The Impact of *TFL Management v Lloyds Bank* and *Relfo v Varsani* on Requirements of Enrichment and "At the Claimant's Expense"[1]

I. Introduction

1. Under the seminal House of Lords decision of *Banque Financiere de la Cite v Parc (Battersea)*, a claimant can make a claim in unjust enrichment if the following elements are shown:[2]

   a. The defendant has been enriched;

   b. The enrichment was at the claimant's expense;

   c. The enrichment was unjust; and

   d. There are no defences.

   The above will be called the "***Battersea* framework**".

2. Under the *Battersea* framework, it has been accepted that the claimant must establish that there is a connection or nexus between the (a) receipt of an enrichment by the defendant and (b) the claimant's loss, so as to justify the unjust enrichment claim against the defendant.[3] However, the question of whether the defendant has been enriched or the enrichment was at the claimant's expense, is complicated, especially where it appears the enrichment was no more than an incidental benefit, or the defendant has received the enrichment only indirectly from the claimant.

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[2] *Banque Financiere de la Cite v Parc (Battersea)* [1999] AC 221 ("***Battersea***") at 227.

[3] Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ("**Virgo**"), at p 104. See also *Chase Manhattan NA v Israel British Bank (London) Ltd* [1981] Ch 105, at 125; *Battersea*, *supra* n 2, at 237.

3. Additionally, with regard to the latter, where a claimant acts primarily out of his own self-interest and only unintentionally or incidentally benefits the defendant, the "at the claimant's expense" requirement is unfulfilled.[4] This requirement is also not satisfied where the defendant has received the enrichment only indirectly.[5]

4. These principles were the subject of recent English Court of Appeal ("**EWCA**") decisions: *TFL Management v Lloyds Bank* ("***TFL***"),[6] which discussed the situation of incidental benefits (which we term the "bar on incidental benefits"), and *Relfo v Varsani* ("***Relfo***"),[7] which discussed the situation where the defendant has indirectly received enrichment (which we term the "bar on indirect enrichment"). This paper will examine how these decisions have contributed to our understanding of the "enrichment" and "at the claimant's expense" requirements under the *Battersea* framework. It is argued that the decisions to reject a strict application of the bar on incidental benefits and indirect enrichments in *TFL* and *Relfo*, respectively, are positive developments in the law of unjust enrichment, as both these assumptions lack a coherent rationale justifying their existence as well as firm grounding in case law.

II. *TFL*

A. Material facts and summary of holding

[4] Charles Mitchell *et al*, *Goff & Jones on the Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("***Goff & Jones***") at p 105.
[5] Virgo, *supra* n 3, at p 105; Burrows, *Restatement*, *supra* n 42, at p 48.
[6] *TFL Management v Lloyds Bank* [2014] 1 WLR 2006 ("***TFL***")
[7] *Relfo v Varsani* [2014] EWCA Civ 360 ("***Relfo***").

5. In *Explora Group Plc v Hesco Bastion Ltd*, the EWCA held that a debt which Explora had sought to recover from Hesco was actually owed to Lloyds Bank, which was a non-party to the action.[8] Lloyds Bank subsequently relied on the judgment to recover the debt from Hesco.[9] Explora's rights were subsequently assigned to TFL.[10] TFL then brought the present claim, arguing that Lloyds Bank had been unjustly enriched at Explora's expense.[11] TFL's central argument was that Explora had incurred legal costs which conferred a valuable benefit on Lloyds Bank as a result of Explora's mistaken belief as to whom Hesco's debt was owed to.[12]

6. Since the dispute was at a pre-trial stage, the EWCA had to determine whether TFL's claim in unjust enrichment had any prospect of success.[13] While the Court declined to grant summary judgment in favour of Lloyds Bank, it found that the Bank had powerful arguments in defeating the claim.[14] The Court also concluded that the bar on incidental benefits was unsupported by authority and a clear conceptual basis.[15] The Court noted that where the benefit obtained by the defendant was incidental, there would be difficulty in establishing the elements of the *Battersea* framework.[16] Specifically, it would be difficult for TFL to show that Lloyds Bank had been enriched since all that the judgment had done was to procure a declaration that the Bank had a right to be paid the debt.[17]

[8] *Explora Group Plc v Hesco Bastion Ltd & Anor* [2005] EWCA Civ 646.
[9] *TFL*, *supra* n 6, at [9].
[10] *Id*, at [3].
[11] *Id*, at [12].
[12] *Id*, at [19]–[20].
[13] *Id*, at [26].
[14] *Id*, at [64] & [89].
[15] *TFL*, *supra* n 6, at [28]–[34].
[16] *Id*, at [64].
[17] Virgo, *supra* n 3, at p 115.

