

Payment of Another's Debts;
*Can Unjust Enrichment Provide the
Solution?*

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Introduction:

Bowen LJ in *Falcke v Scottish Imperial Insurance Co*¹ (*Falcke*) infamously stated that; “liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will.”² This statement represents the reluctance in our common law to impose obligations upon a person who has not requested or consented to the incurring of that obligation. This thesis involves the tension that occurs in the law when this reluctance is met with other policy considerations in favour of such an imposition. Focussing on the area of payment of another’s debts, when should an obligation to repay the intervener be imposed on the debtor?

Since the decision of *Falcke* the area of the law known as unjust enrichment has developed.³ Unjust enrichment accommodates exceptional situations in which we are comfortable to impose obligations. The underlying principle presupposes three things; (i) the conferral of a benefit (or enrichment) upon the defendant; (ii) which is at the expense of the plaintiff seeking recovery; and (iii) the otherwise unjust retention of the benefit by the defendant.

The classic example of an unjust enrichment claim is the mistaken payment. When mistaken payment occurs, the law will require the recipient to repay the money received. Typically a bank will transfer the money, being merely be a conduit for the payment their involvement will be secondary. I refer to these situations as “two party claims”. Despite allowing a claim for the return of the mistaken payment, it is only recently the type of mistake necessary to ground recovery was extended.⁴ Provided the payment was made

¹ *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234.

² At 248 per Bowen LJ.

³ See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 578 per Lord Goff. “The solicitors' claim in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors.” See also Goff and Jones *The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [1-001] – [1-029]. [Unjust enrichment]

⁴ *Barclays Bank v W. J. Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695. Goff J extended the type of mistake necessary to ground recovery to mistakes that had “caused” payment.

under a mistake, which caused the payment, the law has no difficulty concluding the recipient was enriched, at the payer's expense.⁵

This thesis involves another situation involving a mistaken payment, payment of another's debt. In a banking example, the bank may mistakenly believe it has been instructed to make a payment, or may have overlooked their customer's instructions not to and thus made an unauthorised payment. I refer to these situations as "three party claims" or "payment of another's debt". This area of the law is problematic, raising the associated issue of whether the payment can operate to discharge the debt owed to the recipient. There are three interests involved; the intervening payer, debtor and the creditor and the common law ("mainstream cases") has typically favoured the debtor, not forcing an obligation to repay the intervening payer. Prominent unjust enrichment theorists purporting to explain this result agree with a denial of recovery to the payer.

Unjust enrichment theorists explain this denial with the so-called argument of subjective devaluation. Professor Peter Birks argued that apart from two party cases, enrichment is a subjective concept.⁶ Applied to three party claims it suggests that unless the customer has requested or ratified the payment, the customer is not enriched as the debt is not legally discharged. The argument of subjective devaluation and its importance within the unjust enrichment theory is discussed in Chapter One. Chapter One also discusses the impetus for this thesis, the approach offered by Lord Reed to an unjust enrichment claim in the recent Supreme Court decision of *Benedetti v Sawaris*⁷ (*Benedetti*).

Lord Reed questions the theory of subjective devaluation, proposing that the law is better analysed through an objective test of enrichment coupled with explicit considerations of policy factors to determine whether or not to impose an obligation to repay.⁸ Shifting the focus away from subjective enrichment to objective enrichment and a consideration of policy allows a clear formulation of when the law will impose an obligation to repay upon the debtor.

⁵ Usually the argument in two party claims centres around whether the recipient should have a defence to the claim, for example change of position.

⁶ See generally Peter Birks *An Introduction to the Law of Restitution* (revised ed, Oxford University Press, Oxford 1989) at Chapter V.

⁷ *Benedetti v Sawaris* [2013] 3 WLR 351.

⁸ At [118] per Lord Reed.

Chapter Two examines the “mainstream cases”. The success of the claim is dependent upon a request or subsequent ratification to pay the recipient. Currently, *Barclays Bank v W. J. Simms Son & Cooke (Southern) Ltd*⁹ (*Barclays*) is the leading case supporting this approach. Goff J holding that a debt will not be legally discharged without a request or ratification from the customer. In the absence of either of these requirements the claim can only be against the recipient of the payment.¹⁰

Chapter Three provides examples of cases that have endorsed an objective approach to the payment of another’s debts. It considers the policy reasons underlying the imposition of the obligation to repay on the debtor. Chapter Four utilises the approach from Lord Reed in *Benedetti* to determine some of the policy factors which have prevented or allowed the imposition of obligations. This is not an attempt to find that these cases have been incorrectly decided. Rather, it is an opportunity to highlight the true factors at play in each case to determine explicitly why in some situations the law will impose obligations, whilst in others it will not.

The classic illustration of a three party claim is, as stated above, when a bank mistakenly makes a payment to a recipient who is owed money by their customer. Chapter Five will consider this specific factual scenario and the implications of Lord Reed’s approach from *Benedetti* to such a claim. Can the ostensible authority of the bank in making the payments be enough to outweigh the need to protect a customer’s autonomy to pay their own debts?

Applying Lord Reed’s approach in *Benedetti* to the payment of another’s debt allows for an explicit consideration of the policy factors in each case. Currently the law is reluctant to impose obligations onto a debtor to repay the intervening payer in a three party claim. Unjust enrichment developed in the way proposed by Lord Reed would allow for a clear assessment by the court of the real reasons they are denying the imposition of an obligation. Perhaps this is an opportunity for at least one area of the law to be both clear in its analysis and satisfying in its practical consequences.¹¹

⁹ *Barclays Bank v W. J. Simms Son & Cooke (Southern) Ltd* [1980] QB 677.

¹⁰ At 689 per Goff J.

¹¹ *Mexfield Housing Ltd v Berrisford* [2012] 1 AC 955 per Lord Neuberger at [33]. The case involved a lease of property, but is only relevant for the phrase. Lord Neuberger stating “the law appeared clear in its effect, intellectually coherent in its analysis, and, in part, unsatisfactory in its practical

Chapter One: Unjust Enrichment:

A. An unjust enrichment claim:

A claim in unjust enrichment is made up of three key elements; an enrichment, that was at the plaintiff's expense and that this enrichment was unjust.¹² If these three elements are satisfied and the defendant has no defence available to him,¹³ the claim will succeed. When making a claim the "cornerstone" has been found to be the element of enrichment.¹⁴ What constitutes an enrichment is not as simple as it might appear at first sight.¹⁵

Enrichment:

As developed by Professor Birks current unjust enrichment theory draws a distinction between the receipt of money and the receipt of benefits in kind (for example the receipt of goods or the service of someone paying your debt).¹⁶ Birks reasons that "where the defendant received money, it will be impossible on all ordinary facts for him to argue that he was not enriched."¹⁷ This is because money is the "very measure of enrichment."¹⁸ In contrast, when establishing a benefit in kind, the identification of an enrichment is much more complex. Birks' reasoning for this is that "benefits in kind have value only so far as [the recipient] chooses to give them value."¹⁹ This is the argument of "subjective devaluation."²⁰

consequences." This thesis is hoping to develop an approach to third party payment of another's debt that can be both coherent in its analysis and practical in its consequence.

¹² Goff and Jones *Unjust Enrichment*, above n 3, at [1-09].

¹³ Such as the defence of change of position. See generally Goff and Jones *Unjust Enrichment*, above n 3, at [27-01].

¹⁴ Graham Virgo *The Principles of the Law of Restitution* (2nd ed, Oxford University Press, Oxford, 2006) at 62.

¹⁵ Andrew Burrows *The Law of Restitution* (3rd Ed, Oxford University Press, Oxford, 2011) at 44.

¹⁶ Peter Birks *An Introduction to the Law of Restitution* (revised ed, Oxford University Press, Oxford 1989) at 109. [An Introduction].

¹⁷ At 109.

¹⁸ At 109.

¹⁹ At 109.

²⁰ At 109.

Subjective devaluation:

Underlying subjective devaluation is the assumption that an individual's value of a service is not the same as the market value of that service.²¹ Accordingly "the fact that there is a market value in the good which is in question...is irrelevant."²² Subjective devaluation suggests that the outcome depends on the recipient's freedom to choose benefits;²³

"The argument of [subjective devaluation] derives its force from the need to protect people generally from the danger implicit in obligatory market valuation, namely that their choice will be dictated to them by their being made to pay for what they themselves do not value."

Birks suggests that the "basic orientation [of the English law towards subjective devaluation] is expressed in the wording of the old forms of action."²⁴ For example the action for money paid was appropriate for when money had been paid, not to the defendant, but to a third party, from which the defendant had derived a benefit. Historically, money paid was the appropriate form of action for a three party claim.²⁵ The claimant needed to show that the payment was requested, but on certain occasions the law was prepared to imply such a request.²⁶

Birks sees it as significant that the form of action for a receipt of a benefit in kind needed a request to be shown in the initial pleading.²⁷ This is contrary to the action of money had and received, where it was only necessary to show that the defendant had received the named sum. Birks finds that "as soon as the claim is for a non-money benefit received, the emphasis swings round to the defendant's freedom of choice."²⁸ Birks states this is "not

²¹ At 109.

²² At 109.

²³ Peter Birks "In Defence of Free Acceptance" in A.S Burrows (ed.) *Essays on the law of Restitution* (Oxford University Press, Oxford, 1991) at 128.

²⁴ Birks, *An Introduction*, above n 16, at 111.

²⁵ Goff and Jones *Unjust Enrichment*, above n 3, at [1-13].

²⁶ See generally *Falcke v Scottish Imperial Insurance Co*, above n 1, at 241. Per Cotton J that in appropriate cases a request "might be implied from slight circumstances". Some of these occasions include when the claimant had been compelled to make the payment, or in limited circumstances of emergency on the defendant's behalf.

²⁷ Birks *An Introduction*, above n 16, at 111.

