BIRKE HÄCKER

Consequences of Impaired Consent Transfers

Max-Planck-Institut für ausländisches und internationales Privatrecht

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Mohr Siebeck

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Consequences of Impaired Consent Transfers

A Structural Comparison of English and German Law

Mohr Siebeck

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Meinen Lehrern

Denn nur durch Vergleichung
unterscheidet man sich
und erfährt, was man ist,
um ganz zu werden, der man sein soll.[*]

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[*] Thomas Mann, *Joseph und seine Brüder (Joseph in Ägypten)*.

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München, December 2008 *Birke Häcker*

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Part Three:
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Table of Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austria)
AC	Appeal Cases (3rd series)
AcP	Archiv für die civilistische Praxis
Ad & El	Adolphus & Ellis' Queen's Bench Reports
aff'd	affirmed
AG	Aktiengesellschaft
Alberta L Rev	Alberta Law Review
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
ALR	Allgemeines Landrecht für die Preußischen Staaten (Prussia)
alt	alternative
Am J Comp L	American Journal of Comparative Law
App Cas	Appeal Cases (2nd series)
arg e	argument from (*argumentum e*)
Art	Article
Atk	Atkyns' Chancery Reports
B	Baron
BAGE	Entscheidungen des Bundesarbeitsgerichts
Barn & Ald	Barnewall & Alderson's King's Bench Reports
Barn & Ad	Barnewall & Adolphus' King's Bench Reports
Barn & Cress	Barnewall & Cresswell's King's Bench Reports
BC	Borough Council
Beav	Beavan's Rolls Court Reports
Begr	Begründer (founding author/editor)
Best & S	Best & Smith's Queen's Bench Reports
BGB	Bürgerliches Gesetzbuch
BGB-E	Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
Bing NC	Bingham's New Cases, English Common Pleas
Bl H	Henry Blackstone's Common Plea Reports
BLR	Building Law Reports
Brod & Bing	Broderip and Bingham's Common Pleas Reports
Bros	Brothers
BS	Building Society
Burr	Burrow's King's Bench Reports tempore Mansfield
CA	Court of Appeal
CA in Ch	Court of Appeal in Chancery
Can Bar Rev	Canadian Bar Review
Can Bus LJ	Canadian Business Law Journal

CB	Common Bench Reports
CB NS	Common Bench Reports, New Series
CC	Code Civil (France)
CCR	Crown Cases Reserved
cf	compare (*confer*)
ch(s)	chapter(s) (abbreviation used when referring to a cited piece of work)
Ch	Law Reports, Chancery Division (3rd series)
ChD	Chancery Division
ChD Com Ct	Chancery Division, Companies Court
Ch App	Chancery Appeals
CJ	(Lord) Chief Justice
CLC	Commercial Law Cases
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports (Australia)
CLY	Current Law Year Book
Cmnd	Command Paper (abbreviation used for papers issued 1956–86)
Co	Company
Colum L Rev	Columbia Law Review
Com LR	Commercial Law Reports
Corp	Corporation
Cr & Ph	Craig and Phillips' Chancery Reports
Cromp M & R	Crompton, Meeson & Roscoe's Exchequer Reports
CUP	Cambridge University Press
DB	Der Betrieb
DC	Divisional Court
De G F & J	De Gex, Fisher and Jones' Chancery Reports
De G J & S	De Gex, Jones and Smith's Chancery Reports
DJZ	Deutsche Juristen-Zeitung
Doug	Douglas' King's Bench Reports
East	East's Term Reports, King's Bench
ed(s)	editor(s)
Edin L Rev	Edinburgh Law Review
edn	edition
eg	for example (*exempli gratia*)
El Bl & El	Ellis, Blackburn & Ellis' Queen's Bench Reports
ER	English Reports
ERPL	European Review of Private Law
esp	especially
et al	and others (*et alii)*
etc	and so forth (*et cetera*)
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWHC	England and Wales High Court
Ex	Law Reports, Exchequer Cases
ex p	on behalf of (*ex parte*)
Exch Ch	Exchequer Chamber
Exch Rep	Exchequer Reports
f/ff	next/following
fn	footnote (abbreviation used when referring to a cited piece of work)