B. Contribution to the requirement of enrichment

7. In discussing the bar on incidental benefits, dissenting judge Sir Stanley Burton found that TFL was unable to "identify with precision" what type of legal costs it had saved on.[18] In contrast, Floyd L.J. found it "commercially unrealistic" to suppose that the rightful payee of Hesco's debt did not benefit from the EWCA judgment brought about by Explora's actions.[19]

8. Sir Stanley Burton also noted that even if the identifiable benefit was the savings in legal expenses, this could not have enriched Lloyds Bank because it would have been able to recover it from Hesco had Lloyds Bank pursued the case on its own and likely won.[20] The majority however did not take issue with the parameters of exact savings since the question was whether a summary judgment dismissing the entire action was warranted.[21]

[18] *Id*, at [47].
[19] *Id*, at [50].
[20] Since Explora lost the action against Hesco, it would not have been able to recover legal costs to the same degree as Lloyds Bank would have, since the latter, as the rightful payee of the debt in question, would have won the action against Hesco; *Id*, at [73].
[21] *Id*, at [50].

C. Contribution to the requirement that the enrichment must have been at the claimant's expense

9. To understand the rationale of the EWCA's decision in eschewing the bar on incidental benefits in favour of a fact-specific analysis in applying the four elements of the *Battersea* framework, the following will be analysed in turn:

   a. The bar on incidental benefits prior to *TFL*;

   b. How *TFL* dealt with the bar on incidental benefits; and

   c. Whether *TFL*'s treatment of the bar on incidental benefits is desirable.

(1) The bar on incidental benefits prior to TFL

10. As stated earlier, the bar on incidental benefits precludes recovery in a claim in unjust enrichment.[22] The bar on incidental benefits maintains that where a claimant acts primarily out of his own self-interest, and unintentionally benefits the defendant, the "at the claimant's expense" requirement is unfulfilled.[23]

[22] See [2] above.
[23] Charles Mitchell *et al*, *Goff & Jones on the Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) ("***Goff & Jones***") at p 105.

11. The rationales explicating the bar on incidental benefits include the non-exclusive entitlement of some benefits,[24] the abandonment of benefits,[25] and a presumption that claimants acting in their self-interest must have known their actions would incidentally benefit others.[26] However, no clear principle undergirds these different conceptualisations.[27] Without a unifying rationale, a free-standing assumption like the bar on incidental benefits initiates a further inquiry into the meaning of terms like "incidental" and "self-interest", further cluttering the landscape of unjust enrichment.[28] For instance, where benefits are recovered on the grounds of mistake or undue influence, they are still "incidental" insofar as they were unintentionally conferred.[29]

12. Further, a claimant is considered to be acting in his "self-interest" when he repairs a car he believes to be his or where he pays money in the mistaken belief that it is owed.[30] The former situation arose in *Greenwood v Bennett* ("***Greenwood***") where Lord Denning M.R. allowed recovery for repair works done by a garage mechanic who genuinely thought he had title to a car when, in fact, it belonged to the defendant.[31] Lord Denning recognised the

[24] *Edinburgh and District Tramways v Courtenay* (1908) S.C. 99; See Robert Chambers *et al*, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) at pp 335, 346–351, where he also explains two tort cases on the same basis. See also Andrew Burrows & Alan Rodger, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) at p 356, where they argue that no liability arises for heat escaping from a flat because it "is not attributed to the owner of the flat or to the person generating it; it belongs to no one".

[25] Eli Ball, "Abandonment and the Problem of Incidental Gains in the Law of Restitution of Unjust Enrichment" [2011] R.L.R. 49 at 67–69.

[26] It has been argued that in such instances, the claimant has intended a gift upon interested third parties; Peter Birks, *Unjust Enrichment* (Oxford University Press, 2005) ("**Birks**") at p 158. This view has been challenged on the basis that a gift is a transfer of a benefit with a positive donative intent, which is not present on the facts of such cases; *Goff & Jones*, *supra* n 23, at p 106.