²⁸ At 113.

an accident” and “represents intuitive deference to the argument from subjective devaluation.”²⁹

It must be remembered that these common counts which Birks sees as support for his theory are “ghost[s] of the past”.³⁰ They became based on fictions, the court in some situations would “imply” a request from the circumstances, thus the significance of a request may be hard to determine.³¹ Precluding the finding of an objective enrichment by reference to forms of actions developed in the sixteenth and seventeenth century creates unease. The law should be able to develop to reflect the practical consequences of the situation, thus it is submitted the theory of subjective devaluation is less than persuasive.

Exceptions to subjective devaluation

Birks does recognise exceptions to subjective devaluation. These are instances where it would be impossible for the defendant to argue he was not enriched. These exceptions are free acceptance, incontrovertible benefit, and others. Free acceptance occurs “where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept.”³² Incontrovertible benefit relies on the “no reasonable man test.”³³

The “others” category encompasses cases in which the courts took an objective approach to enrichment.³⁴ For example, *Greenwood v Bennett*³⁵ (*Greenwood*) which concerned a mistaken improver. Mr Bennet had entrusted his car to a rogue. The rogue crashed the car, selling the wreck to Mr Harper, who purchased it in good faith. Harper repaired the car. Subsequently, the police returned the car to Bennett, who sold it. Harper argued that

²⁹ At 113.

³⁰ *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29 per Lord Aitken.

³¹ Struan Scott “Restitution and the Argument of Subjective Devaluation: when is an enrichment not an enrichment?” (1993) 15 NZULR 246 at 260.

³² Birks, *An Introduction*, above n 16, at 114. Free acceptance occurs “where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept.” See also P Birks, *In Defence of Free Acceptance*, above n 23.

³³ Birks, *An Introduction*, above n 16 at 116. A distinction is drawn between “a straightforward objective standard of value” and a “no reasonable man test” the latter not being defeated by an argument of subjective devaluation. Birks explains that the “no reasonable man test is “to moderate the greater absurdities of the subjective approach.” “No reasonable man would say the defendant has not been enriched.”

³⁴ Birks, *An Introduction*, above n 16, at 124.

³⁵ *Greenwood v Bennett* [1972] 3 All ER 586.

although the car legally belonged to Bennett, he was entitled to reimbursement for the work he had done.³⁶ Despite no request by Bennett for the improvements, the Court of Appeal allowed Harper's claim. Lord Denning held that the plaintiff should not be unjustly enriched at the innocent improver's expense.³⁷ Birks acknowledges that in *Greenwood* the court found the benefit to be "obvious."³⁸ He argues however that the case does not reflect the significance of subjective devaluation. If all benefits were viewed as "obvious" the whole English law's orientation towards benefits in kind would change.³⁹

In *Greenwood* the court implicitly employs policy arguments to allow recovery for the mistaken improver. This can be seen through the judges noting that if the action had been in detinue or conversion Bennett would have had to repay Harper for the improvements to the car.⁴⁰ The court held it would therefore seem odd if due to the fact the car had been returned to the owner by the police, he no longer needed to pay for the car's improvements.⁴¹

The argument of subjective devaluation overlooks the factual realities of the case and allows a sidestepping of the real issues. It focusses on the concern associated with the imposition of liability, but this concern is different from the issue of enrichment. The exceptions provide us with a lingering doubt about the strength of Birks' theory. Perhaps it is really an attempt to explain cases as they have occurred, instead of a principle with can be uniformly applied.

A challenge to the persuasiveness of subjective devaluation in relation to the payment of another's debt is made by Scott.⁴² Discussing the incontrovertible benefit exception to subjective devaluation (which is satisfied when the defendant has been saved a "legally necessary expenditure"), Scott notes that;⁴³

³⁶ At 200.

³⁷ At 202.

³⁸ Birks *An Introduction*, above n 16, at 124.

³⁹ At 124-125. "A rough and ready standard of reasonableness would be applied and would mean [adopting] an objective approach, exactly the opposite technique from that which the common law has grown up."

⁴⁰ *Greenwood v Bennett*, above n 35, at 201,

⁴¹ At 201.

⁴² Struan Scott "Restitution and the argument of subjective devaluation: when is an enrichment not an enrichment?" (1993) 15 NZULR 246.

⁴³ At 251.

“Contrary to a “common sense view” of when a debt is discharged, this exception [incontrovertible benefit] does not apply whenever a legitimate debt has been paid by another. If a debt is regarded by the law as being discharged, its discharge must have benefited or enriched the debtor who can no longer be sued for the debt. Subjective devaluation, however enables to debtor to assert that the mere fact of another’s payment of the debt does not constitute a benefit or an enrichment.”

Currently, the issue of enrichment and discharge of debt is intertwined, the mere fact of payment does not discharge the debt. Rather, the debt is only legally discharged where there has been a request or ratification or when there was legal compulsion to make the payment.⁴⁴ If the debt has not been discharged, the conclusion is that the debtor has not been enriched. The debtor is in no better position than before the payment was made and thus a claim in unjust enrichment by the bank against their customer will fail. Currently, unjust enrichment reasoning is consistent with the “mainstream” approach, which will be discussed in Chapter Two. It is submitted that recognition of the factual objective benefit that is bestowed onto a person whose debt you have paid should be adopted to allow for consideration of the underlying policy factors of each case.

B. Benedetti v Sawaris: objective enrichment?

In *Benedetti*⁴⁵, Benedetti rendered services of considerable value to Sawaris as a broker or adviser. Benedetti sought recompense in the form of a *quantum meruit* for these services, the parties disagreed as to their value. The claim was founded on the defendant's unjust enrichment. Benedetti had provided the services in the expectation that he would be remunerated under a contract. The contract however did not exist due to a failure of consideration.⁴⁶ All three judges agreed that when valuing an enrichment, the starting point was to be objective market value.⁴⁷ As noted earlier Lord Reed questioned the concept of subjective devaluation as advanced by Birks.

⁴⁴ *Exall v Partridge* (1799) 101 ER 1405. See Chapter Four for discussion on the persuasiveness of the “legal compulsion” argument.

⁴⁵ *Benedetti v Sawaris*, above n 7.

⁴⁶ At [10] per Lord Clarke.

⁴⁷ At [15] per Lord Clarke, [100] per Lord Reed, [181] per Lord Neuberger.

Instead, Lord Reed advances “another possible approach [to an unjust enrichment claim]” This might be to:⁴⁸

“treat enrichment as dependent upon the objectively beneficial nature of the receipt and to consider at a later stage of the analysis, when determining whether it would be just to impose liability to make restitution (at all, or on a particular basis), the question whether the imposition of such a liability would be compatible with respect for the defendant’s freedom of choice.”

This “conceptual framework” advanced by Lord Reed is clearly inconsistent with subjective devaluation as described by Birks.⁴⁹

As Lord Reed states and I would agree, unlike the argument of subjective devaluation Lord Reed’s “approach appears at first sight to have the virtue of simplicity.”⁵⁰ Employing Birks’ own concern for the need for simplicity in the law, Lord Reed describes his approach as applying “Occam’s razor”⁵¹ to Birks’ theory of subjective devaluation. Lord Reed finds his analysis would “group normative issues under an explicitly normative heading[s].”⁵²

It is submitted that applying the approach as advanced by Lord Reed provides two benefits to the analysis of the merits of a three party claim. First, an objective analysis of enrichment allows for the focus to shift away from extended concepts of request. It separates the question of enrichment from policy considerations to determine whether recovery should be granted. Claims could be such that, “in the absence of a contract, neither parties’ intentions nor expectations can be determinative of their mutual rights and obligations.”⁵³ Secondly, policy could be explicitly considered which would allow for a principled approach as to when to impose obligations to repay when they have not been voluntarily assumed.

⁴⁸ At [118] per Lord Reed.

⁴⁹ At [119] per Lord Reed.

⁵⁰ At [119] per Lord Reed.

⁵¹ Birks, *An Introduction*, above n 16, at 97. “It is vain to do with more what can be done with fewer”; or “Entities are not to be multiplied without necessity.” See also *Benedetti v Sawaris*, above n 5, at [118] per Lord Reed.

⁵² *Benedetti v Sawaris* above n 5 at [118] per Lord Reed.

⁵³ At [99] per Lord Reed.

Chapter Two: “Mainstream” approach:

A. Development of the approach and the policy arguments in its favour:

In 1855 *Simpson v Eggington*⁵⁴ the court set out what I shall call the “mainstream approach” to the payment of another’s debt in a three party claim. A debt was owed by the City of Lichfield (the company) to Mr Eggington. The treasurer of the company, Mr Proffit paid Mr Eggington. In doing so Mr Proffit appeared to be acting as a representative of the company.⁵⁵ Subsequently, the company refused to reimburse Mr Proffit or to ratify the payment.⁵⁶ The question for the court was whether the debt was discharged by Mr Proffit’s payment. Parke B formulated the rule that;⁵⁷

“[The payment] is not sufficient to discharge a debtor unless it is made by the third person, as agent, for and on account of the debtor with his prior authority or subsequent ratification.”

The corporation had no intention to pay Mr Eggington and he considered the debt paid.⁵⁸ The debt however, was still legally owing. Mr Proffitt had neither authority nor had the payment been ratified, thus he could not be reimbursed for the payment.

Applied to a situation where the bank exceeds its mandate and pays a customer’s creditor, the mainstream approach denies the bank a claim against its customer. The bank is in the position of a stranger who has voluntarily paid their customer’s debt.⁵⁹ This mainstream approach has been adopted in a number of cases⁶⁰, but the trend is by no means

⁵⁴ *Simpson v Eggington* (1855) 10 Ex 845.

⁵⁵ At 846

⁵⁶ At 847.

⁵⁷ At 848. See also *Jones v Broadhurst* (1850) 9 CB 173 *Belshaw v Bush* (1851) 11 CB 191 and *James v Isaac* (1852) 12 CB 791.