gen ed	general editor
Harv Int LJ	Harvard International Law Journal
HC	High Court
HCA	High Court of Australia
HL	House of Lords
(LR) HL	Law Reports, English and Irish Appeals
(LR) HL Sc	Law Reports, Scotch and Divorce Appeals
HMSO	Her Majesty's Stationery Office
Hurl & C	Hurlstone & Coltman's Exchequer Reports
Hurl & N	Hurlstone & Norman's Exchequer Reports
ibid	in the same place (*ibidem*) (abbreviation also used to refer to another passage in the same case or in the same piece of work)
ie	that is (*id est*)
Inc	Incorporated
InsO	Insolvenzordnung
IR	Irish Reports
IRC	Inland Revenue Commissioners
J	Mr(s) Justice
JCL	Journal of Contract Law
JherJB	Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts
JR	Juristische Rundschau
Jurid Rev	Juridical Review
JuS	Juristische Schulung
JW	Juristische Wochenschrift
JZ	Juristenzeitung
Kay & J	Kay & Johnson's Vice Chancellor's Reports
KB	Law Reports, King's Bench (3rd series)
KBD	King's Bench Division
KO	Konkursordnung
KTS	Konkurs, Treuhand, Sanierung: Zeitschrift für Insolvenzrecht
LBC	Lawbook Co
LC	Lord Chancellor
Ld Raym	Lord Raymond's King's Bench and Common Pleas Reports
LJ/LJJ	Lord Justice / Lord Justices
LJ Exch	Law Journal Reports, Exchequer New Series
Lloyd's Rep	Lloyd's (List) Law Reports
Lloyd's Rep Bank	Lloyd's Law Reports: Banking
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
Loy LA L Rev	Loyola of Los Angeles Law Review
LQR	Law Quarterly Review
LR	Law Reports (1st series: abbreviation dropped after 1875)
LS	Legal Studies
LT	Law Times Reports
Ltd	Limited
Mass	Massachusetts
Maul & Sel	Maule & Selwyn's King's Bench Reports
Mees & W	Meeson & Welsby's Exchequer Reports
Mer	Merivale's Chancery Reports
Mlle	Mademoiselle
MLR	Modern Law Review

MR	Master of the Rolls
n/nn	note/notes (abbreviations used when referring to a footnote in the current chapter, unless otherwise indicated)
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift: Rechtsprechungs-Report
No(s)	Number(s)
NSWSC	New South Wales Supreme Court
NSWSC Comm	New South Wales Supreme Court, Commercial Division
NZBLQ	New Zealand Business Law Quarterly
NZCA	Court of Appeal of New Zealand
NZHC	High Court of New Zealand
NZI	Neue Zeitschrift für das Recht der Insolvenz und Sanierung
NZLR	New Zealand Law Reports
NZ L Rev	New Zealand Law Review
OGH BrZ	Oberster Gerichtshof für die Britische Zone
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht
OUP	Oxford University Press
p/pp	page/pages (abbreviation used when referring to the present book)
para(s)	paragraph(s)
PC	Privy Council
PCB	Private Client Business
plc	public limited company
Pty Ltd	Proprietary limited company
QB	Law Reports, Queen's Bench (3rd series)
QBD	Queen's Bench Division
QBD Comm	Queen's Bench Division, Commercial Court
QBD TCC	Queen's Bench Division, Technology and Construction Court
R	The King/Queen (*Rex/Regina*) = The Crown
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
rev'd	reversed
RG	Reichsgericht
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RheinZ	Rheinische Zeitschrift für Zivil- und Prozeßrecht des In- und Auslandes
RLR	Restitution Law Review
Rly	Railway
s/ss	section/sections
SA	Société anonyme
sic	as in the original
SpA	Società per Azioni
StBG	Strafgesetzbuch
Str	Strange's King's Bench Reports
Taunt	Taunton's Common Pleas Reports
TLR	Times Law Reports
tr	translator
TR	Dunford & East's Term Reports, King's Bench
TruLI	Trolley's Trust Law International
U Chi L Rev	University of Chicago Law Review
UK	United Kingdom

UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UWALR	University of Western Australia Law Review
v	against (*versus*)
Ves Jun	Vesey Junior's Chancery Reports
vol(s)	volume(s)
WLR	Weekly Law Reports
WM	Wertpapier-Mitteilungen
You	Younge's Exchequer in Equity Reports
ZEuP	Zeitschrift für Europäisches Privatrecht
ZHR	Zeitschrift für das gesamte Handels- und Konkursrecht
ZSS (RA)	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)