[27] Andrew Trotter, "The Double Ceiling on Unjust Enrichment: Old Solutions for Old Problems" (2017) 76(1) C.L.J. 168 ("**Trotter**") at 186–187; Alvin See, "Restitution of Non-Gratuitously Conferred Benefit in Malaysia: A Case for Sowing the Unjust Enrichment Seed" (2016) 11(1) A.J.C.L. 141 ("**Alvin See**") at 150.

[28] Trotter, *id*, at 186.

[29] *Id*, at 187.

[30] *Ibid*.

[31] *Greenwood v Bennett* [1973] 1 QB 195.

unfairness in recovering the enrichment of an unwitting beneficiary — "one man cleans another's shoes. What can the other do but put them on?"— [32] but held it did not apply in situations where the person who does the work honestly believes himself to be the owner of a property.[33]

13. To fulfil the need for a coherent rationale to underpin the bar on incidental benefits, the bar has been justified by analogy to the hypothetical tenant with a heater in his ground flat ("**Tenant Hypothetical**").[34] In this example, X spends money heating his ground floor flat, causing the heat to rise and incidentally benefit Y in the flat above such that Y does not need to turn on his own heating, X would not be able to claim restitution from Y.[35] However, the analogy fails to mask the absence of a uniform rule that justifies the end result. For instance, Birks justifies the result in the Tenant Hypothetical on the basis of a gift,[36] while Virgo states there is no obvious ground of restitution for X to rely on.[37]

14. In light of the ambiguities inherent in terms like "incidental" and "self-interest", which are used to justify a free-standing bar on incidental benefits, it might be better to rationalise cases where recovery has failed on the failure to meet certain *Battersea* requirements,[38] such as transfer of value,[39] corresponding loss,[40] or an unjust factor.[41]

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[32] *Taylor v Laird* (1856) 25 L.J. Ex 329 at 332.
[33] *Greenwood v Bennett* [1973] 1 Q.B. 195 at 202.
[34] Birks, *supra* n 26, at p 158.
[35] *Ibid*.
[36] See [11] of this Paper and the accompanying text.
[37] *Ibid*.
[38] For a full discussion of such cases, see Trotter, *supra* n 27, at 189–194.
[39] Andrew Burrows, *The Law of Restitution* (Oxford University Press, 2011) at p 64; Frederick Wilmot-Smith, "Taxing Questions" (2015) 13 L.Q.R. 531 at 534.
[40] *Shilliday v Smith* (1998) S.C. 725 ("***Shilliday***") at 731 (US).
[41] Daniel Friedmann, "Unjust Enrichment, Pursuance of Self Interest, and the Limits of Free-Riding" (2003) 36 Loy.L.A.L.Rev. 831 at 845–851.

15. The bar's grounding in authority is also highly unclear.[42] The oft-cited authority in support of the existence of the bar on incidental benefits is *The Ruabon Steamship Company v The London Assurance* ("***Ruabon Steamship***") where Lord Halsbury L.C. held that the law does not require a contribution to be paid where "there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no conduct between then".[43] However, since this decision long predated the modern law of unjust enrichment, the claimant's position might have been different had they proceeded under the *Battersea* framework and showed that the accrual of an incidental benefit *in and of itself* was not the basis for the claim.[44]

(2) How *TFL* dealt with the bar on incidental benefits

16. Floyd L.J. noted the Court was not compelled to recognise the bar on incidental benefits as a matter of authority.[45] He distinguished *The Ruabon Steamship* on the basis that the claimant there had relied on an unsustainably wide principle where recovery was owed solely due to a causal link between an insurer's costs and a shipowner's savings, thereby echoing the earlier-mentioned view that counsel's arguments would have been different under the *Battersea* framework.[46] He also disregarded the defendant's reliance on *Becerra*

[42] Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) ("***Restatement***") at p 54.
[43] *The Ruabon Steamship Company v The London Assurance* [1900] AC 6 ("***Ruabon Steamship***") at 12.
[44] Adam Kramer and Adrian Beltrami, "A Note on Incidental Benefit and Multi-Party Situations" (2013) 21 R.L.R. 46 ("**Kramer and Beltrami**") at 51.
[45] *TFL*, *supra* n 6, at [28].
[46] *TFL*, *supra* n 6, at [8] & [39]. See also [15] of this Paper.

v Close Bros Corporate Finance[47] because that decision involved a concession by the claimant that he was acting in his own self-interest to justify the operation of the bar on incidental benefits.[48]

