Unjustified Enrichment evolving in Mixed Legal Systems

Confronting the South African Supreme Court of Appeal

*McCarthy Retail Ltd Shortdistance Carriers CC* 2001 (3) SA 482 SCA

by

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*Introduction*

Scotland in the last twenty years has taken major steps forward in the recognition and development of the law of unjustified enrichment. The developments have been called a “revolution”.[[1]](#footnote-2) The “revolution” is attributed to the judiciary because its clearest expression is in three leading decisions in the Court of Session and the House of Lords: *Morgan Guaranty Trust Company of New York v Lothian Regional Council*[[2]](#footnote-3)*, Shilliday v Smith*[[3]](#footnote-4) and *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd.*[[4]](#footnote-5)It is misleading to portray the revolution as having been purely “judicial”. Its stimulus was the work of an academic whose primary focus was English law. In the 19th century Sir Frederick Pollock stood behind major developments in understandings of the Scots law of frustration of contract and delict. In the same tradition of cross-border influence the stimulus for the recent revolution in unjustified enrichment was the work of Peter Birks. [[5]](#footnote-6) It is a testament to his powerful personal influence. In *Shilliday* the leading judgment was given by Lord Rodger who said that:[[6]](#footnote-7)

“Anyone who tries to glimpse the underlying realities [of unjustified enrichment in Scots law] must start from the work of Professor Peter Birks, Regius Professor of Civil law at the University of Oxford…”[[7]](#footnote-8)

Scottish academic writers like Niall Whitty have also developed the law in significant ways, as, for example, in his understanding that unjustified enrichment comprises different groups of cases that are best distinguished from one another according to the manner in which the enrichment was acquired.[[8]](#footnote-9)

This chapter examines, briefly, the content of the Scottish enrichment revolution. However, its main focus is modern South African law with which aspects of the Scottish “revolution” resonate closely, in particular in relation to a “general enrichment “action””. Perhaps curiously, the issue of the general “action” has arisen most prominently in the context of improvement of another’s property. For this reason the chapter examines the background to the current South African law on “improvements” which in turn explains the approach taken by the South African Supreme Court of Appeal in *McCarthy Retail Ltd v Shortdistance Carriers CC*.[[9]](#footnote-10) The Court identified a paradigm in the facts of *McCarthy* which enabled it to dispose of the challenging facts as a “typical” improvements claim. The decision has received universal academic approbation. Whether this is justified will be questioned, partly by reference to developments that occurred recently in Scots law in its “revolution”.

*Scottish Enrichment Revolution: Content*

(1) *Recognition of Unjustified Enrichment*

Historically unjustified enrichment has often surfaced as a background concept in Scots law. In1995, in a decision in which the leading judgment was given by Lord Hope, in *Morgan Guaranty* the Court of Session elevated it to a level with contract and delict as an independent source of obligations. The subject has long been recognisedat this level by contemporarycivilian legal systems so, given the civilian provenance of this part of Scots law, why the same recognition in Scotland came so late needs to be explained. The major delaying factor was the influence of the writings of the Scottish institutional writer, Stair (1681)**.****[[10]](#footnote-11)** His natural law scheme of obligations drew, partly at least, from a theological tradition according to which obligations are ‘conventional’ (contract) or ‘obediential’ (owed to God). Stair, like Roman law, did not conceive of a body of law called unjustified enrichment. The causes of action that now make up the contemporary Scots law of unjustified enrichment are scattered within his titles on ‘restitution’ and ‘recompence’ which are sub-divisions of ‘obediential’ obligations formed, in line with the theological teaching, according to the content of the response, whether restitution, recompence (or reparation). [[11]](#footnote-12) However, Stair’s classifications were not fully accepted or understood by those who immediately followed him and the Roman law scheme of obligations sourced in contract, quasi contract, delict and quasi delict re-asserted itself over time. The Roman scheme did not wholly supplant that of Stair. What resulted over time was a mix of the two. The result was a number of serious confusions which Peter Birks was the first to understand and bring to the attention of the Scottish legal community. *Morgan Guaranty[[12]](#footnote-13)* drew limits on the influence of Stair by its recognition of unjustified enrichment as a distinct source of obligations governed by four principles. In *Dollar Land* Lord Hope enumerated the principles in the following terms:[[13]](#footnote-14)

the pursuers must show that the defenders have been enriched at their expense, that there is no legal justification for the enrichment and that it would be equitable to compel the defenders to redress the enrichment.