Short Glossary of German Terminology

German	English (or Latin) equivalent
Abstraktionsprinzip	principle of abstraction
Anfechtung	~ rescission / avoidance
arglistige Täuschung	~ fraudulent misrepresentation
Aussonderung	segregation (in insolvency)
Besitz	possession
Besitzer	possessor
bösgläubig	~ *mala fide*
dinglicher Vertrag	real contract / real agreement
Eigenschaftsirrtum	mistake as to an essential characteristic
Eigentum	ownership
Eigentümer	owner
Eigentümer-Besitzer-Verhältnis	relationship between owner and illegitimate possessor
Eingriffskondiktion	infringement-based restitutionary claim
Erklärungsirrtum	mistake as to declaration (of intention)
Ersatzaussonderung	segregation of substitutes
Fehleridentität	identity of defect
gutgläubig	~ *bona fide*
Inhaltsirrtum	mistake as to content (of a declaration of intention)
Leistung	performance
Leistungskondiktion	performance-based restitutionary claim
Naturalrestitution	specific reinstatement
Nichtleistungskondiktion	non-performance-based restitutionary claim
Rechtsgeschäft	legal transaction
Rechtsgrund	legal basis / cause
redlicher Besitzer	~ *bona fide* possessor
Schuldvertrag	obligatory contract
Trennungsprinzip	principle of separation
Treuhand	~ trust
Treuhänder	~ trustee
Übergabe	delivery
ungerechtfertigte Bereicherung	unjustified enrichment
Verfügung	conveyance / disposition
Verfügungsgeschäft	dispository transaction
Verpflichtungsgeschäft	obligatory transaction
Vertrag	contract
Wegfall der Bereicherung	disenrichment / change of position
widerrechtliche Drohung	~ duress
Willenserklärung	declaration of intention

Part One:

Setting the Scene

Chapter I

Introduction

A. Aim of Project and Methodology

Although this book is based on a thesis, it does not contain a θέσις (*thesis*) in the sense of a single intellectual proposition which it sets out to prove. Instead, its aim is in some respects more modest, in others perhaps more ambitious. The book seeks to explore the fundamental structures pertaining to a core area of private law in comparative perspective. It analyses the English and German law on impaired consent transfers and their consequences, paying particular attention to the way in which the interplay of various legal rules and principles[1] determines the processes by which such transfers are unwound (both in terms of personal and property rights).

Take the following example: A sells and delivers or makes a gift of a painting to B, but he does so on the basis of some incorrect assumption or while under some form of pressure.[2] How do English and German law respond to this and similar situations? That depends on a large number of different parameters, such as the proper characterization of the factors inducing and influencing A's actions, the nature of the transaction(s) between A and B, whether or not B is still in possession of the painting and – where he has passed it on to a third party C, eg by way of sale or gift – the exact circumstances of B's dealing with C. In both legal systems, the outcome of the stipulated case and any variation on it is the product of a complex interaction between (primarily) the rules and principles of con-

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[1] The terms 'rules' and 'principles' are not co-extensive. Principles are general legal maxims whose implementation requires concrete rules: cf K Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn Springer, Berlin 1991) 437–90, esp 474–82. Yet the demarcation line between the two is fuzzy in practice, such that 'rules' and 'principles' often overlap, especially in a non-codified legal system like the English. Both terms are used here to indicate that we are concerned with general maxims as well as concrete norms of varying specificity. No attempt will be made in what follows to draw a clear boundary between abstract principles and concrete rules, and both terms will, moreover, be employed interchangeably for legal norms of a certain level of generality.

[2] For exposition purposes, the word 'pressure' is used in a very broad sense within the present chapter, encompassing both threats emanating from another party ('duress') and more subtle forms of inter-personal influence, typically resulting from a relationship of emotional or other dependency ('undue influence'): see below, text to n 36.

tract law, property law and the law relating to the reversal of 'unjust' or 'unjustified' enrichments. Metaphorically speaking, these rules and principles, though originating in different branches of the law, together constitute the component parts of an intricate machinery whose operation within each legal system is the subject-matter of this book. It is hoped that a comparison of the machinery's structures will not only contribute to the ongoing dialogue between English and German lawyers in the relevant fields, but will also enhance our understanding of each legal system as such. Knowledge of foreign solutions to similar problems often opens our eyes to the strengths and weaknesses of our own approach.

Given the aim of the current investigation, its methodology is to a large extent predetermined. At a fundamental level, it shares many of the features of traditional comparative law functionalism as espoused most prominently by Konrad Zweigert and Hein Kötz.[3] By asking how the German and English legal systems respond to the problem of impaired consent transfers, and in particular what rules and principles play a role in their reversal, the book focuses on the functions which these rules and principles perform in balancing all the competing interests at stake. Of course, as with most functionalist projects, it is virtually impossible to frame the research question in entirely neutral terms.[4] The very notion of an 'impaired consent transfer' imports certain legal connotations. What is 'consent', and when is it 'impaired'? What is meant by 'transfer', and how is a transfer effected within a given legal system? While the task of delineating these terms and thus the scope of our inquiry more precisely can be postponed until later,[5] it is worth stressing here that reference to certain (shared) legal concepts and categories will be inevitable. This is because, in view of its overarching structural concern, the present book is much more interested in the *legal* than in the *social* background and function of the rules and principles it investigates.