17. Floyd L.J. also dismissed the argument that recovery should only be allowed where the accrual of a benefit was identical to the claimant's principal intended consequence.[49] He held this would be inconsistent with *Greenwood* where the principal intended consequence by the garage mechanic would be to benefit himself and not the true owner of the car, and yet, recovery was allowed.[50] Echoing the same concern of precedent consistency, Beatson L.J. stated that if the bar on incidental benefits were to be maintained, it would alter the result in the core case of *Kelly v Solari*,[51] since it would mean that a claimant who acted in his own interest to discharge a debt he mistakenly believed he owed would not be able to recover it.[52]

18. Floyd L.J. also noted the differing conceptual justifications for the bar.[53] Given the divergent rationales proffered for the existence of the bar on incidental benefits, he found it more prudent to regard incidental benefits as encompassing a variety of cases which

[47] *Becerra v Close Bros Corporate Finance* (unreported) (25 June 1999) (QB) ("***Becerra***").
[48] *TFL*, *supra* n 6, at [41]; Kramer and Beltrami, *supra* n 44, 51–52; Virgo, *supra* n 3, at 24. Further, while Floyd L.J. did not discuss this, the Court in *Becerra* made it clear that their discomfort was with a defendant being required to make restitution "in every case where a plaintiff had conferred the benefit whilst acting in his own self-interest" but hesitated from endorsing a general bar to such benefits as they acknowledged there might be "exceptional circumstances in which a person whose acted without a request, but whose own interests were subservient, might be entitled to make a restitutionary claim"; *Becerra*, *ibid*.
[49] *TFL*, *supra* n 6, at [44].
[50] *TFL*, *supra* n 6, at [44].
[51] *Kelly v Solari* (1841) 152 ER 24. This decision has been regarded as one of the earliest restitution cases, holding that the mistaken payment of funds to a widow must be returned.
[52] *TFL*, *supra* n 6, at [85].
[53] *Id*, at [30]–[36].

might be better explained by reference to the *Battersea* framework, rather than to formulate a general exception based on the characterization of the benefit alone.[54] In this connection, Floyd L.J. deemed the bar on incidental benefits as assuming a negative response to the "at the claimant's expense" question posed in *Battersea*.[55] He preferred a fact-specific approach which inquired into "whether the other ingredients of a cause of action in restitution are present".[56] Responding to the Tenant Hypothetical, Floyd L.J. stated that while there would be no restitutionary claim in the example, the result stemmed not from the bar on incidental benefits but because the heating of the flat was simply "the entirely foreseeable consequence of heating the flat below" such that the owner of the lower flat "must be taken to have accepted this as an inevitable consequence of turning on her own heating".[57]

19. While the Court found that the bar on incidental benefits was not clearly grounded in authority or rationale, and would be better subsumed under the *Battersea* framework, it did not embrace all types of incidental benefits.[58] The Court held it would be difficult to establish that Lloyds Bank was enriched because all the judgment obtained by Explora did was to declare that Lloyds bank had a right; it did not create the right in the first place.[59] The only possible enrichment that Lloyds Bank could be said to have enjoyed was savings in legal expenses in not having to bring the claim in the first place.[60] However, the Court noted that even if Lloyds Bank had commenced proceedings, it would presumably have

[54] *Id*, at [37].
[55] *Id*, at [32].
[56] *Id*, at [45].
[57] *Id*, at [36].
[58] *TFL*, *supra* n 6, at [47] & [75].
[59] *Ibid*.
[60] *Id*, at [47].

been able to recover its costs from Hesco.[61] Thus, while the Court found there was an arguable case for TFL to justify the case proceeding to trial, the Court did not deny the difficulty with TFL's position.[62]

(3) *The desirability of* TFL

20. Since the bar on incidental benefits lacks a coherent rationale justifying its existence as well as firm grounding in case law,[63] its rejection is to be welcomed. The Court in *TFL* acknowledged that as a matter of precedent and principle, the bar on incidental benefits is not well-supported and it would be more prudent to analyse every instance of an incidental benefit pursuant to the *Battersea* framework.