⁵⁸ *Simpson v Eggington*, above n at 54, at 846 per Parke B. “The defendant had treated this payment as made on behalf of the corporation and had not returned it.”

⁵⁹ *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] KB 48 at 60 per Wright J. “At common law the principal cannot be sued and cannot be made to repay the amount so borrowed.”

⁶⁰ Above n 57. See also Daniel Friedmann “Payment of another’s debts” (1983) 99 LQR 534 at 536.

uniform.⁶¹ Indeed some cases, have recognised a wider equity to allow recovery to the bank, even when it did not act within its mandate.⁶²

There are good policy arguments underlying the mainstream approach. As noted by Watts the debtor may dispute the debt or have a counter claim or right of set off against the creditor.⁶³ Furthermore, Watts highlights the problem of double payment. If payment of the debt by a third party acted to discharge the debt and subsequently the debtor also made a payment, his payment would be the “superfluous” one.⁶⁴ The debtor would then need to sue the creditor for this second payment. Furthermore, Watts reminds us that the law of unjust enrichment will allow for the intervener to make a claim against the creditor⁶⁵ thus a claim against the debtor is not required.⁶⁶

*Crantrave Ltd (in liq) v Lloyds Bank plc*⁶⁷ (*Crantrave*) is a recent Court of Appeal decision that further highlights some of the policy reasons in favour the mainstream approach. In *Crantrave*, the bank was seeking repayment from its customer for a payment made under a garnishee order that was not yet absolute.⁶⁸

For Pill LJ it would be a “startling proposition” if bankers could pay off a third party out of their customers account because they believe the customer to be indebted to that third party.⁶⁹ Furthermore, he holds the bank could become a “debt collector” for their customer.⁷⁰ The bank could decide in what priority to pay creditors and how much without the customer having recourse against them and could also affect the rights of other creditors.⁷¹

Arguably the “mainstream” approach offers commercial certainty to customers that they have general autonomy to pay their own debts (or authorise the payment). The

⁶¹ Daniel Friedmann “Payment of another’s debts” (1983) 99 LQR 534 at 536.

⁶² *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*, above n 59 at 63.

⁶³ Peter Watts “Mistaken payment of another’s debt- a brief defence of the orthodox view” (1993) NZ Rec Law Rev 249. (Mistaken payment)

⁶⁴ At 249.

⁶⁵ A claim can be made against the creditor, but they may have a defence available to them, such as change of position.

⁶⁶ Watts “Mistaken payment”, above n 63, at 249.

⁶⁷ *Crantrave Ltd (in liq) v Lloyds Bank plc* [2000] 3 WLR 877 CA at 924 per Pill LJ.

⁶⁸ At 924 per Pill LJ.

⁶⁹ At 924 per Pill LJ.

⁷⁰ At 924 per Pill LJ.

⁷¹ At 924 per Pill LJ.

importance of the customer's mandate is upheld. However, the proposal being analysed in this thesis, is not one which would re-invent this approach but would provide an exception to it. Instead of assessing whether there was a request or ratification it would be found that the payment objectively benefitted the debtor. An explicit consideration of the relevant policy factors both for and against recovery would then be undertaken. This could arguably include rights of set off or counter claims to determine whether a remedy is appropriate in the circumstance.

B. The (in)significance of *Barclays*

The mainstream approach appears to be supported by the reasoning of Goff J in *Barclays*.⁷² The case was a two party claim. The bank had overlooked its customer's instructions to stop payment and had paid a cheque on presentation.⁷³ The bank was claiming against the recipient of the payment on the grounds of mistaken payment.

Goff J upheld the banks claim. The main consideration for the court was the type of mistake necessary to ground recovery. Goff J found on the authorities⁷⁴ that all that was necessary was that the mistake had "caused the payment."⁷⁵ Goff J went on to consider when this claim could be defeated. Importantly for this thesis his honour held a claim would fail if "the payment is made for good consideration, in particular if the money is paid to discharge and does discharge, a debt owed to the payee."⁷⁶ Goff J, supporting the mainstream approach, held the debt would not be discharged without request or ratification.⁷⁷

This case is important in as far as it decides what mistakes will allow recovery and the rights of an intervener payer against the recipient of the payment.⁷⁸ However, it cannot

⁷² *Barclays Bank v W. J. Simms Son & Cooke*, above n 9.

⁷³ At 682 per Goff J.

⁷⁴ At 686. Goff J cites *Kelly v Solari* (1841) 9 M & W 54, *Aitken v Short* (1856) 1 H & N 210 and *R E Jones Ltd v Waring and Gillow Ltd* [1926] AC 670. Contrast *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotai* (1855) 11 AppCas 84 and *Kleinwork, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263.

⁷⁵ *Barclays Bank v W. J. Simms Son & Cooke*, above n 9, at 690 per Goff J.

⁷⁶ At 695 per Goff J. Two other ways that a recipient will not be liable for repayment are if there is a change of position defence, or the payer intends the payee to have the money or is deemed in law to so intend.

⁷⁷ *Barclays Bank v W. J. Simms Son & Cooke*, above n 9, at 690.

⁷⁸ This is the classic remedy for a two party claim.

be said to be universally applicable to three party claims. Although Goff J did discuss when a debt will be discharged, the purpose of this discussion was to assess the possibility of a defence for the Housing Association (the recipient of the payment).⁷⁹ Goff J considered that if the debt was legally discharged on payment the Housing Association would have a defence to the claim.⁸⁰ Although a consideration for Goff J, the discussion of when a debt is discharged was not concerned with the ability of a bank to claim against their customer in a three party claim.

Indeed the case has attracted criticism when applied to three party claims.⁸¹ Friedmann argued that Goff J's obiter statements denying the intervener a claim against the debtor, are circular in nature.⁸² He notes that the reluctance to recognise a right to claim against the customer in *Barclays* was due to the fact that the payment (albeit mistaken) was contrary to the express instructions of the bank's customer.⁸³ Furthermore, an underlying factor of *Barclays* was the fact that there was a dispute as to whether any legitimate debt was owed. Indeed, Goff J concluded his judgment by noting that he was "happy to be able to reach the conclusion that the money is recoverable by the plaintiff bank" and that the "true dispute between the association and the receiver can be resolved on its merits."⁸⁴

The result in *Barclays* is consistent with the analysis being advanced in this thesis. Even on an objective view of enrichment if there was no legitimate debt owed by the bank's customer then there would be no objective enrichment in the payment. The payer would need to recover from the recipient of the payment on the grounds of mistaken payment.

Unnecessary focus on request and ratification:

Despite the emphasis on request and ratification by the customer to legally discharge the debt, it is submitted that, in certain circumstances, there is more to payment of another's debt than the customer's autonomy. There can be instances of factual discharge as opposed to purely focussing on the "legal" effects of the payment. In a three party claim perhaps the focus on request and ratification has allowed for the real issues to be

⁷⁹ *Barclays Bank v W. J. Simms Son & Cooke*, above n 9, at 699.

⁸⁰ At 699.

⁸¹ Daniel Friedmann "Payment of another's debts", above n 61, at 546.

⁸² At 547.

⁸³ At 547.

⁸⁴ *Barclays Bank v W. J. Simms Son & Cooke*, above n 9, at 703.

overlooked. Variables between two and three party claims cannot be accounted for with a blanket application of two party reasoning to three party claims. Oversimplified considerations of such a complicated area of the law should be avoided instead, the analysis as advanced in this thesis should be adopted. It allows for a sophisticated analysis of the policy in the case without the need to inquire into requests and ratifications.

Another point of interest in Goff J's reasoning in *Barclays* is his review of the authorities to support his conclusion. In particular the case of *R. E. Jones Ltd v Waring and Gillow Ltd*⁸⁵ (*R E Jones*). Goff J cites this case to support the reasoning that any mistake causing payment is a ground for recovery.⁸⁶ Although the case supports that conclusion his honour fails to note that his later conclusions as to when a debt is discharged, sit in contrast to the outcome of *R E Jones*.

In *R E Jones* a rogue obtained furniture on hire purchase. The rogue then defaulted on the down payment and the respondents repossessed the goods. To recover the furniture from the respondents the rogue needed to raise the necessary funds. To do this the rogue convinced the appellants they were acting as agents of the sale of certain parts of a "Roma" car in England, the rogue asked the appellants to pay the deposit to the respondents. The deposit was accepted by the respondents as the down payment for the rogue's hire purchase furniture. The rogue had the goods restored to him. When it came to light that in fact there was no "Roma" car the appellants claimed the money they paid to the respondents as money paid under mistake.⁸⁷

On Goff J's reasoning no claim could be made against the respondents due to the payment legally discharging the debt. The rogue had requested payment and the debt must have been legitimate and discharged as he resumed possession of the furniture.⁸⁸ Goff J made it clear that on the facts before him had the payment discharged the debt the banks claim against the recipient would have been denied.⁸⁹ In contrast, in *R E Jones* the House of Lords unanimously allowed recovery from the recipient, concluding the mistaken

⁸⁵ *R. E. Jones Ltd v Waring and Gillow Ltd* [1926] AC 670.

⁸⁶ *Barclays Bank v W. J. Simms Son & Cooke*, above n 9, at 694.

⁸⁷ At 672.

⁸⁸ *R. E. Jones Ltd*, above n 85, at 677.

⁸⁹ *Barclays Bank v W. J. Simms Son & Cooke*, above n 9, at 690.

payment was sufficient to ground recovery.⁹⁰ *R E Jones* provides us with an example of the complexities of a three party claim, and the weaknesses of merely focussing on request or ratification.

Finally, Goff J does not consider the decision of Wright J in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*⁹¹ (*Liggett*) a classic three party claim. The reasoning in this case is considered later. At this stage it suffices to note that Wright J, although recognising the common law's focus on request or ratification prefers a "wider equity" to support recovery by the bank from the debtor.⁹² Despite being referred to this case in argument, Goff J does not discuss it in his judgment.⁹³ Arguably the two cases stand as authority for different points. Arguments as to whether a "wider equity" could apply were not necessary to reach a decision on the facts before Goff J.