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[3] T Weir (tr), K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn OUP, Oxford 1998) 32–47. On functionalism generally see eg M Graziadei, "The Functionalist Heritage" in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP, Cambridge 2003) 100; J Husa, "Farewell to Functionalism or Methodological Tolerance?" RabelsZ 67 (2003) 419, esp 422–34; R Hyland, "Comparative Law" in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, Oxford 1996) 184, 187–90; R Michaels, "The Functional Method of Comparative Law" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, Oxford 2006) 339.

[4] Cf M van Hoecke, "Deep Level Comparative Law" in M van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart, Oxford 2004) 165, 169–70; Hyland in *Companion* (n 3) 189.

[5] See below, section B of the present chapter (pp 9–13).

The emphasis on exploring and comparing rules and principles as part of a larger *system of law* also accounts for a number of methodological departures from traditional functionalism. According to the orthodoxy, "the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones".[6] Kötz has thus likened the functionalist approach to that of a 'black box', into one side of which is fed the 'problem' and which spews out the 'solution' on the other.[7] However, he also notes that outcomes are often less interesting than the processes by which they are generated.[8] The aim of the present book is to explore the inside of the English and German 'black boxes' in order to highlight and compare their internal processes *as such*. To this end, it is necessary to jettison a basic distinction commonly drawn by comparative lawyers: that between a rule-based and a case-based approach.[9] The former proceeds by comparing and contrasting individual rules, principles and concepts in the abstract, while the latter looks at the outcome of actual (or hypothetical) cases. Yet in order fully to understand the solutions produced by a legal system in respect of a particular problem, it is essential to look at both rules and cases equally. Rules and principles do not operate in isolation, but in conjunction with other rules and principles, and on the basis of a certain conceptual framework.[10] The outcome of concrete cases is, in turn, determined by the interaction between such rules and principles when applied to a specific factual scenario. To see the whole picture, we must adopt an integrated approach which regards rules and principles as axioms whose combination gives shape to the legal system and yields solutions to cases. Only an awareness of the structural setup endows us with the ability to recognize when, how, and why a variation of the underlying facts, or the change of a particular rule, alters the outcome of a given case.

Connected with the focus on the internal operation of the 'black box' constituted by each legal system are a number of further departures from orthodox functionalism. First and foremost among them is the rejection of the famous – and equally notorious – *praesumptio similitudinis* (presump-

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[6] *Zweigert & Kötz* (n 3) 44.

[7] H Kötz, "Abschied von der Rechtskreislehre?" ZEuP 1998, 493, 505.

[8] Ibid. M Rheinstein, "Teaching Comparative Law" (1937–38) 5 U Chi L Rev 615, 621, even claims that a "general morphology of law" can be developed "in no other way ... than on the basis of a structural, formalistic comparison".

[9] Cf eg van Hoecke in *Epistemology and Methodology* (n 4) 167–69.

[10] This is the reason why E Rabel, "Aufgabe und Notwendigkeit der Rechtsvergleichung" RheinZ 13 (1924) 279, 281, called for more *systematische Rechtsvergleichung* (system-oriented comparison). The essay is reprinted in HG Leser (ed), *Ernst Rabel: Gesammelte Aufsätze, vol 3: Arbeiten zur Rechtsvergleichung und zur Rechtsvereinheitlichung 1919–1954* (Mohr Siebeck, Tübingen 1967) 1.

tion of similarity) which has its roots in the observation that "as a general rule developed nations answer the needs of legal business in the same or in a very similar way".[11] Like its anti-functionalist counterpart, that deriving from the so-called 'difference theory',[12] the presumption of similarity is liable to restrict the comparative inquiry unduly by pre-empting its conclusions.[13] It is preferable to start off without any presumptions, either of similarity or of dissimilarity, and to be on the lookout for both phenomena. In fact, the comparison between two legal systems may be most rewarding where similar rules or principles, as a result of their interaction with other rules and principles, lead to different outcomes, or where the solutions of cases converge despite apparent discrepancies in the applicable rules and principles.[14]