21. However, the UK Supreme Court ("**UKSC**") criticised *TFL* in *HMRC v Investment Trust Companies* ("***ITC (SC)***").[64] Lord Reed rejected *TFL*, stating that the EWCA would not have reached the same conclusion if, at the inquiry on the "at the claimant's expense" requirement, it had focused on the need to identify a transfer of value from the claimant to the defendant.[65] However, as explained above,[66] the Court in *TFL* was not advocating for a blanket acceptance of incidental benefits but rather advocating for a fact-specific

[61] *Id*, at [50].
[62] *Id*, at [65] & [89].
[63] See [11]–[15] of this Paper. See also Alvin See, *supra* n 27, at 150.
[64] *HMRC v Investment Trust Companies* [2017] UKSC 29 ("***ITC (SC)***").
[65] *Id*, at [57]. See also Andrew Burrows, "Narrowing the Scope of Unjust Enrichment" (2017) 133 L.Q.R. 537 at 540. The UKSC also found that where one party received the legal serves it had bargained for when it incurred the expense, it had voluntarily assumed the risk inherent in litigation that it might have to also meet another party's costs, finding support in dated Scottish writings; see David Hume, *Lecutres, 1786–1822, Volume 3* (Stair Society, 1952) at p 167; John Schank More, *Notes to Stair's Institutions* (Mowbray Publishing, 1832) at p 54.
[66] See [19] of this Paper.

examination pursuant to the *Battersea* framework to determine whether recovery should be allowed. As detailed earlier,[67] it is not simply the "incidental" nature of certain benefits that bars recovery but the fact that these benefits fail to meet one or more *Battersea* requirements. Thus, it is better to eschew terminology like "incidental benefits" and approach every instance of enrichment with reference to the *Battersea* framework.

III. *Relfo*

A. Material facts and holding

22. *Relfo* concerned a claim by a liquidator seeking to recover funds which had been transferred from an insolvent company, Relfo, to the defendant, Mr Varsani, through a series of intermediate transactions conducted by Relfo's errant director, Mr Gorecia.[68] The liquidator of Relfo claimed against Mr Varsani for the recovery of the value of the funds received by him, arguing, *inter alia*, that Mr Varsani had been unjustly enriched by receipt of the funds at the expense of Relfo.[69]

23. Having found for Relfo on its knowing receipt claim, the Court further affirmed that even if the funds could not be traced, thereby precluding the aforementioned claim, Relfo's claim in unjust enrichment would nevertheless succeed.[70] Crucially, the Court looked at

[67] See [11]–[14] of this Paper.
[68] *Relfo*, *supra* n 7, [6]–[11].
[69] *Relfo*, *supra* n 7, at [2] & [26]. The liquidator of Relfo's primary positions were, first, that Relfo had a superior title in equity to the funds, and in the alternative, that Varsani was a constructive trustee of the funds. The claim in unjust enrichment was a further alternative, in the event that tracing was not present to establish the first two claims.
[70] *Id*, at [69], [99], [103] & [105].

the substance of the transaction rather than its form,[71] and observed that the "at the claimant's expense" requirement was fulfilled,[72] notwithstanding Mr Varsani's indirect receipt of the funds from a third party.[73]

B. Contribution to the "at the claimant's expense" requirement

24. To understand *Relfo*'s holding on how the economic reality of the situation could constitute a sufficiently close causal connection for the "at the claimant's expense" requirement, the following will be analysed in turn:

    a. The approach to indirect enrichment prior to *Relfo*;

    b. How *Relfo* dealt with indirect enrichment; and

    c. The desirability of *Relfo*'s treatment of indirect enrichment.

(1) *The approach to indirect enrichment prior to* Relfo

25. It is uncontroversial that the "at the claimant's expense" requirement is satisfied where the defendant has received the enrichment directly from the claimant.[74] The "direct" nature of this enrichment means that only one claimant and one defendant can be parties to a defective transfer of value.[75] This is to prevent claimants from leapfrogging over an

[71] *Id*, at [97] & [121].
[72] *Id*, at [69].
[73] *Id*, at [69].
[74] Virgo, *supra* n 3, at p 105; Burrows, *Restatement*, *supra* n 42, at p 48.
[75] Stephen Watterson, "'Direct Transfers' in the Law of Unjust Enrichment" (2011) 64(1) C.L.P. 435 at 442. This secondary or peripheral parties from the status of additional or alternative claimants or defendants.

immediate contractual counterparty to target a more distant defendant,[76] thereby ensuring greater transactional security for those involved in permissible activities.[77]

26. When it comes to indirect enrichment, there are circumstances where multiparty transactions are regarded as "legally equivalent to a transaction directly between the claimant and the defendant";[78] however, the scope of this exception has been the subject of rigorous scholarly and judicial debate.