At the level at which Lord Hope states them these are “general” principles in the sense that they must all be satisfied, *ex facie*, in a uniform manner, to found a successful claim. It remains unclear how the (new) “general” principles cohere with the established causes of action like, for example, *condictio indebiti* that originated in Roman law when no such over-riding principles existed. Should we now view the established causes of action as no more than tested examples of the application of the “general” principles? On this understanding the established claims, although having distinct historical origins, just represent typical fact situations to which the general principles can be applied and whose satisfaction alone founds liability. Alternatively, does a claimant need to address the particular requirements of the established causes of action? This issue of “subsidiarity” prompts a consideration of the process of generalisation from causes of action like the *condictio* and the liability of an owner to the good faith possessor/improver to “unjustified enrichment” in modern law.

(2) Condictio *is a Cause of Action*

The *condictio* in the formulary system of old Roman law was a widely used remedy addressed to the recovery only of “certain” benefits like a fixed sum of money (ZAR100) or a distinct thing (the horse “Ned”). In 1998 in *Shilliday v Smith* Lord Rodger stated that in Scots law the term *condictio* represents a distinct group of causes of action. As Reinhard Zimmermann makes clear elsewhere this had in fact been the case since Justinianic *i.e*. late, Roman law. A *condictio* cause of action now arises as a claim of unjustified enrichment wherever D has been enriched; it is completely immaterial whether the benefit was “certain” or “uncertain”. The inclusion of the *condictio* within the law of unjustified enrichment also results in a necessary shift in the conception of the nature of the transaction from which it arises. Where this had been restricted in Roman law to payments or transfers of property (*certa pecunia/res*) it is now necessary to include all circumstances by which D was objectively enriched as, for example, where D benefited from services provided by P. The point is expressly made by Lord Rodger in *Shilliday*. However, modern South African law adheres to the nature of the transaction to which a *condictio* gives rise as a “transfer”. The equivalent Scottish descriptor is “deliberate conferral” which is better because it is inclusive also of the “provision of a service” cases.

*Rights not Actions: Stripping the Alters: De-colonising Scots Law*

Grotius fashioned a unitary law of “unjustified enrichment” out of a range of disparate fact situations for which Roman law had provided remedies (actions) unconnected with “unjustified enrichment”. The actionability of these remedies in Roman law rested upon the authority of the *praetor* and later, of the jurists. In the later European civilian tradition their actionability rested on the authority of the text of the *Corpus Iuris Civilis*. In Scotland a break from this “Roman” tradition was made by Stair who replaced its authority, partly at least, with that of a Christian God in the idea of “obediential” obligations. Notwithstanding that his classificatory model was not to survive, the learning of the *ius commune* had to pass through the eye of the needle of Stair’s *Institutions of the Law of Scotland*. Stair stripped Scots law of much of the “actional” nomenclature of old Roman law drawn in origin from the formulary system, some of it obsolete even for late Roman law. ‘*Condictio*’ remains part of the language of contemporary Scots law but, as we are reminded by Lord Rodger in *Shilliday*, the term now no longer has an ‘actional’ import but is representative only of causes of action understood as part of a system of *rights* to recover a benefit under defined circumstances.[[14]](#footnote-15) Since unjustified enrichment is recognised by the Scottish courts as a source of obligations, it – in all its applications – is generally justiciable as a system of rights on the basis of that recognition alone**.** ‘Actions’ as previously understood should have no role to play. However, what is commonly known as a general enrichment “action” has recently been recognized by Scots law. South African law, because of its Roman-Dutch heritage remains strongly imbued with Roman “actional” terminology and its remedial disparity. A stripping of these alters would be a positive contribution to the achievement of clarity and accessibility (decolonisation) of the old laws.

