Virgo puts it,

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[14] P. Birks (1985) at 15-16.
[15] P. Birks, *Misnomer*, in W. Cornish, R. Nolan, J. O'Sullivan & G. Virgo (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones*, (Bloomsbury, 1998); P. Birks *Unjust Enrichment*, (Clarendon, 2005).
[16] P. Birks (2005) at 107.
[17] We should bear in mind that his views were still evolving when he died at a sadly early age.
[18] P. Birks (2005) at 115.

'. . . *The Law of Restitution is concerned with all claims where the remedy the claimant seeks is assessed with reference to the defendant's gain*. .'[19]

(3) Critiquing the mainstream

18. Despite the very significant and impressive works of Birks, Virgo and others, including Lord Burrows,[20] the search for restitution's and unjust enrichment's essence remains elusive and contested. As Lord Sumption noted in *Patel v Mirza* in 2016 '*English law does not have a unified theory of restitution*'[21] This is also illustrated by what Virgo has described as a hedging of judicial bets by Lord Burrows.[22] Lord Burrows recently described unjust enrichment as a '*principle or, one might say, the cause of action or category of causes of action, underpinning restitution*. . .'[23] If we remain uncertain about what it is, how can we argue with any degree of confidence that it is a subject that has a single conceptual unity, a single essence?

19. Most recently, Stevens has argued powerfully against the mainstream. Rather than search for conceptual unity, he has argued that restitution and unjust enrichment should '*cease to be discussed as unified areas of law*':[24] The mainstream have thus, failed to identify a conceptual unity to the law, because what they are looking at a different, unconnected laws.

20. Stevens' scepticism, or anti-essentialism, is not novel. Twenty-five years ago, Steve Hedley also argued that the search for a single theory of restitution was misconceived.[25] He too

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[19] G. Virgo (2024) at 19.
[20] A. Burrows, *The Law of Restitution*, (OUP, 2011); A. Burrows, *A Restatement of the English Law of Unjust Enrichment*, (OUP, 2012).
[21] *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [246]. And see Lord Hoffmann in *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2006] UKHL 49; [2007] 1 AC 558 at [21].
[22] G. Virgo, *Book Review – The Laws of Restitution by Robert Stevens*, Cambridge Law Journal, 82(3), November 2023, 563 at 565.
[23] *Attorney General of Trinidad and Tobago v Trinsalvage Enterprises Ltd (Trinidad & Tobago)* [2023] UKPC 26; [2023] WLR 4045 at [44].
[24] R. Stevens, *The Laws of Restitution*, (OUP, 2023) at 3.
[25] Other critiques have also been developed by, for instance, Peter Jaffey; see P. Jaffey, *The Nature and Scope of Restitution*, (Hart, 2000).

argued that, '. . . *the idea that 'restitution' forms a subject with a coherent policy basis is an illusion*.'[26] Restitution was in reality nothing more than a range of disparate '*leftovers*' that did not fit easily into the law of contract, tort and property. Rather than attempt to define a law of restitution, he argued that private law theory should accommodate the leftovers within those established areas of the law of obligations.

(4) The Wittgenstein Turn

21. Where does this leave us? We could continue to try to refine unifying theories. We could join Hedley and Stevens and argue that there is no law of restitution or unjust enrichment. We could be essentialist or anti-essentialist. Or we could take a different, a Wittgensteinian approach and seek a more perspicuous view of the subject that is neither essentialist nor anti-essentialist.[27] Such an approach is perhaps particularly apt now as unjust enrichment remains an area in development, as the Court of Appeal observed last year in *Lunak Heavy Industries v Tyburn Film Productions Ltd*,[28] echoing remarks made by Lord Reed in *ITC v Revenue & Customs Commissioners* in 2017.[29] This type of approach could assist that development. It could help provide a more effective conceptual and theoretical framework for understanding the subject.