27. Some scholars such as Birks have stated that all that is required to fulfil the "at the claimant's expense" requirement is the presence of a causal link between the claimant's payment and the defendant's enrichment.[79] However, such an approach has been consistently rejected by English courts for being unsustainably wide.[80]

28. Conversely, scholars such as Burrows advocate a restrictive interpretation of exceptions. This is seen in the *Restatement on the English Law of Unjust Enrichment* ("***Restatement***") which is regarded as a "personal, but authoritative account" on the common law principles of unjust enrichment.[81] The non-exhaustive exceptions listed therein are largely premised on the claimant being able to identify a proprietary interest in the enrichment transferred

[76] Virgo, *supra* n 3, at p 105; *MacDonald Dickens and Macklin v Costello* [2011] EWCA Civ 930 at [20].
[77] Andrew Tetternborn, "Lawful Receipt – A Justifying Factor?" (1997) 5 R.L.R. 1 at 7; *Goff & Jones*, *supra* n 23, at p 153.
[78] *ITC (SC)*, *supra* n 64, at [48].
[79] Birks, *supra* n 26, at pp 89–98.
[80] *Goff & Jones*, *supra* n 23, at p 161; Virgo, *supra* n 3, at p 107; *Investment Trust Companies v HMRC* [2012] EWHC 458 ("***ITC (HC)***") at [67].
[81] Kit Barker, "Centripedal Force: The Law of Unjust Enrichment Restated in England and Wales" (2014) 34(1) O.J.L.S. 155 at 178–179.

from the third party to the defendant.[82] However, this interpretation of exceptions does not explain the coordinated transactions which the law regards as forming a single scheme for the purposes of the "at the claimant's expense" requirement.[83]

29. A framework to identify possible exceptions to the bar on indirect enrichment, building off the *Restatement*, was proposed by Henderson J and approved by the EWCA in *Investment Trust Companies v HMRC* ("***ITC (HC)***"). The learned judge held that in formulating exceptions to the bar on indirect enrichment, relevant considerations include the need for a "close causal connection between the payment by the claimant and the enrichment of the indirect recipient".[84] While this approach begs the question of what constitutes a sufficiently close connection,[85] it does not prematurely foreclose exceptions in the absence of finding a proprietary link.

(2) How Relfo *dealt with indirect enrichment*

30. The EWCA first noted that courts have not rigidly observed the bar on indirect enrichment as exceptions have been recognised,[86] and that Henderson J's approach provided guidance

[82] Burrows, *Restatement*, *supra* n 42, at pp 7–8, 49–52, where the learned author characterises the various exceptions as being premised on *inter alia* title, trust, agency, and subrogation. The Singapore Court of Appeal in *Anna Wee* analysed exceptions to the Direct Providers Rule in similar terms, stating such exceptions were premised on a "proprietary link" and the need for the claimant to prove she had "lost a benefit to which she is legally entitled or which forms part of her assets"; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [126] & [128]. The purpose of mandating a proprietary link is to "limit the substitution of new property or rights for the property which leaves the claimant's hands"; *Relfo*, *supra* n 7, at [78].
[83] *ITC (SC)*, *supra* n 64, at [61].
[84] *ITC (HC)*, *supra*, n 80, at [68].
[85] *Goff & Jones*, *supra* n 23, at p 163.
[86] *Relfo*, *supra* n 7, at [113].

to the courts in formulating these exceptions.[87] The Court then looked to the substance rather than form of the transaction and found that there was a sufficiently close causal connection between Varsani's enrichment and Relfo, such that this enrichment could be considered to be at Relfo's expense.[88] For instance, Arden LJ looked to the "substance" and "economic reality" and found that Mr Gorecia's objective was to confer a benefit on Varsani by a circuitous route.[89] Further, Floyd J held that the "intervening and meaningless arrangements orchestrated by Mr Gorecia … could not change what would otherwise have been a direct payment into one which the law will not recognise as sufficiently proximate".[90] Thus, while not explicit, it seems that the Court considered the concept of "economic reality", which is established via looking at the substance of the transaction, as a possible way to show a close causal connection.