(3) *General Enrichment Principle* (*Action*)

In the hearing of the appeal of *Dollar Land* before the House of Lords (1998) Lord Hope said: [[15]](#footnote-16)

The event which gives rise to the granting of the remedy is the enrichment. *In general terms* it may be said that the remedy is available where the enrichment *lacks a legal ground to justify the retention of the benefit*. In such circumstances it is held to be unjust. (emphasis supplied)

The principle “(retention) without a legal basis” started life in “actional” terms in Roman law as the foundation of the *condictio sine causa*. Until recently it was applied in Scots law as a broad principle to *condictio* claims alone. However, it is now, *ex facie*, the single general criterion of liability (cause of action) in all claims of unjustified enrichment. Itsrecognition as such did not arise from the need to address a novel fact situation as, we have been told, will have to be the case in South Africa.[[16]](#footnote-17) Drawing from modern civilian systems of law, it was regarded as an organic, natural, development of Scots law**.** Was it worthwhile? Views no doubt differ. The general principle potentially provides a framework around which claims in unjustified enrichment can be analysed and by doing so assist in the determination of their scope and interrelationships. Visser has suggested that come the day of its recognition in South Africa, it will be the *Donoghue v Stevenson*[[17]](#footnote-18) of the law of unjustified enrichment.[[18]](#footnote-19)

*Problems*

There are issues concerning what is meant by “general enrichment action” and what its proper function should be. Additionally for Scottish judges trained in the ways of the common law for whom even “unjustified enrichment” itself is not a wholly familiar concept, there have been challenges in understanding what “retention without a legal ground (*sine causa*)” means. It has been treated by some judges as a new beginning and not subsidiary to the established causes of action of unjustified enrichment. Thereby it immediately started to go seriously wrong. In *McCarthy Retail* Schutz J. identifies these as the sorts of problems that have constrained the recognition of a general “action” in South Africa. However, the initial difficulties in Scotland can perhaps also be viewed as the inevitable early consequences of major re-orientations which the elevation of the principle to its “general” status certainly is.

*Example*

*Virdee v Stewart* [[19]](#footnote-20)

The pursuer, at her own expense and with some grant aid, built a house on the croft of her brother for use by her family and the defender (her brother) when the house was not occupied by her. The house was completed in August 1994. In 2009, the relationship of the parties broke down and the pursuer was excluded from the use of the house. The pursuer raised a claim of unjustified enrichment in 2011 to recover her outlay in building the house. The intended claim was *condictio causa data causa non secuta*. In reaching her decision Lady Smith expressly relied upon the “new” general principle “retention without a legal ground”.

She said:[[20]](#footnote-21)

This all happened in circumstances where, from the outset, the defender had no legal right or entitlement to have the pursuer build anything on his land or to confer any benefit on him by way of taking any action on or relating to his land….. the defender was enriched as soon as the house was completed…that was an enrichment which, again, as a matter of law, was wholly unjustified because he had no legal right or entitlement to it.

A “legal ground” was conceived with the paradigm of “contract” in mind. To be a “ground” for retention it was thought that it must give the defender a legally enforceable entitlement to the benefit. Clearly the defender had had no such “right” to have the house built on his land. He did, however, agree to its construction and to his becoming owner by its accession to his land for the *quid pro quo* that his sister be allowed to use it at will. Since he had no such “right” to the house when it was built it was understood by the court to have been held without a legal ground by him from the moment that it was built. As a result the prescriptive period of five years[[21]](#footnote-22) was conceived to have run from 1994 and any obligation of unjustified enrichment in respect of the pursuer’s outlay had therefore prescribed.