Currently, the law surrounding three party claims for the payment of another's debt is inconsistent. The focus on request or ratification blurs the reasoning of why recovery is being granted or denied. Lord Reed's analysis finding an objective enrichment would allow a principled approach to develop and would not be inconsistent with the outcome of *Barclays*.

While not discussed by Goff J in *Barclays* the next case to be considered, *Falcke*, has played an important role in the development of the law's reluctance to impose obligations not voluntarily assumed. As we shall see, this case has been misinterpreted, instead its outcome is consistent with the approach being advanced in this thesis.

Falcke:

*Falcke*⁹⁴ is similar to a three party mistaken payment claim. The case involved the payments of a premium due under a mortgage policy which was in danger of lapsing. The

⁹⁰ *R. E. Jones Ltd*, above n 85, at 702.

⁹¹ *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*, above n 59.

⁹² At 63.

⁹³ *Barclays Bank v W. J. Simms Son & Cooke*, above n 9, at 679.

⁹⁴ *Falcke v Scottish Imperial Insurance Co*, above n 1.

payer, Mr Emmanuel was the owner of the policy, which was subject to two mortgages, one of these was Mr Falcke's.⁹⁵

For unrelated reasons, Emmanuel had been released from any personal obligation to pay the premiums.⁹⁶ Thinking he had purchased Falcke's interest in the second mortgage Emmanuel paid a premium to keep the policy alive. Shortly afterwards the insured passed away. It was then discovered Falcke's agent had exceeded his authority in purporting to sell the mortgage to Emmanuel. The proceeds of the policy discharged the first mortgage and part of Falcke's second mortgage, leaving nothing to Emmanuel.⁹⁷ Emmanuel sought reimbursement for this payment. His claim, however, was unanimously rejected.⁹⁸

The case is seen as support for the need for a request or ratification to impose an obligation to repay.⁹⁹ As to the extent that the case considered request and ratification, there had been neither by Falcke for Emmanuel to make the payments.¹⁰⁰ If the claim in *Barclays* had been from the bank against their customer recovery would have been denied. The denial of recovery in *Falcke* is therefore consistent with *Barclays*. It is submitted however, that the reasoning for the denial in each case is different and *Falcke* may not provide support for the need for request or ratification when the case and the judge's reasoning is considered in more detail.¹⁰¹

Goff J would deny recovery in *Barclays* either due to a lack of request by the customer for the payment or due to a lack of objective enrichment if no debt was owed. Contrary to this is *Falcke*, arguably Emmanuel was denied recovery due to acting in his own self-interest. If his claim had been allowed it would have undermined the mortgage that Falcke owned. Indeed, Cotton LJ states that it would be strange if a mortgagor could

⁹⁵ At 243 per Cotton LJ.

⁹⁶ At 243 per Cotton LJ

⁹⁷ At 240 per Cotton LJ.

⁹⁸ At 248 per Cotton LJ, 251 per Bowen LJ, 254 per Fry LJ.

⁹⁹ At 248 per Bowen LJ.

¹⁰⁰ At 252 per Fry LJ.

¹⁰¹ Chapter Four below discusses in more depth what is arguably the "real reason" recovery was denied to Mr Emmanuel- illegitimate self- interested action.

establish a claim over their mortgaged property.¹⁰² It is submitted that recovery was not denied due to a lack of request by Falcke to make the payment.

Falcke interpreted correctly, provides no hurdle to the proposed formulation of an unjust enrichment claim being advanced. Falcke was clearly objectively enriched by Emmanuel's payment, as otherwise the policy would have lapsed, recognition of this objective enrichment would not equate to recovery of that enrichment. Instead, the policy factors must be considered and recovery can still be denied despite the objective finding of an enrichment.

¹⁰² At 243 per Cotton LJ. "[I]t would be strange indeed if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgage."

Chapter Three: “Others”

Despite the mainstream focus on request and ratification and Birks’ argument of subjective devaluation to support this, some cases have favoured the intervening payer, allowing them to recover in certain situations. The intervening payer may want to recover from the debtor in situations where the creditor is either insolvent or has a defence to the two party claim.

The cases considered in this chapter show three things; (i) in certain situations the factual discharge of a debt suffices; especially when the payments are for legitimate demands; (ii) the identity of the payer is an important consideration, related to this need for an “appropriate” payer is; (iii) the ability of the creditors to rely on the payment.

A. “Other” cases:

Jenner:

*Jenner v Morris*¹⁰³ (*Jenner*) concerned the payment for necessities for a deserted wife by her brother.¹⁰⁴ At the time of the case woman had no authority to make payments. These necessity payments were typically made by the wife’s husband. The wife after being deserted asked for her brother (the plaintiff) to help with her payments. The plaintiff was claiming reimbursement for the money advanced to the wife, and on some occasions paid directly to the creditors.¹⁰⁵ The court held there was no claim available at law, but that equity would allow such a claim.¹⁰⁶ The claim at equity would be made when it was shown “that the money has actually been applied to the payment of the debt for which the husband would be liable at law”.¹⁰⁷ The court notes that the tradespeople would have given valuable consideration for the payments¹⁰⁸ implicitly assuming that the debts are discharged on payment.

¹⁰³ *Jenner v Morris* (1861) 45 ER 795.

¹⁰⁴ At [45] per Campbell LC.

¹⁰⁵ At [51] per Campbell LC.

¹⁰⁶ At [51] per Campbell LC.

¹⁰⁷ At [52] per Campbell LC.

¹⁰⁸ At [52] per Campbell LC.

Jenner shows a consideration of the factual realities of the situation. The brother made the payments both to the wife and to the creditors directly yet was still allowed to be reimbursed, and the husband had not requested the payments. Although not addressed in the judgement, perhaps the brother being the payer is to be considered as an appropriate source of payment. On Lord Reed's approach these policies would be considered after the objective establishment of enrichment.

Liggett:

In *Liggett*¹⁰⁹ the customer was making a claim against the bank for a wrongful debiting of their account. The bank had been instructed to make payments on cheques which had been signed by two directors. Mr Melia, a director, sent a letter instructing the bank that his signature must be present at all times before any cheques were drawn.¹¹⁰ This was an attempt by Mr Melia to stop the company trading.¹¹¹

The bank then received notice that Mrs Liggett had been appointed a director, and was authorised to sign cheques.¹¹² The bank then honoured cheques signed by Mr Liggett and from time to time when signed by both Mr and Mrs Liggett. Despite the bank acting outside its mandate (i.e. without any request or ratification of the payments), the plaintiff's claim failed. The court allowed the bank to rely on what was found to be a "sufficiently sound principle in equity".¹¹³

Wright J focusses on the fact the cheques were drawn in favour of ordinary trade creditors for goods supplied to the company.¹¹⁴ Mr Liggett was continuing to order goods which were "*in fact*" paid for by the cheques.¹¹⁵ The company argued the bank was in the position of a stranger, thus the payments merely voluntary.¹¹⁶ Wright J rejects this,

¹⁰⁹ *B Liggett*, above n 59, per Wright J.

¹¹⁰ At 49 per Wright J.

¹¹¹ At 50 per Wright J.

¹¹² At 51 per Wright J.

¹¹³ At 61 per Wright J.

¹¹⁴ At 58 per Wright J.

¹¹⁵ At 59 per Wright J. Emphasis added.

¹¹⁶ At 60 per Wright J.

relying on equity to hold that “a person who has *in fact* paid the debts of another, without authority is allowed to take advantage of his payment.”¹¹⁷

Although not expressly stated, we can see that Wright J assumes the payments factually discharged the debts. Furthermore, the fact that the suppliers of the goods had no notice that the position of the company had changed was a relevant consideration.¹¹⁸ This implicitly emphasises the importance of the payer’s identity. Presumably if the payment had come from an unknown source the creditors would not be entitled to assume that the payments were valid. Wright J further notes the cheques paid for “legitimate demands” which the company “was bound in some way or another to meet.”¹¹⁹ Thus we see the weight placed on the factual realities of the situation. The identity of the payer being an implicit consideration to allow the creditors to rely on the payments. Although relying on “equity” it is submitted that this case can be better explained as applying unjust enrichment. Utilising Lord Reed’s analysis we can see that there was an objective benefit to the company. Instead of the outcome being explained as some vague “wider equity”, it is submitted that employing the policy arguments discussed helps better explain why the court allowed recovery.

Majesty

In *Majesty Restaurant P/L V CBA*¹²⁰ (*Majesty*) Majesty’s mandate with its bank required two authorised officers to sign before a cheque could be drawn.¹²¹ Mr Liu, Majesty’s managing director and secretary having both actual and ostensible authority to issue cheques and pay creditors signed the cheques on behalf of Majesty.¹²² Mr Liu did this without obtaining the additional signature.¹²³ The cheques allowed Majesty to continue trading. The cheques were accepted by the creditors as satisfaction of the outstanding debts. The court needed to consider whether, despite Mr Liu acting within his authority

¹¹⁷ At 59 per Wright J. Emphasis added.

¹¹⁸ At 59 per Wright J.

¹¹⁹ At 61 per Wright J.

¹²⁰ *Majesty Restaurant P/L v CBA* [1998] 47 NSWLR 593.

¹²¹ At 596 per Hunter J.

¹²² At 598 per Hunter J.

¹²³ At 596 per Hunter J.

(both actual and ostensible) to pay debts, the bank was empowered to honour the cheques, despite acting outside their mandate.¹²⁴

Two main points are emphasised in the judgment. First, the cheques were delivered by the plaintiff (Majesty) to their trade creditors in purported satisfaction of their trade debts.¹²⁵ Secondly, Majesty continued trading with the creditors on the validity of the payments.¹²⁶ The effect of Liu's ostensible authority in issuing the cheques was also important. Hunter J held that the trade creditors were entitled to assume the duties of Mr Liu to Majesty as both Managing Director, and secretary had been fulfilled, in so far as the cheques issued had followed procedure.¹²⁷ Furthermore, Hunter J found there would be no reason for the trade creditors to assert non-payment, the debts being satisfied on payment.¹²⁸

Hunter J referred to s 164 of the Corporations Law Act.¹²⁹ In particular he refers to s 164(3) (f) which states;¹³⁰

“(3) The assumptions that a person is ... entitled to make in relation to dealings with a company... are; ... (f) that the directors, secretaries, the employees and the *agents* of the company properly perform their duties to the company.”