22. A Wittgensteinian approach might be developed along the following lines. First, it would explain why the attempt to identify the essence of restitution is one that repeats the mistake made by philosophers when they seek to find the objective essence of things independent of language, or the mistake that Turing made when he considered that 'to find' operated in the same way when looking for white lions and mathematical analogies. Secondly, it would show that the fact that we have not found a single answer shows something else: that restitution is what Wittgenstein termed a family resemblance concept. And through that, it

[26] S. Hedley, *Restitution: Its Division and Ordering*, (Sweet & Maxwell, 2001) at vii. Also see S. Hedley, *A Critical Introduction to Restitution*, (Butterworths, 2001).
[27] L. Wittgenstein (1989) at s.122.
[28] *Lunak Heavy Industries v Tyburn Film Productions Ltd* [2025] EWCA Civ 1643 at [25] citing Lord Reed PSC in *Investment Trust Companies v Revenue & Customs Commissioners* [2017] UKSC 29; [2018] AC 275 at [37], '*Decisions concerning the question whether an enrichment was "at the expense of" the claimant demonstrate uncertainty as to the approach which should be adopted.*'
[29] *Investment Trust Companies v Revenue & Customs Commissioners* [2017] UKSC 29; [2018] AC 275 at [50].

has a conceptual coherence, albeit a more nuanced one than that argued for by the essentialists.

23. Developing this approach, we will then be left with a conceptual unity across the three subjects that Virgo claims fall within unjust enrichment (see para. 17 above). It will be unity that arises in a way the we know only too well. It is one grounded in similarity and analogy; in a series of overlapping similarities that form the common law, what the late Sir John Laws referred to as '*the matrix of the common law's genius*': that it is a distillation of practice, adaptation, evolution that is '*endlessly creative*' yet '*stands for no grand theory*.'[30] If we take this approach, we are left with an account of restitution that tracks the common law. It is one that is descriptively accurate. It is one that is consistent with the approach taken by the courts. It is institutionally accurate. And, it is one, through exposing what Wittgenstein would have called the grammar of restitution, is normative. It is to these points that I now turn.

(5) Restitution, Ostensive Definition and Essentialism

24. Wittgenstein took his sledgehammer to philosophers' attempts to discover the 'essence of things' by establishing how words in our language described, for instance, an object, a colour, a shape's independent and objective essence, through a discussion of what is called ostensive definition. That is the idea that words get their meaning – that words become associated with the independent, objective essence of the world –, through pointing and naming. The obvious example, which he used, was of someone pointing to an object and saying 'This is red'. The act of pointing links the word with the world. The meaning of 'red' is fixed not by the word, but by it becoming associated – by it representing – the objective essence of redness. In that way we can be seen to provide a foundational meaning for words.

25. Wittgenstein would then look at more complex concepts. What might it mean to say that someone is a bachelor, what might it mean for something to be a game, for example. A traditional view was that such concepts had features that were true of all examples of them.

[30] J. Laws, *The Common Law Constitution*, (CUP, 2014) at 7.

All bachelors must be men and must be unmarried. Those were the necessary and sufficient conditions of the concept: the essence of the concept. That an individual man had blonde hair or blue eyes might also be true, but had nothing to do with him being a bachelor. They were inessential properties. Discovering the essential properties of a concept meant that you had discovered the conceptual unity underpinning the word 'bachelor.' It also meant that you could work out when someone was not a bachelor.[31]

26. Wittgenstein might then look at what we are doing with restitution. He might say that we too are acting a little bit like the philosophers who try to identify the objective essence of things through ostensive definition. We look at *Moses v Macferlan* (1760)[32] and say 'this is restitution for unjust enrichment'. We look at *Fibrosa Spolka v Fairbairn* (1943)[33] and say 'this too is restitution for unjust enrichment.' We go a step further. We point at *Kelly v Solari* (1841)[34] and say 'this is the unjust factor of mistake'. We then look at *Kleinwort Benson v Lincoln City Council* (1999)[35] and say 'this unjust enrichment must be returned because there is no legal basis for the defendant to retain it'. We too are in this way engaging in ostensive definition: trying to identify the necessary and sufficient features – the objective essence – of restitution.

27. There is a difficulty here. Ostensive definition, as Wittgenstein demonstrated, cannot work in this way. It does not fix the meaning of words to the objective essence of things. It may form part of the process by which words gain their meaning, and may then form part of the way in which we identify whether something is 'red', or someone is a 'bachelor' or a cause of action is a restitutionary one, but that is not the same as saying it reveals any conceptual unity. It cannot do this because, as the development of Birks' approach to restitution exemplifies, it is inherently ambiguous.