31. Notably, Arden LJ suggested that the law was moving towards the recognition of a "general principle" in favour of indirect enrichment.[91] Under this general principle, rather than having to bring the case within the exceptions to the bar on indirect enrichment,[92] the claimant simply has to show that there was a "sufficient link between the … transaction whereby the claimant conferred a benefit on the direct recipient and the transaction under which the defendant obtained a benefit".[93] However, it is unclear whether Arden LJ's test of a "sufficient link" differs from Henderson J's criteria of a "close causal connection",[94]

[87] *Id*, at [82].
[88] *Id*, at [77] & [122].
[89] *Id*, at [97].
[90] *Id*, at [122].
[91] *Id*, [95]–[96].
[92] *Id*, at [88].
[93] *Relfo*, *supra* n 7, at [95].
[94] See [29] of this Paper.

especially since she made reference to Henderson J's criteria, stating that it "[would] no doubt be of assistance".[95]

32. Despite the apparent similarity between both approaches, they differ in at least two aspects. First, the starting point of the approaches differ. Under Arden LJ's approach, indirect enrichment claims are generally allowed if there is a "sufficient link" between the enrichment and the claimant.[96] In contrast, under Henderson J's approach which adopts a "general requirement of direct enrichment",[97] such claims are generally disallowed. Secondly, recovery under Henderson J's approach is stricter. Apart from requiring a "close causal connection",[98] Henderson J lays out other criteria that may serve negatively to explain why even if such a connection exists the claim should be refused or limited.[99] One such criterion is the need to prevent double recovery.[100] Therefore, it seems that under Arden LJ's approach, there is nothing inherently objectionable with allowing recovery for indirect enrichment, while Henderson J remains more cautious in approaching the matter.

33. Unlike Arden LJ, Floyd and Gloster LLJ were reluctant to lay down any general rule.[101] They noted that *Relfo* was not a suitable case to do so since it was a clear case that had the requisite causal link to justify a claim in unjust enrichment.[102] Any analysis of precisely how much liberalisation of the general rule of direct enrichment, or how much tightening

[95] *Relfo*, *supra* n 7, at [96].
[96] *Id*, at [95].
[97] *ITC (HC)*, *supra* n 80, at [67].
[98] See [29] of this Paper.
[99] *Goff & Jones*, *supra* n 23, at p 165.
[100] *ITC (HC)*, *supra* n 80, at [68].
[101] *Relfo*, *supra* n 7, at [115].
[102] *Id*, at [104].

of the "but for" test will ultimately prove to be appropriate would be better left to subsequent decisions.[103]

34. Since the EWCA was tentative in its remarks, it remains to be seen what the preferred interpretation of the "at the claimant's expense" requirement is in the context of indirect enrichment, and where "economic reality" fits into the framework.

(3) *The desirability of* Relfo

35. *Relfo* is desirable primarily because it has provided clarity to the proper approach to identifying recovery in indirect enrichment cases, that is, by looking to the substance of the situation to determine whether the "at the claimant's expense" requirement is fulfilled. This is especially so when considered in light of the other English appellate court decisions subsequent to *Relfo*.

36. Further, this approach is consistent with precedent. In *Battersea* itself,[104] the House of Lords held that the interposition of a director in a loan arrangement was "no more than a formal act to allow the transaction to proceed".[105] That would not "prevent recognition of the reality" which was that the defendant had been enriched at the claimant's expense.[106] Thus, *Relfo* is desirable because it sits well with past cases which also looked to the substance and reality of the situation.

[103] *Id*, at [115].
[104] *Battersea*, *supra* n 2.
[105] *Battersea*, *supra* n 2, at 227.
[106] *Id*, at 238.

37. Following *Relfo*, the "at the claimant's expense" requirement in the context of indirect enrichment received exceptional judicial scrutiny.[107] Preliminarily, the UKSC in *ITC (SC)* affirmed that *Relfo* was correctly decided on its facts.[108] Significantly, the UKSC affirmed looking to the substance of transactions as a possible way to establish "close causal connection" under Henderson J's approach.[109] In *Bank of Cyprus v Menelaou* ("***Menelaou (SC)***"),[110] Lord Clarke applied Henderson J's approach and found that on the facts,[111] even though there were two separate transactions, the "reality of the transaction" was that the bank had agreed to release its charge over the first property only in return for a charge over the new property.[112] It was also on that basis that Lord Neuberger treated the two transactions as "a single composite transaction".[113] Thus, the common thread running through *Relfo* and *Menelaou (SC)* is the continuing application of Henderson J's approach, and the recognition that the reality of the situation is one way to fulfil the "close causal connection" contained therein.