In the context of a bank and its customer the bank is held to be acting as the customer's agent when honouring cheques.¹³¹ Hunter J held that Mr Liu as Managing Director issuing the cheques, “holds the drawee bank out as authorised and instructed to pay on the cheque...the Bank is acting in the role of...agent.”¹³² On this analysis the importance of payer is emphasised, as well as the circumstances surrounding the payment. Hunter J holds the trade creditors are entitled to assume the bank has fulfilled its duties to Majesty,

¹²⁴ At 596 per Hunter J.

¹²⁵ At 595 per Hunter J.

¹²⁶ At 695 per Hunter J.

¹²⁷ At 600 per Hunter J.

¹²⁸ At 601 per Hunter J.

¹²⁹ At 600 per Hunter J. Corporations Law Act 1989 (NSW), s 164. This section may be similar to the New Zealand Companies Act 1993, s 18. The similarities between the two sections and the applicability of such an argument in New Zealand will be discussed in Chapter Five below.

¹³⁰ Corporations Law Act 1989 (NSW), s 164(3) (f). Emphasis added.

¹³¹ *Majesty Restaurant P/L v CBA*, above n 120, at 600. Hunter J also held that the exceptions to the ability to rely on s 164, found in s 164 (4) did not apply to the creditors in this situation.

¹³² At 602 per Hunter J.

including those under its mandate.¹³³ Further holding that the bank's lack of authority is relevant only to the issue of damages.¹³⁴ The important consideration is the "effect of the authority of the signatory or issuer of the cheque."¹³⁵

While Hunter J is referred to *Barclays*,¹³⁶ Hunter J holds that Goff J did not consider the effect of apparent authority. Instead Goff J focussed exclusively on actual authority in making the payment. Hunter J however, considers the ostensible authority of the person issuing the cheque, as well as the person making the payment to be important considerations.

Hunter J referring to *Liggett* further finds that the factual basis for the common law denial of recovery; the need to prevent strangers paying without authority, is far removed from the situation before him. A bank being requested and instructed by a person with authority to pay debts honouring those cheques is very different from a stranger paying another's debts.¹³⁷ Although the bank is acting outside its authority in making the payments, the circumstances surrounding payment such as Mr Liu's actual and ostensible authority and the bank's identity as an "agent of the company", allow the bank the benefit of their payments.¹³⁸

Assessing *Majesty* with the approach offered by Lord Reed we may reach the following conclusion; the payments objectively benefitted Majesty, allowing continued trade. Secondly, Majesty's Managing Director issued the cheques and delivered them in satisfaction of the debts. Lastly, a bank honouring those cheques despite being outside their authority is held out as an agent of the company. The creditors are therefore entitled to rely on the validity of the payments. The bank may be entitled to the benefit of the payment, the factors listed outweighing the need to protect Majesty's autonomy.¹³⁹

¹³³ At 602 per Hunter J.

¹³⁴ At 602 per Hunter J.

¹³⁵ At 603 per Hunter J.

¹³⁶ *Barclays Bank v W. J. Simms Son & Cooke (Southern) Ltd*, above n 9.

¹³⁷ *Majesty Restaurant P/L v CBA*, above n 120, at 605 per Hunter J.

¹³⁸ Perhaps "circumstances surrounding payment" are better explained as policy factors and are considered in Chapter Four below.

¹³⁹ See below Chapter Four, where the reliance on certainty of receipt by Hunter J in *Majesty* is questioned, perhaps recovery being better explained due to a lack of officiousness from the payer bank.

Westpac

*Westpac Corporation v Rae*¹⁴⁰ (*Westpac*) involved three claims by the bank. The important claim for us is between the bank and its customer Varga. Varga had employed Rae to carry out work, subsequently a dispute arose over the amount owed for that work. Rae presented a document to Varga's bank, Westpac, described as a sola bill of exchange, which he had signed. Westpac, mistaking Rae's signature for that of their customer Varga's, debited Varga's account. Varga then insisted that Westpac credit their account for this amount which Westpac did. Westpac then sued Varga, for the benefit which they had conferred by discharging the debt to Rae.¹⁴¹ Holland J held that the bank was entitled to recover. Although at law the debt was not discharged, he considered that equity deemed the payment to have discharged the debt. As a result the company was enriched as it had been relieved of its liability to Rae.¹⁴²

Important for this discussion is Holland J's consideration of the position of the bank as payer. Holland J notes that;¹⁴³

"a bank is not in those circumstances an officious outsider and nor is it a true volunteer when it has made a payment which is in the ordinary course of banking business except that by a mistake the authority of the customer was not obtained."

This again emphasises the focus on the identity of the payer. The bank being an appropriate source from which a payment may come not an "officious outsider who voluntarily makes a payment to another person."¹⁴⁴

Holland J with "considerable trepidation"¹⁴⁵ declines the argument to follow the decision of *Barclays*. His honour finds the statements made by Goff J in relation to payments made with and without mandate are purely obiter and notes the lack of reference to *Liggett* in Goff J's judgment.

¹⁴⁰ *Westpac Corporation v Rae* [1992] 1 NZLR 338.

¹⁴¹ At 343 per Holland J.

¹⁴² At 346 per Holland J.

¹⁴³ At 345 per Holland J.

¹⁴⁴ At 345 per Holland J.

¹⁴⁵ At 346 per Holland J.

Holland J holds that “in reality” the payments discharged the debt, the bank is an appropriate payer, and thus entitled to repayment.¹⁴⁶ Applying Lord Reed’s analysis, *Westpac* is explained as an instance where other policy factors outweigh the reluctance to impose obligations not voluntarily assumed. Once objective enrichment is established many factors may be considered to determine whether to deny or grant relief.

Conclusions from the case law:

In the context of a three party claim, three important policy factors come to light that conflict with the reluctance to impose obligations not voluntarily assumed. These policy factors are; (i) the consideration of a factual discharge of debt. Although at law a debt is still owing the creditor is unlikely to seek another payment. (ii) The identity of the payer is important. *Westpac* and *Majesty* have highlighted that, although acting outside their mandate, a bank is unlikely to be considered an officious outsider when making a payment to a creditor. *Jenner* demonstrated that familial ties may make the payer an appropriate source from which the payment comes. (iii) The identity of the payer is important, if the payment came from an “appropriate” payer then it is more likely that an argument of certainty of receipt will be successful.¹⁴⁷

Identifying the policy underlying the decisions allows for a coherent assessment of claims. Instead of relying on extended concepts of request or ratification to deny enrichment the law would objectively establish enrichment and then explicitly engage with policy to determine the outcome of the case.

¹⁴⁶ At 346 per Holland J.

¹⁴⁷ Chapter Four will consider whether the argument of certainty of receipt is the best explanation for why a claim by the bank may be allowed.

Chapter Four: Policy factors identified:

This thesis is not supporting that the conferral of an enrichment justifies recovery. This is contrary to our law.¹⁴⁸ Nor that in a three party claim, the payer's mistake is sufficient to make the enrichment unjust. That may be the position in two party claims, but three party claims are more complex. Rather, the mistake and conferral of an objective enrichment, while prerequisites, are insufficient in themselves. The case law supporting other policy considerations becomes crucial. This chapter will seek to identify some of these policy considerations, such as officiousness. It must be noted that policy considerations do not work in a vacuum and an exhaustive list cannot be formed. Some cases will engage with more than one policy factor and the court will be required to decide which is more important to determine the outcome of the case. Explicit considerations of these factors will allow for a clearer approach than the current formulation of an unjust enrichment claim.

A. Officiousness:

One mischief that the mainstream approach responds to is officiousness. Officiousness can be considered on a continuum with the "bad faith" meddlesome intervener at one end and the requested payer at the other. The issue for the court is determining which "shades" of officious behaviour should warrant recovery.

Officiousness has always been an important consideration in three party claims. This is demonstrated by the current requirement for request or ratification. The courts clearly seeing the request or ratification as a way to ensure no officious behaviour is rewarded. Subjective devaluation further discourages rewarding officious behaviour in denying the existence of an objective enrichment due to no request.

At one end of the "officiousness scale" is the American case, *Norton v Haggett* which provides a clear example of "bad faith" officiousness on the intervening payer's behalf.¹⁴⁹

¹⁴⁸ Need to have "unjust" enrichment to enable recovery. See *Exall v Partridge*, above n 42, at [310] per Lord Kenyon. "It has been said, that where one person is benefited by the payment of money by another, the law raises an assumpsit against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor, nolens volens." More than merely a benefit is needed to justify recovery.

¹⁴⁹ *Norton v Haggett* (1952) 117 Vt 130 at 85.

Norton, after a dispute with the Haggett's, deliberately took steps to find out whom they were indebted to. Norton then approached the creditor offering to discharge the debt owed. The creditor accepted the payment and the plaintiff moved against the defendant.¹⁵⁰ Not surprisingly, the Supreme Court of Vermont refused the claim.¹⁵¹ The overarching policy in this case is clearly that our law should not encourage others to meddle in people's affairs, only to then be entitled to the benefit of that payment. Applying Lord Reed's analysis, despite the fact the debtor was objectively enriched, when considering the policy factors, the officious intervener's claim should be denied.