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[31] L. Wittgenstein (1989) at s.6 and following; P.M.S. Hacker, *A Beginner's Guide to the Later Philosophy of Wittgenstein*, (Anthem Press, 2024) at 75-89.
[32] *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676.
[33] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.
[34] *Kelly v Solari* [1841] M & W 54; 152 ER 24.
[35] *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349.

28. When someone points to an object and says 'this is red', what does the learner know is being pointed at? Is it the colour? Is it the shape? Is it the size or type of object? When an academic or lawyer points at *Kelly v Solari* and says 'this is a case of unjust enrichment', what is being pointed at? Is the mistake that the claimant made - in assuming that the insurance policy on which it paid out on was still operative - being pointed at? Is it the fact that the mistake caused it to pay out wrongly being pointed at? Is it the absence of a lawful basis for the defendant to retain the money paid to them being pointed at? Or are we pointing at the fact that there has been a transfer between the parties, that we are engaged in some form of corrective justice, which we now know underpins restitution, following Lord Reed's magisterial judgment in 2017 .[36] And so on.

29. In both situations Wittgenstein would suggest that the inherent ambiguity in any ostensive definition points to a wider truth. Our words, our concepts gain their meaning not from an objective essence or through essential features being identified, but rather because we understand the specific rules and conventions that govern their use, by practices that we engage in, by our complicated form of life.[37] Ostensive definition is, on this view, the means by which we begin to induct someone, to train someone, in the conventions and practice of particular kinds of language: the language of colour, of shape, of restitution. It is how we train someone in the use of a word in the language.[38]

30. Applying this more directly to restitution, we might develop the following perspective. When we look at old cases, paradigm cases, we do so not to identify an essence of restitution. On the contrary, we do so to train lawyers in the use of the word 'restitution', of mistake, of absence of basis and so on. Our use of ostensive definition, pointing at those paradigmatic cases, is one means to teach us that in such circumstances, as evident in those cases, the law treats the enrichment as reversible and that it does so for certain specific reasons. We are teaching the rules of the game. Just as someone who is taught what 'red' means by pointing at red objects, when we point to specific cases where restitution has been ordered, we are teaching the rules of what it means for something to be classified as 'red' or restitution in future. And where those rules are concerned, they do not arise in isolation, via

[36] *Investment Trust Companies v Revenue & Customs Commissioners* [2017] UKSC 29; [2018] AC 275 at [43].
[37] L. Wittgenstein (1989) at 174.
[38] As Wittgenstein put it, '*The meaning of a word is its use in the language'*: L. Wittgenstein (1989) at s.43.

abstraction or through identifying essential features. They arise through lawyers engaging in a shared practice. Wittgenstein once said that language was just refinement, but that '. . . *'in the beginning was the deed."*[39]

31. Where restitution is concerned, the deed – the shared practice of lawyers - is one in which the common law has been engaged, as those old cases illustrate, for many centuries. It is one that has evolved over time, as language has, with new rules developing and old rules falling by the wayside. The conceptual coherence that Birks and Virgo seek, and which Stevens and Hedley deny, comes then not from essences or the absence of essences. It comes from those shared practices and the rules of the game as it has evolved. We can easily remind ourselves of those rules now by looking to the four questions identified by Birks and which the courts apply when considering if unjust enrichment arises and restitution needs to be made. As Lord Reed rightly put it, in a way that echoes the Wittgensteinian approach, those four questions are '*signposts towards areas of inquiry involving a number of distinct legal requirements.'*[40] They are the rules that point the way, and which provide us with a clear survey of how we play the game of restitution.[41]

32. This may point us towards a better understanding of Lord Burrows' 'hedging his bets'. Rather than, as Virgo has it, the reference to unjust enrichment as a principle, a cause of action, or a category of causes of action, we can take a different and more accurate view. We can say that Lord Burrows is highlighting the different uses and roles played by the term 'unjust enrichment'. He is showing what to Wittgenstein are the different uses of the term in different language games.[42] The key for us is to be clear which game is being played at any given time. Sometimes we use unjust enrichment to refer to a cause of action, one that was once called an action for money had and received or one where the defendant was required to transfer money back to a claimant because there had been a total failure of consideration where the transfer was concerned. Sometimes we use it to refer to a category of causes of action: all those that are now identified by reference to the four questions first identified by