A more acceptable view of the facts would have been to regard the “ground” for the conferral of the benefit as the (non-contractual) agreement between the parties. The continued occupation by the claimant was what formed the basis of the parties’ agreement and expectations and it was the claimant’s ejection from the property that disrupted these expectations. The enrichment then became unjustified only from the moment that it (the agreement) failed in 2009 resulting in the failure of the *quid pro quo* for the pursuer’s outlay. On that understanding her claim would not have prescribed by 2011. Shortly after the decision the defender died and the case was not appealed.

It is worth noting at this point that the odd identification of a “ground” exclusively with a “legally enforceable entitlement” also appears in *McCarthy Retail*. Harms JA said:[[22]](#footnote-23)

Since the owner (and for that matter the insurer) had no right against the garage to have the vehicle repaired and because the garage had no other claim against either of them, the shift of assets was without any ground and therefore *sine causa*.

In Scotland this understanding of “legal ground” as necessarily a “legally enforceable entitlement” surfaced again at first instance in *Thomson v Mooney*[[23]](#footnote-24)but was soundly brought to an end on appeal to the Inner House of the Court of Session.[[24]](#footnote-25)

*Sub-Division of Unjustified Enrichment*

Due to the influence of Stair, Scots law now distinguishes according to the nature of the response to which each claim of unjustified enrichment gives rise, whether ‘restitution’ or ‘recompence’.[[25]](#footnote-26) Otherwise it has treated unjustified enrichment as a unity. By and large all the separate cases have been conceived in similar terms and subjected to the same general rules and principles. Since the law of unjustified enrichment itself lacked clear definition until recently, this is unsurprising. However, Scottish academic commentaries now recognise that although they are all expressions of ‘unjustified enrichment’, there are groups of claims in that have to be handled differently because they are conceptually and functionally distinct from each other in some significant respects. The explanation for the existence of the ‘groups’ is that they were conceived as unrelated causes of action in Roman law each with a distinct form of action (remedy) of its own. They were brought together as expressions of unjustified enrichment only much later by modern scholarship. Reflecting their origins, they remain conceptually and functionally distinct in significant ways. In Roman law the groups were the *condictio*, good faith possessor/builder on another’s land, some acquisitions of ownership by D of what belonged to P without his permission, and payment of another’s debt cases. Drawing from Roman law as developed by modern German law, the same groups are now identified, and distinguished from one another in Scots law, according to the *manner* in which the enrichment is acquired; whether by *deliberate conferral* of a benefit upon D by P (*condictio* causes of action); by P’s *imposition* of a benefit upon D, by D’s *interference* with the property and analogous rights of P and by D having had his *debt* or duty *discharged* by P under certain circumstances. The ‘manner’ descriptors are useful expressions of the essence of each group and therefore as the first signposts in understanding the law. It is worth emphasising that although they fall within the broad church of “unjustified enrichment” there are conceptual and substantive differences between the groups. Modern commentators like Du Plessis and Visser have sub-divided modern South African law on similar lines for the same reasons.[[26]](#footnote-27)

*Improvement of Another’s Property*

*Identical Benefits but Different Causes of Action*

A person may improve another’s property for a variety of reasons, most commonly under the terms of a valid contract. The law of unjustified enrichment may also arise for different reasons giving rise to different causes of action.

Compare:

I. 2.1.30

*Ex diverso si quis in alieno solo sua materia domum aedificaverit, illius fit domus, cuius et solum est…Certe illud constat, si in possessione constituto aedificatore, soli dominus petat domum suam esse, nec solvat pretium materiae et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonae fidei possessor fuit qui aedificasset: nam scienti, alienum esse solum, potest culpa obici, quod temere aedicaverit in eo solo quod intellegeret alienum esse*.[[27]](#footnote-28)

(Conversely, if someone builds a house with his own materials on another’s land, the house belongs to the owner of the land...Of course if the owner of the land should claim against the builder in possession that the house is his and does not pay the cost of the materials and of the labour, he can be resisted with the defence of fraud; that is, if the builder was in good faith: for if he knew that the land belonged to another, it can be objected that he was at fault in rashly building on land that he knew belonged to another).