Another example of officious behaviour is *Owen v Tate (Owen)*.¹⁵² *Owen* concerned a bank loan which was secured by a legal mortgage over property belonging to Miss Lightfoot. Miss Lightfoot wanting to be relieved of her obligation, consulted Mr Owen. Subsequently, Mr Owen deposited an amount equivalent to the loan at the bank, in return for the release of Miss Lightfoot's title deeds. He signed a guarantee to pay the money due by the defendants up to the amount deposited. The plaintiff's motives were purely to help Mrs Lightfoot, but the defendants were neither consulted about the change, nor did they request the plaintiff's involvement. The bank applied the money in repayment of the defendant's debt. The plaintiff was seeking reimbursement from the defendants.¹⁵³

It was argued by Mr Owen that when the defendant's chose to make use of the guarantee they were ratifying the payment, thus he should be entitled to reimbursement.¹⁵⁴ The court denied recovery, holding Mr Owen, when assuming the position of guarantor acted "behind [the defendants] backs, against their will and despite their protest."¹⁵⁵ He was an absolute volunteer, hoping to bestow a benefit onto Miss Lightfoot.¹⁵⁶ Scarman LJ held merely accepting the new guarantor, when they had previously had a mortgage over the property of Miss Lightfoot, was not ratification of the payment.¹⁵⁷ When Mr Owen was

¹⁵⁰ At [8].

¹⁵¹ At [9].

¹⁵² *Owen v Tate* [1976] QB 402.

¹⁵³ At 406 per Scarman LJ.

¹⁵⁴ At 411 per Scarman LJ.

¹⁵⁵ At 410 per Scarman LJ.

¹⁵⁶ At 410 per Scarman LJ.

¹⁵⁷ At 411 per Scarman LJ.

forced to honour the obligation, the defendants were not to be criticised for accepting the payment.¹⁵⁸

Stephenson LJ agreed, holding that the plaintiff cannot recover merely because his act in taking on the guarantee was generous, finding his actions could even be described as officious.¹⁵⁹ Furthermore he holds that although there may be some circumstances in which an obligation to repay the guarantor occurs, this case was not one of them. Instead perhaps it will be in circumstances where it is “obviously unjust that the debtor should be enriched by accepting the payment.”¹⁶⁰

This case sits inconsistently with many previous decisions we have looked at.¹⁶¹ The court assumed the debt was discharged when the guarantee was called in, but the court also emphasises the lack of request or ratification by the defendants. How can the payment have discharged the debt?

Utilising Lord Reed’s approach from *Benedetti* perhaps *Owen* can be explained. Payment objectively benefitted the defendant; they no longer owed money to the bank, the money deposited considered as payment of the outstanding debt. The policy reasons to be considered would be that the undertaking by Mr Owen was done in circumstances where he knew of the consequences if that guarantee was called in. Essentially, he had acted officiously in wanting to relieve Miss Lightfoot of her obligations. He had meddled in the business of others when he need not have.

Lord Reed’s approach allows for *Owen* to be explained whilst engaging with all the policy before the court. Recovery was not denied due to no “enrichment” or “request”. Mr Owen was not acting in bad faith when taking on the guarantee. Indeed, he was acting with good intentions to help Miss Lightfoot but despite this he was meddling in another’s business.

The continuum of officiousness may go further, potentially a payer whose intentions were to benefit the debtor can be an officious payer nonetheless.¹⁶² For example Mr Creighton

¹⁵⁸ At 411 per Scarman LJ.

¹⁵⁹ At 412 per Stephenson LJ.

¹⁶⁰ At 413 per Stephenson LJ. As the obligation undertaken was neither at the defendant’s request nor needed, it was not necessary to grant reimbursement.

¹⁶¹ See Jack Beatson and Peter Birks “Unrequested payment of another’s debt” in J Beatson *The Use and Abuse of Unjust Enrichment* (Clarendon Press, Oxford, 1991) 201 at 201.

¹⁶² Compared to *Owen* whose intent was to benefit Miss Lightfoot.

in *Re Cleadon Trust Ltd (Cleadon Trust)*.¹⁶³ Cleadon Trust Ltd was a secured creditor of its two subsidiary companies. It also guaranteed their obligations in respect of the development of a block of flats. When the time came to pay the builders of this development, neither the subsidiaries, nor Cleadon Trust had the necessary funds. Against this backdrop, the major shareholder and director Mr Creighton advanced money for the purpose of paying those debts. He advanced the sums initially at the request of the managing director of the company and subsequently at the request of the company's secretary.¹⁶⁴ The case concerned the claim by Mr Creighton for reimbursement for the money advanced and used for the benefit of the subsidiaries.

Scott LJ holds that as a director Mr Creighton's actions were in "flagrant disregard" of the Companies Act.¹⁶⁵ His position in relation to the company meant Mr Creighton could never be in a position to entitle him reimbursement. Scott LJ focuses on the conduct of the applicant, the constitution and the position of the company, as well as their articles of association.¹⁶⁶ The company was the "outer shell of a persona, but it [the company] was paralysed."¹⁶⁷ Scott LJ holds that Mr Creighton treated the company and its subsidiaries "as one business belonging to himself."¹⁶⁸ The actions of Mr Creighton were held to be legally irregular being "guilty of interfering improperly and without authority."¹⁶⁹

Scott LJ notes that the limited liability privilege that Parliament has afforded to companies registered under the Companies Act is done on the condition of observance of the Act. Scott LJ further holding that "small private companies...makes due compliance with the law all the more important."¹⁷⁰

Applying Lord Reed's reasoning, although identifying an objective enrichment, recovery would be denied. The policy consideration for Scott LJ would be that as a director, Mr Creighton's actions were completely outside the scope of his duties and furthermore inconsistent with them.¹⁷¹ Proper management, company law and duties of directors

¹⁶³ *Re Cleadon Trust Ltd* [1939] 1 Ch 286.

¹⁶⁴ Mr Antrobus, the company secretary was also the secretary of the two subsidiary companies.

¹⁶⁵ *Re Cleadon Trust*, above n 163, at 311 per Lord Scott.

¹⁶⁶ At 309 per Scott LJ.

¹⁶⁷ At 309 per Scott LJ. Cleadon Trust needed a quorum of two to make decisions binding but only had one effective director at all times, so the company could not make up the necessary quorum.

¹⁶⁸ At 310 per Scott LJ.

¹⁶⁹ At 311 per Scott LJ.

¹⁷⁰ At 311 per Scott LJ.

¹⁷¹ At 311 per Scott LJ.

should always be held as more important than giving recovery to the intervener who acted in such a way as to contravene these principles.¹⁷² The actions of Mr Creighton were officious, due to his position he could never be entitled to meddle in the company's affairs.

Clauson LJ in *Re Cleadon* also held Mr Creighton was not entitled to be reimbursed. His focus was on a line of cases which I shall call the "unauthorised loan cases". These cases include *Reid v Rigby*¹⁷³, *Bannatyne v D & C MacIver*¹⁷⁴ and *Reversion Fund and Insurance Co. v. Maison Cosway, Ltd*¹⁷⁵. The common feature in all these cases is that they involved the proceeds of unauthorised loans that were used to pay for legitimate debts of a company. The person making the payments had authority from the company to pay debts, but lacked authority to borrow. In the cases the lender was seeking recovery for the loan to the extent that it had been used to pay the debts.

Due to the authority of the person paying, the debt was discharged on payment. There was a clear objective enrichment. The problem for the lender was that the loan was invalid. There had been no valid request for the loan thus there was no obligation on the borrower to repay. As in a three party claim, the lenders claim arises independently of the lack of a valid request to make the loan. The claim is instead based on the borrower receiving an enrichment.

The unauthorised loan cases allowed recovery to the lender. It is submitted that these cases provide us with another example of behaviour that falls into the officiousness continuum. The cases provide further incentive to identify the real reasoning of the cases as clearly a lack of a valid request is not fatal to a claim. These cases can be explained as such; the request for the loan (albeit invalid) "encouraged" the lenders actions which arguably counters any suggestion that the lender was officious in advancing the loan.

Applying Lord Reed's approach we see that the objective enrichment is clear, the debt was both legally and factually discharged on payment. Furthermore, there was a lack of

¹⁷² At 318 per Scott LJ. His Lordship is "glad to think that this Court is not extending its help to a director who seems to me to have used the company's business as if he owned it and to have disregarded very important statutory provisions for proper management."

¹⁷³ *Reid v Rigby* [1894] 2 QB 40.

¹⁷⁴ *Bannatyne v D & C MacIver* LR 4 Ch. 748

¹⁷⁵ *Reversion Fund and Insurance Co. v Maison Cosway Ltd* [1913] 1 KB 364.

officiousness due to the encouraging actions of the borrower, thus the lender was entitled to recover.

Clauson LJ in his denial of recovery to Mr Creighton distinguishes the facts of *Re Cleadon* from the unauthorised loan cases. Clauson LJ is influenced by his interpretation of the decision in *Falcke*.¹⁷⁶ His primary focus is on the lack of request by the company for Mr Creighton to make the payments.¹⁷⁷ Clauson LJ holds that the fact of payment without authority is not enough to entitle recoupment.¹⁷⁸ Due to no request from the company, Mr Creighton could not “force a liability” onto Cleadon Trust.¹⁷⁹ Furthermore Mr Creighton lacked authority to pay debts thus could not be reimbursed.¹⁸⁰ Clauson LJ sees Mr Creighton’s actions as officious in imposing an obligation onto Cleadon Trust which they had not requested.

Arguably, both Scott LJ and Clauson LJ would hold that, under the new formulation of an unjust enrichment claim, the policy reasons do not entitle Mr Creighton to recovery. The approach by Lord Reed would have enabled an explicit discussion of the policy factors identified.