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[39] L. Wittgenstein, *Culture & Value* (Blackwell, 1992) at 31C.
[40] *Investment Trust Companies v Revenue & Customs Commissioners* [2017] UKSC 29; [2018] AC 275 at [41].
[41] L. Wittgenstein (1989) at s.127.
[42] L. Wittgenstein (1989) at s. 23, '. . . *the term "language-game" is meant to bring into prominence the fact that the speaking of language is part of an activity, or a form of life.*'

Birks. And sometimes, we use it to refer to a principle, perhaps an essence, that underpins that category of causes of action, even if – as a Wittgensteinian might say - we are conceptually confused when we use it in that way.

33. What we need to ensure is that we do not mistake our use of the terms in one game for their use in another. That is one of the ways in which we lead ourselves astray as we try to find a common essence for a principle, a cause of action or category of causes of action. Along that road we are likely to find ourselves, as another philosopher put it, being in the same position as a tourist being shown round Cambridge, seeing the Law Library, the mathematical bridge, and the colleges, and then asking 'And where is the university?'.[43] Gaining a clearer view of legal classification helps us have a better understanding of how we play the game, of its rules.

34. Wittgenstein might then say that this points us towards another feature of his philosophical technique: the idea that conceptual unity comes not from essences, from abstraction, but rather from the fact that our rule-governed practices, our legal language games, gain their conceptual coherence and normative structure in a different way: through the fact that restitution and unjust enrichment are family resemblance concepts.[44]

(6) Restitution as a family resemblance concept

35. What is a family resemblance concept? Hacker summarises Wittgenstein's approach to this idea as follows,

> '*Wittgenstein thought that games have no common defining features in virtue of which they are games. [There is no Platonic ideal of a game]. Rather, all the things we call 'games' are so called because of a multitude of overlapping features. They are related to each other like the faces of members of a family. . .*'[45]

[43] G. Ryle, *The Concept of Mind*, (Penguin, 1990) at -17-21.
[44] L. Wittgenstein (1989) at s.65-71.
[45] P.M.S. Hacker (2024) at 87.

If this is right, both the essentialists and the anti-essentialists miss the point. The former because restitution's conceptual unity, just as that of 'games', arises from the overlapping similarities that exist between restitution for mistake, for total failure of consideration, for wrong: from their family resemblance, not from any single common essential feature they share. The latter because the absence of a single, conceptual unity does not leave us with a set of disparate, single laws of restitution. Again unity comes from the family resemblance.

36. It is here that the work of Birks, Virgo, Stevens, Hedley and others becomes all the more important. Their rigorous analysis of the case law is exactly what is needed to enable us to gain a clear view of the resemblance. We could take mistake cases for example. There are a plethora. We could start with *Skyring v Greenwood* (1825).[46] In that case a payment was made on the mistaken belief about the law; that Greenwood was legally entitled to the payment. The court held that the payment was not recoverable. That was because the payment arose from a mistake of law. Then we have *Kelly v Solari* (1841). In that case payment was made because the plaintiff acted on a false assumption that an insurance policy taken out by the defendant's husband was operative. Recovery was permitted because there had been a mistake of fact. Then we can turn to *Aiken v Short* (1856)[47]. In that case, it was explained that mistakes of fact could only ground recovery if the mistake was of a fact that, if true, would have made the plaintiff liable to make the payment that was to be recovered. And then, we could turn to *Barclays Bank v Simms* (1980): recovery for mistakes of fact requires the plaintiff to demonstrate that but for the mistake the payment would not have been made.[48] Then we can turn to *Kleinwort Benson v Lincoln City Council* (1999).[49] Not only could mistakes of law now found recovery, they could do so when there is a long-established and widely shared view that what is now known to be a mistake was believed to be correct.