Next is the question of perspective. Traditional functionalist doctrine maintains that the comparatist has to adopt "an outsider's non-normative view of different legal systems, which is opposite to that of legal dogmatics or practice oriented national legal study".[15] In so far as this approach protects a lawyer trained in one legal system from the dangers of assessing foreign rules as if they formed part of his own system and from false *déjà vu* experiences,[16] it has much to commend itself. However, as regards each legal system individually, the adoption of an internal point of view becomes inevitable if we are to appreciate the mechanisms operating within the 'black box'. Comparability is then reached not by means of an external epistemic perspective, but through the possibility of mapping different systems across one another using the various similarities and discrepancies between individual rules and principles as reference points. All this requires us to commit to is the perception and treatment of national law as a

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[11] *Zweigert & Kötz* (n 3) 40. G Dannemann "Comparative Law: Study of Similarities or Differences?" in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, Oxford 2006) 383, 395, points out that, on closer inspection, the presumption applies only to *outcomes* of cases and "only to those areas of (a) substantive (b) private law which (c) are not culturally or politically sensitive".

[12] Advocated most prominently by G Frankenberg, "Critical Comparisons: Rethinking Comparative Law" (1985) 26 Harv Int LJ 411, and P Legrand, "The Same and the Different" in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP, Cambridge 2003) 240.

[13] Hyland in *Companion* (n 3) 190. Cf also Husa RabelsZ 67 (n 3) 424–25; Michaels in *Oxford Handbook* (n 3) 269–72.

[14] Cf Dannemann in *Oxford Handbook* (n 11) 406–8; van Hoecke in *Epistemology and Methodology* (n 4) 171.

[15] Husa RabelsZ 67 (n 3) 438. Similar also: R Sacco, "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 Am J Comp L 1, 25, who describes the comparative method as "the opposite of the dogmatic".

[16] Cf O Kahn-Freund, "Comparative Law as an Academic Subject" (1966) 82 LQR 40, 52–54.

coherent 'system' rather than just an accumulation of rules. There can be no doubt that German law fulfils that postulate. Its Civil Code (*Bürgerliches Gesetzbuch*, abbreviated BGB), in particular, is the product of centuries of systematization. More difficulties are caused by English law, whose incremental development via forms of action[17] and non-academic practice in the Inns of Court long obscured the potential for system-building.[18] Yet even the Common law tradition is not beyond the reach of the Gaian institutional scheme, as already demonstrated by the works of Bracton and William Blackstone.[19] The cause has most recently been championed by the late Peter Birks. He was convinced that the Common law was at least as amenable to a classification in terms of events as Civilian legal systems.[20] Today, his writing on the subject provides something like a 'common frame of reference' for an ever increasing number of Common lawyers throughout the world.[21] This book avowedly adopts Birks' scheme as the basic framework of the 'system' of English private law. It is hence premised on the assumption that rights – whether personal or proprietary – are generated by events, the three nominate categories of events being 'consent', 'wrongs' and 'unjust enrichment'.[22]

Finally, a word on what the book is not intended to do. Traditional functionalism envisages an evaluative stage after the process of description and comparison has been completed. The comparative lawyer is encouraged to

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[17] On the history of the forms of action see JH Baker, *An Introduction to English Legal History* (4th edn Butterworths, London 2002) 53–70.

[18] Cf eg T Weir, "The Common Law System" in R David (gen ed), *International Encyclopedia of Comparative Law, vol 2: The Legal Systems of the World, ch 2: Structure and Divisions of the Law* (Mohr Siebeck, Tübingen 1974) 77, 77–80 ([2–82]–[2–86]).

[19] G Woodbine (ed) and S Thorne (tr), *De Legibus et Consuetudinibus Angliae: Bracton on the Laws and Customs of England* (Harvard University Press, Cambridge/Mass 1968–77); W Blackstone, *Commentaries on the Laws of England: vols 1–4* (Clarendon Press, Oxford 1765–69), reprinted in facsimile by the University of Chicago Press (Chicago 1979).

[20] Esp P Birks, "Definition and Division: A Meditation on *Institutes* 3.13" in P Birks (ed), *The Classification of Obligations* (Clarendon Press, Oxford 1997) 1; P Birks, "Rights, Wrongs, and Remedies" (2000) 20 OJLS 1. On the advantages of having a taxonomy see also E McKendrick, "Taxonomy: Does It Matter?" in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP, Cambridge 2002) 627.

[21] See eg A Burrows (ed), *English Private Law* (2nd edn OUP, Oxford 2007) esp xxix–xxxiii (Burrows); J Edelman and E Bant, *Unjust Enrichment in Australia* (OUP, Sydney 2006) esp 1–14; M McInnes, "Taxonomic Lessons for the Supreme Court of Canada" in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart, Oxford 2008) 77, esp 79–91; and many of the contributions in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, Oxford 2006).

[22] A fourth, ragbag category encompasses 'miscellaneous other events'.