Greene MR dissents in *Re Cleadon*, holding that Mr Creighton should be reimbursed for the payments. The payments made distinguished a debt owed by the subsidiaries, which, when they were extinct, relieved the company of the corresponding liability under their guarantee.¹⁸¹ Mr Creighton’s actions benefitted the company. Greene MR further holds that if the subsidiaries had been able to and did pay their creditors then there would be less to go to the company as the holder of all the debentures.¹⁸² Despite the fact that the company could not act, due to not having the necessary quorum of two directors to make decisions, Greene MR’s judgment emphasises the importance of focussing on an objective

¹⁷⁶ *Re Cleadon Trust*, above n 163, at 321 per Clauson LJ. “It is, I conceive, not open to this court to hold that a person who by paying money confers an unsought benefit on another thereby entitles himself to an equitable right of recoupment as against that other.”

¹⁷⁷ *Falcke v Scottish Imperial Insurance Co*, above n 1. This thesis demonstrates that the court in may actually have been responding to the self-interested nature of the payment, not the lack of request in their denial of recovery. See Chapter Two above, and below “self-interested actions”.

¹⁷⁸ *Re Cleadon Trust*, above n 163, at 322.

¹⁷⁹ Perhaps if the money had been used by someone in the company with authority to pay debts, Clauson LJ may have allowed a claim.

¹⁸⁰ *Re Cleadon Trust*, above n 163, at 322 per Clauson LJ.

¹⁸¹ *Re Cleadon Trust*, above n 163, at 298 per Greene MR.

¹⁸² At 298 per Greene MR.

assessment of enrichment. His reliance on the objective benefit bestowed upon the company due to the fact of payment by Mr Creighton is in line with the approach advanced by this thesis.¹⁸³

Greene MR holds that the fact Mr Creighton paid the creditors direct is not a consideration that should preclude recovery.¹⁸⁴ Instead, Greene MR allows recovery focussing on the factual realities. Greene MR does not place weight on the technicalities of the case, for example the fact that “technically” Cleadon Trust could make no request for the payment. Instead Greene MR focusses on the fact that Mr Creighton was arguably “encouraged” to make payments which factually benefitted Cleadon Trust. Greene MR implicitly not viewing Mr Creighton’s actions as officious and therefore finding that recovery should be allowed.

Using Lord Reed’s approach it might still be concluded that the majority policy factors are stronger, thus recovery denied. What is important however, is that Greene MR does not seem to consider Mr Creighton’s actions as officious.

This “continuum of officiousness” is an underlying consideration in a number of the cases, however, no one policy factor can be considered independently of the others.

B. Identity of payer allowing creditors to reasonably rely on payment:

As identified in Chapter Three, the appropriateness of the payer as a source of payment is a relevant factor in determining the reasonableness of the creditors to rely on the fact of payment. *Majesty* particularly emphasised the need for certainty of receipt for creditors.¹⁸⁵ *Majesty* however, like the unauthorised loan cases may be an example of where the granting of recovery is better explained due to a lack of officiousness. Despite the courts focus on the certainty of receipt for the creditor, the “encouragement” of Mr Liu to advance the funds may also preclude any finding of the bank acting officiously in

¹⁸³ In contrast to this, if Greene MR was concluding that the enrichment entitled recovery, his conclusion would be inconsistent with the approach being advanced. A conferral of a benefit alone does not entitle the payer to recover.

¹⁸⁴ *Re Cleadon Trust*, above n 163 at 303 per Greene MR. “Payment was direct to the builders... this difference is not, in my opinion, one of substance”.

¹⁸⁵ *Majesty Restaurant P/L v CBA*, above n 120, at 601.

making the payments. The recovery being based, not on certainty of receipt for the creditors, but on the fact that the bank as an intervening payer, was not “meddling” in another’s affairs. The bank’s actions were not officious.

Holland J in *Westpac* also noted the fact that a bank is unlikely to be officious in making payments to their customer’s creditors.¹⁸⁶ This may be dependent on the circumstances of the payment and will be discussed in more detail in Chapter Five.

Certainty of receipt for creditors is a valid consideration, creditors being one of the three interests involved in a three party claim. It is submitted however, that a focus on the relationship between the debtor and the intervening payer, when the claim is from the payer to the debtor, is to be preferred. The officiousness or lack thereof of the payer may be a better way to explain why recovery is being granted to the intervening payer in a claim against the debtor.

C. Self- interested actions:

This policy consideration can be determinative for either denying or granting recovery, further emphasising there must be more to the payment of another’s debt than mere request or ratification.

Falcke is an example of a self-interested payment where the intervener was denied recovery. As will be recalled, Emmanuel was acting in his own interests when he paid the insurance premium. Emmanuel, mistakenly believing that the secured debt did not exceed the policy’s value, ensured the policy did not lapse, by paying a premium. His actions were purely so he would receive a larger payment on the death of the insured. When it came to light he was actually not entitled to a larger share, not having gained Falcke’s interest, he attempted to make a claim against Falcke’s representative.¹⁸⁷

Applying Lord Reed’s approach, the payment objectively benefited those who received payment on the death of the insured. Two policy factors are important; Emmanuel was purely acting in his own self- interest to increase his share of the money on the death of the insured. Secondly, his claim would have defeated the legitimate claim of Falcke’s

¹⁸⁶ *Westpac Corporation v Rae*, above n 140, at 345.

¹⁸⁷ *Falcke v Scottish Imperial Insurance Co*, above n 1, at 240.

representative. These are arguably the real reasons recovery was denied, not the lack of request for Emmanuel to make the payment.

Not all self-interested behaviour is fatal to the claim, Emmanuel's actions in *Falcke* can be compared with those of Mr Exall. In *Exall v Partridge*¹⁸⁸ (*Exall*), Exall had left his carriage with Partridge for repair which was seized as distress when Partridge failed to pay his rent.¹⁸⁹ In order to recover his carriage Exall paid the rent. In the proceedings Exall sought recovery from Partridge for the amount paid. His claim was successful.¹⁹⁰

Currently, *Exall* is considered one of the "earliest and most familiar example[s] of compulsory discharge of another's debt," and is seen as support for the argument that if one pays under compulsion of law then they are entitled to be reimbursed for the payment.¹⁹¹ Cockburn CJ in *Moule v Garrett* explains the common law principle as such;¹⁹²

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

This case is interesting as there was no discussion of request or ratification, however the court allowed recovery. The common law explanation of *Exall* is the Exall was compelled to make the payment. Relying on an extended understanding of request the "compulsion" is said to act as an implied request by Partridge for Exall to make the payment. Grose J held;¹⁹³

"The plaintiff could not have relieved himself from the distress without paying the rent: it was not therefore a voluntary, but a compulsory payment. Under these circumstances, the law implies a promise by the three defendants to repay the plaintiff"

¹⁸⁸ *Exall v Partridge* (1799) 3 Esp 8; 170 ER 520 KB at [311].

¹⁸⁹ At [311] per Grose J.

¹⁹⁰ At [311] per Grose J.

¹⁹¹ Goff and Jones *The Law of Restitution* (7th ed, Sweet & Maxwell, London, 2007) at [15-004]. (Restitution)

¹⁹² *Moule v Garrett* (1872) L.R. 7 Ex. 101 at 104 per Cockburn CJ. Goff and Jones state the "nineteenth century lawyers would no doubt have sought the solution to this problem in the notion of request...the formal language of request...artificially extended to include cases where the claimant had acted under compulsion."¹⁹²

¹⁹³ *Exall v Partridge*, above n 188, at [311] per Grose J.

It is submitted however that the explanation of legal compulsion by the court in *Exall*, and subsequently, is misleading. The “compulsion” in *Exall* is contrary to *Owen*. Once Mr Owen had voluntarily assumed the role of guarantor, when the guarantee was called in, he was legally compelled to make the payment. Whereas in *Exall* there was in fact no personal obligation on Exall to pay the rent, he was not compelled.¹⁹⁴ He could have left his carriage with the landlord if he no longer had a use for it. An argument based on legal compulsion hides the underlying issues at play in the case.¹⁹⁵

It is submitted that instead cases should be assessed with regard to the approach offered by Lord Reed as it will lead to a more satisfying and coherent conclusion as to why recovery was granted or denied. For example, if we consider the payment made by Exall to the landlord objectively enriched Partridge then we can consider the policy factors underlying the case.

I would suggest the policy reason which allowed recovery was that Exall was acting in his own self-interest. Contrary to Emmanuel in *Falcke*, Exall’s self-interested action in paying the rent was legitimate, as he owned the carriage. The carriage was on the land with Partridge’s consent.¹⁹⁶ Exall paying the rent is a form of a legitimate self-interested action, which should entitle him to reimbursement.

D. Conclusion of policy factors:

This chapter demonstrates the advantages of identifying the policy factors that arise in the cases showing that the outcomes in the cases can be better explained with the use of these factors. Currently policy is hidden behind the court’s focus on request and ratification. Lord Reed’s approach would allow the courts to undergo such an analysis explicitly.

¹⁹⁴ It could be argued that even if Exall was not personally compelled to pay, that his carriage was. However, this argument becomes unnecessary if Lord Reed’s approach is adopted.

¹⁹⁵ Goff and Jones *Restitution*, above n 190, at [15-008]. The author’s further state that reliance on this extended notion of a request conceals the true grounds on which the courts granted or refused relief.

¹⁹⁶ Goff and Jones *Restitution*, above n 190, at [15-009], [15-010]. The fact that Partridge was aware that the carriage was on his land and had consented to it being there was an important factor in the case. Accordingly if a trespasser had left their carriage on the land and it was seized as distress a claim for recovery from Partridge would likely fail. Again highlighting the need to assess the policy at play in the cases.

Chapter Five: A banking example:

Currently when a bank makes a payment without authority they will be denied recovery from their customer. Both the mainstream approach and the argument of subjective devaluation favour the customer's autonomy. As we have seen, this is achieved through a need for a request or ratification before any debt is discharged.¹⁹⁷ However, the bank may want to recover from their customer if the creditor is insolvent or has a defence available to them.¹⁹⁸

As noted in Chapter Four no policy factor can be assessed independently. In a three party claim involving a bank the main policy factors are likely to be; (i) the autonomy of the customer and their ability to pay their own debts; (ii) the identity of the bank as the payer allowing certainty of receipt; and (iii) the officiousness of the bank in making the payments. The need to address each of the policies arising in the case is important.