37. None of these cases are identical. They have no one common feature. They rest on different types of mistake, whether they are factual or legal. The mistakes arise in different

[46] *Skyring v Greenwood* (1825) 107 ER 1064
[47] *Aiken v Short* (1856) 1 H&N 120; 156 ER 1180.
[48] *Barclays Bank v Simms* [1980] QB 677.
[49] *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349.

circumstances: false assumptions, the absence of liability, factual issues, legal issues. Different approaches are taken to the way in which mistake operates, with the law later clarifying that a 'but for' test applies on causation, and that it applies to both mistakes of law and fact.[50] The cases leave us with what for Wittgenstein would be one aspect of the grammar of restitution, that which governs the unjust factor of mistake and when it applies. They also leave us with a clear view that while each of the cases has features in common, they have no one thing in common, a point that is underscored by Lord Goff's judgment in *Kleinwort Benson*, which extended mistake to apply to mistakes of law and rejected the previous settled understanding of the law. Not only did that case change the grammar, the rules, it also points to those rules being a set of criteria, rather than an essence.

38. We can also see through these cases the common law in operation; its endlessly creative genius. The law develops incrementally. New cases apply mistake to new situations based on their similarity with past precedent. Or, as we could say, based on their family resemblance. This, of course, fits squarely with how legal practice and legal institutions operate. It is an approach that the courts adopt and have always adopted. When faced with novel situations, we ask ourselves : is this case analogous to others that have gone before? We look for a resemblance not an essence. On this view, Wittgenstein's approach would leave us with a situation that more effectively accounts for the law's incremental development than an essentialist account could. It leaves us with more room for unjust enrichment to evolve than one that rested on there being a single essence underpinning it.

39. Does this all leave restitution simply as a description of what we do? Does it rob it of any rules-based force, saying what we do rather than what we ought to do? The answer to that is no. Restitution gains its normativity from the fact that it is a rule-governed practice. As Wittgenstein would put it, the mistake cases, just as others in the restitution, provide a set of criteria – a grammar – for what counts as a reason requiring reversal of the defendant's enrichment. They do not simply say what does happen. They establish what ought to happen in certain factual situations. Our task is to engage in a methodology that exposes those rules all the more clearly.

[50] See the initial move in this direction in *Nurdin & Peacock v Ramsden* [1999] 1 WLR 1249.

(7) Conclusion

40. Where does this leave us? Peter Hacker had this to say about the role of philosophy after Wittgenstein,

> '*Philosophy has a task to perform as long as human beings continue to become conceptually confused, continue to tie knots in their understanding that need to be unravelled by patient ordering. . .*'[51]

41. My essential point tonight is that rather than look for a single, unifying theory of unjust enrichment, might we consider an approach that carries on one fundamental aspect of Birks' approach, the one that Wittgenstein would have fully endorsed: conceptual clarification. But rather than put that into a search for an overarching theory or an essence, it could be put into clearing up confusions about the four questions of unjust enrichment – not least where failure of basis is concerned, clarifying the family resemblance between restitution for unjust enrichment, restitution for wrongs and proprietary restitution, and the relationship between restitution, tort and contract,[52] clarifying how we use the four questions. So that lawyers and courts are in the best possible place to consider whether the case in front of them is sufficiently similar to established claims for unjust enrichment for there to be a basis. If it is a novel issue, to enable the common law to develop. Specifically this means we should, for instance, spend time in sharpening our understanding of each of the four questions and making clearer the limits of absence of basis is in relation to the unjust factors.

42. In other words, we need more scholarship, like that of Birks, Burrows, Virgo, and Stevens – amongst others – to help create and clarify a 'perspicuous survey' of this part of the law. We need more work to demonstrate the nature and extent of the family resemblance that provides the conceptual coherence between the various aspects of restitution, of unjust

[51] P.M.S. Hacker (2024) at 308.
[52] *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149; [2022] 1 All ER (Comm) 1244 at [51]-[105].

enrichment, wrongs, and proprietary restitution. If we do that we may have a clearer view of the rules, the grammar of restitution. We will gain a better view of the internal coherence and normativity that are built into those rules, and the legal and institutional practices that underpin them. We may see the law afresh. That could be a valuable search, with no east poles to lead us astray. Thank you[53].

[53] And with grateful thanks to Dr John Sorabji for his assistance in the preparation of this lecture.