38. Nevertheless, *Relfo* presents at least two difficulties. First, while the economic reality approach is attractive, it has been criticised for being a "somewhat fuzzy concept" which may mask unarticulated judicial reasoning.[114] Judicial references to "economic reality"

[107] *Goff & Jones*, *supra* n 23, at p 154.
[108] *ITC (SC)*, *supra* n 64, at [48].
[109] *Id*, at [62].
[110] *Bank of Cyprus v Menelaou* [2015] UKSC 66 ("***Menelaou (SC)***").
[111] *Id*, at [31]–[32].
[112] *Id*, at [33].
[113] *Id*, at [67].
[114] *Menelaou v Bank of Cyprus Plc* [2013] EWCA Civ 1960, at [62]. See also Eli Ball, *Enrichment at the Claimant's Expense: Attribution Rules in Unjust Enrichment* (Hart Publishing, 2016) at p 132.

remain "unhelpfully amorphous".[115] Virgo and *Goff & Jones* have suggested looking at the intention of the parties involved.[116] If at the outset, it is intended that money which is paid from the claimant to the third party is to be paid on to the defendant, it is appropriate to treat the defendant as having been enriched at the claimant's expense.[117] This was seen in *Relfo*, where it was intended from the start that money would be transferred from the claimant to the defendant via a complex corporate structure.[118]

39. However, this approach has limitations. The intentions of the parties may not always be a good determinant of the economic reality of the case. For instance, in *ITC (SC)*, even though claimants and managers intended that at least some of the tax which the claimants paid to the managers was to be paid on to the Commissioner,[119] the UKSC found that the Commissioner had not been enriched at the claimants' expense.[120] The UKSC arrived at this outcome on a number of considerations,[121] such as the absence of tracing of the payments made by the claimants into the payments subsequently made by the managers to the Commissioner.[122] Thus, the uncertainty surrounding the ascertainment of economic reality persists, notwithstanding the commentators' proposed solution.

40. Secondly, *ITC (SC)* has cast doubt on the appropriate characterisation of *Relfo* as well as the meaning of "economic reality". Even though Lord Reed affirmed that *Relfo* had been

[115] *Goff & Jones*, *supra* n 23, at p 164.
[116] *Ibid*; *Shilliday*, *supra* n 40, at 743; Virgo, *supra* n 3, at p 109.
[117] Virgo, *supra* n 3, at p 109.
[118] *Ibid*.
[119] *ITC (SC)*, *supra* n 64, at [4] & [5].
[120] *Id*, [70]–[71].
[121] *Id*, at [72].
[121] *Id*, at [71].
[122] *Id*, at [72].

correctly decided on its facts insofar as the EWCA rightly concluded that Varsani's enrichment was at the claimant's expense, he preferred to characterise *Relfo* as a case where "an intervening transaction [was] found to be a sham".[123] Economic reality, as understood by Lord Reed, entailed "[a]n inquiry into where the economic burden of an unjust enrichment has fallen".[124] This is different from the way the EWCA in *Relfo* conceived of economic reality: the EWCA looked to the substance of the transaction to ascertain the economic reality of the case.[125]

41. Lord Reed further alluded to the concept of coordinated transactions, which the court has treated as "forming a single scheme or transaction, on the basis that … considering each of the individual transactions separately would be unrealistic".[126] He characterised *Battersea* and *Menelaou (SC)*, and not *Relfo*, as falling within this category, notwithstanding that these cases all looked at the substance and the reality of the circumstances. While it remains to be seen whether subsequent cases will adopt Lord Reed's finer categories of indirect enrichment cases, it is argued that it would be wise to do away with the label "economic reality" as understood in *Relfo,* to minimise confusion arising out of the different conceptions of "reality".

[123] *ITC (SC)*, *supra* n 64, at [48].
[124] *Id*, at [59].
[125] *Relfo*, *supra* n 7, at [97].
[126] *ITC (SC)*, *supra* n 64, at [61].

IV. Conclusion

42. Principles like the bar on incidental benefits and the bar on indirect enrichment are not altogether unwarranted as there are scenarios where recovery should be precluded under these terms. Alleging unjust enrichment where there is no unjust factor is the type of scenario the bar on incidental benefits was meant to target, while claiming a causal connection through a series of disparate and distinct transactions engages the bar on indirect enrichment. However, *TFL* and *Relfo* show these presumptions may not accord with precedent, principle, or practicality. The preferred approach would be to adopt a fact-specific inquiry pursuant to the *Battersea* framework, to determine if requirements like "enrichment" or "at the claimant's expense" are fulfilled in a particular case.