A. Lord Reed's approach:

An example of a three party claim involving a bank is *Liggett*. As will be recalled, *Liggett* involved payments of legitimate demands of the company. The bank was acting outside its mandate in making the payment.¹⁹⁹ There was no "valid request" from the company. Lord Reed's approach would hold the customer is objectively enriched due to the fact of payment. The bank would need to show that a legitimate debt is factually discharged on payment. Secondly, the court would explicitly consider the policy factors.

Chapter Three highlights that a bank will usually be considered an appropriate payer allowing creditors to rely on the validity of the payments. As we saw in *Majesty* this is a valid consideration, especially if the bank is "held out" by their customer as an appropriate payer.²⁰⁰ Discussed in *Majesty* was s 164(3) (f) of the Corporations Law

¹⁹⁷ They must make a claim against the recipient of the payment on the grounds of mistaken payment. See generally *Barclays Bank v W. J. Simms Son & Cooke*, above n 9.

¹⁹⁸ Such as a change of position.

¹⁹⁹ *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*, above n 59, at 49. The bank was paying when cheques did not have the required signature of Mr Melia.

²⁰⁰ *Majesty Restaurant P/L v CBA*, above n 120, at 602.

Act.²⁰¹ This is a similar section to New Zealand's s18 of the Companies Act 1993²⁰². In particular, s18 (1) (c) (ii) states that;²⁰³

“(1) A company...may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that—...

(c) a person held out by the company as a director, employee, or *agent* of the company...

(ii) does not have authority to exercise a power which a director, employee, or *agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise.*”

In a banking context *Majesty* held that when a bank is paying a customer's creditor, they are being held out as agents of the company.²⁰⁴

Majesty also noted the importance of the authority of Mr Liu, who had both actual and ostensible authority to pay debts. The court holding that Mr Liu “held out” the bank as having authority to pay the company debts. *Majesty* therefore could not argue that the bank was acting outside its mandate in making the payment, especially as the bank was a usual source of payment.²⁰⁵ The customer may have a nominal claim for breach of mandate, but this will not equate with the amount paid to the creditor.²⁰⁶ The court in *Majesty* allowed the bank the benefit of the payment emphasising the creditors need to rely on payment. Due to the similarities of s 164(3) (f) and s 18 (1) (c) (ii) perhaps this will be a valid argument in New Zealand as well. If a bank is “held out” as an agent of a company then the company may not be able to refute the validity of the payment.

Although certainty of receipt is a relevant consideration it is submitted that too much weight can be placed on it.²⁰⁷ If this occurs too much protection is afforded to the creditor, who will always want to rely on the certainty of the payment. Again the different policy

²⁰¹ At 600. Corporations Law Act 1989 (NSW) s 164.

²⁰² Companies Act 1993.

²⁰³ At s 18. Emphasis added.

²⁰⁴ *Majesty Restaurant P/L v CBA*, above n 120, at 600.

²⁰⁵ At 602 per Hunter J.

²⁰⁶ At 602 per Hunter J.

²⁰⁷ As perhaps occurred in *Majesty Restaurant P/L v CBA*, above n 120.

becomes important. The focus of a claim from the intervening payer to the debtor should be on their relationship. Thus if too much reliance is placed on certainty of receipt it may undermine other valid considerations that exist within the debtor and payer's relationship.

One such policy may be officiousness and the inherent difference between when a bank is instructed not to pay²⁰⁸, compared to when there is no valid request.²⁰⁹ Holland J in *Westpac* held that a bank is unlikely to be officious in making a payment.²¹⁰ It is submitted that this may be dependent on the circumstances of the payment. In *Liggett* the bank continued paying legitimate debts when there had been no valid request, but some form of "encouragement" to make the payments.²¹¹ The bank making payments in this circumstance may fall somewhere closer to the "not officious" end of the continuum. The same can be said for *Majesty*. A better explanation for the outcome in *Majesty* is that, despite Hunter J's focus on certainty of receipt, the bank was not officious in making the payment. Indeed, the bank was "encouraged" by Mr Liu to continue making payments.

It is submitted that although the creditor's position is a relevant consideration, the focus of a three party claim should not be on the creditor, but on the relationship between the bank and its customer. If the customer "encouraged" the payments which were used for legitimate demands, the bank in meeting those demands is not an officious outsider meddling in another's affairs. The benefit of Lord Reed's approach is the explicit use of policy allowing for the real reasoning in the cases to become clear.

B. Consequences of a claim against the customer:

It could be argued that the policy specific nature of the approach offered by Lord Reed and the "weighing of policy" will allow for "unstructured reasoning about injustice."²¹² However, as noted by Lord Reed in *Benedetti* this need not be the case. Indeed, a banking example highlights the advantages of the approach offered by Lord Reed with no one

²⁰⁸ As occurred in *Barclays Bank v W. J. Simms Son & Cooke (Southern) Ltd*, above n 9, at 682.

²⁰⁹ For example in *Barclays Bank v W. J. Simms Son & Cooke*, above n 9. The bank explicitly overlooked the instructions not to pay. Compared to *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*, above n 59. Arguably the bank was "encouraged" to continue making payments.

²¹⁰ *Westpac Corporation v Rae*, above n 140, at 345.

²¹¹ *B Liggett (Liverpool) Ltd v Barclays Bank Ltd*, above n 59, at 60. Mr Liggett continued presenting cheques, signed by himself, and from time to time his wife as well.

²¹² *Benedetti v Sawaris*, above n 7, at [118] per Lord Reed.

interest (or policy) unduly favoured. The approach allows for policy to be considered on an even footing with clear explanations of why one policy factor is being preferred.

If a bank makes a claim in unjust enrichment against their customer, the current favouring of the customer's autonomy will be no more. Instead, the actions of the customer and the bank will be considered and the policy factors that those actions involve weighed against each other. As we have seen when a bank is not officious in making payments, a claim in unjust enrichment against their customer is more likely to succeed. Where the bank is officious (for example by ignoring its customer's stop-payment instructions) their claim for reimbursement is likely to fail.

There are two points to note about the creditors position and certainty of receipt if the approach advanced in this thesis is adopted. First, as discussed, although certainty of receipt is a relevant policy factor in a three party claim, it should not be the paradigm consideration. Instead, the focus of the claim is on the bank and its customer.

Secondly, if Lord Reed's approach is adopted, although the court may consider whether it was reasonable for the creditor to rely on the payment, the law will not change regarding certainty of receipt. Currently, the mainstream approach offers the creditor no "certainty of receipt" the bank can still claim against the creditor for a mistaken payment. The creditor will only have certainty of receipt if it is found that the customer requested or ratified the payment²¹³, with the result that a good consideration defence becomes available²¹⁴ or they have a change of position defence.²¹⁵

The approach offered by Lord Reed would not afford the creditor any more or less protection than the mainstream approach. Unlike the mainstream approach however, the creditor's position will be considered when weighing up policy in the three party claim.

²¹³ Which they will be unaware of on receipt of payment.

²¹⁴ See *Barclays Bank v W. J. Simms Son & Cooke* above n 9.

²¹⁵ See generally Goff and Jones *Unjust Enrichment*, above n 3, at [27-01].

Conclusion:

This thesis demonstrates that in the complicated area of the law that is payment of another's debts (three party claims) a consideration of the real factors driving a decision is necessary. The analysis advanced by Lord Reed in *Benedetti* allows for a more sophisticated analysis of why in some circumstances recovery to the intervening payer is denied, whilst in others it is granted.

On the payment of a legitimate debt, Lord Reed's approach finds that there has been an objective enrichment. The approach then encourages a consideration of the policy factors that arise in the case. The conclusion reached discusses why one policy is being preferred over another, to either allow or deny recovery.

The mainstream approach to such a claim is to deny recovery. Without a request or ratification no debt has been legally discharged, thus no claim is allowed by the intervening payer. Current unjust enrichment theory explains this denial of recovery using the argument of subjective devaluation. As the debt is still legally owing, the debtor is in no better position and thus cannot be said to have been enriched. These approaches favour the debtor's interests and reflect the law's reluctance to impose obligations which are not voluntarily assumed.

This thesis utilises Lord Reed's approach and questions the argument of subjective devaluation as a valid explanation for the outcome of three party claims. It has demonstrated that the focus on request or ratification hides the underlying policy at play in the cases. An analysis that allows these policy factors to be dealt with explicitly has been shown to be a better approach to this area of the law. The issue arises when the intervening payer cannot recover from the recipient; they may have a defence to the claim or be insolvent. The question becomes whether the intervening payer can ever recover from the debtor?

Despite the current focus on request or ratification, exceptional cases do exist where recovery is granted despite no valid request or subsequent ratification. These rare cases highlight the need to explore the policy that is at play. This thesis identifies examples of the policy considerations arising in a three party claim. These include the concept of officiousness and self-interested action.

In some circumstances denial of recovery is better explained as being due to officiousness, not a lack of request or ratification. Contrary to this is where, despite no valid request or ratification, recovery was granted. This thesis shows that the granting of recovery may be due to the payer acting legitimately in their own self-interest, or alternatively, not acting officiously in making the payments. Despite a lack of valid request, some cases have shown that the “encouragement” from the debtor precluded any finding of officiousness on the intervening payer’s behalf.

This thesis highlights that policy factors actually drive the decisions. The focus on request and ratification hides the policy underlying the outcomes of the cases. The approach by Lord Reed focusses on the factual realities of the claims. A recognition of an objective enrichment does not equate to recovery. Instead, engaging with all the policy at play allows the courts to demonstrate why a particular conclusion is reached. The focus on request or ratification lacks guidance as to why rare cases exist and relies on exceptions to explain the outcomes. Although the payment of another’s debt is a complicated area of the law, an analysis of a three party claim utilising Lord Reed’s approach would allow for a better understanding of past and future cases.

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