D.12.6.33 (Julian)

*Si in area tua aedificassem et tu aedes possideres, condictio locum non habebit, quia nullam negotium inter nos contraheretur: nam is, qui non debitam pecuniam solverit, hoc ipos aliquid negotii gerit: cum autem aedificium in area sua ab alio positum dominus occupant, nullum negotium contrahit…[[28]](#footnote-29)*

(If I build on your site and you possess the house, there is no room for a *condictio* because there has been no dealing (*negotium*) between us. However, one who pays a sum that is not due does conclude a transaction (*negotium*). But when an owner takes possession on his own land of a building, placed there by another, he enters no transaction (*negotium*)).

The civil law regards the *condictio* and good faith possessor/builder causes of action in unjustified enrichment as different. Central to the differentiation is the presence or absence of “*negotium*”. The *condictio* cases arise from *negotium* – agreements/transactions - that go wrong. A classic application of the *condictio indebiti* is to restore the *status quo ante* after the performance of a contract that was void *ab initio*. For example, P builds on D’s land under the terms of a void contract. Another common claim belonging to the group is the *condictio causa data causa non secuta*. In *Shilliday* a woman was able to recover the costs of improvements to her partner’s home made in anticipation of their (agreed) marriage that never took place. By contrast, a very different paradigm is that of the good faith possessor who builds on another person’s land in the mistaken belief that the land is his own. In this instance there has been no dealings leading to a transaction or agreement between the parties. Classically the owner of the land is enriched without his knowledge and for this reason, if only for differentiation from the *condictio* purposes, it is usefully now described as an “imposition” of enrichment case.

In the Justinianic text – and therefore in Roman law - we should note in particular that: (a) the discussion appears in book two of the *Institutes* which concerns the law of property; (b) the problem arises because of the operation of the rules of accession; (c) the builder, although not an owner, has status in the law of property. He is a *possessor* whose rights are exercised *in rem*. It is therefore his property law status that entitles him to a claim for the building outlays; (d) the claim is allowed only to the possessor who thinks that he is owner; he must be in good faith; (e) the bad faith possessor is someone who knows, when he improves the property, that he was not the owner; such a person is not allowed a claim; (f) the claim of the good faith possessor is in the form only of a defence to the owner’s *vindicatio*. It therefore arises only on the prospect of dispossession in a legal process; (g) the possessor may claim his outlay costs in respect of materials and labour from the owner. There is no suggestion that the measure of recovery is related in any degree to a conception of enrichment of the owner at the expense of the improver. However, in a seismic development in the second life of Roman law, both in Scots and South African law, the building by mistake on another’s land case is no longer conceived as raising an issue of property law but of unjustified enrichment. *Ex facie*, this does, or should, import major changes. The claim of the improver is now regulated by the law of obligations, the plaintiff/pursuer has both a defence and a positive right of action and the measure of recovery may be referenced to the owner’s enrichment.

“*The*” *Paradigm*

Notwithstanding the availability of the *condictio* claims, Justinian’s text on the good faith possessor/builder is commonly treated by both Scottish and South African law as the paradigm – the **“***typical***” -** improvement cause of action in the law of unjustified enrichment. Its focus is “improvements” alone, especially where this in the form of “building”, it has been taught to students in classes on Roman law for centuries and carries with it the emblematic *imprimatur* of Justinian’s *Institutes*, one of the most powerful transmitters of culture in the western legal tradition. It is the *Champs Elysees* of enrichment for improvements. However, as a cause of action it is in fact no more “typical” of “improvements” than a *condictio* cause of action or claim. However, here we come up against a potential major impediment. As noted by Lord Rodger in *Shilliday*, the *condictio* is representative of a group of causes of action and is *not* a remedy restricted to the recovery of a *certum*. A legal system still tied to such an idea of the *condictio*, notwithstanding that the causative facts are identical, needs to identify some otherremedy or cause of action to enable the recovery of the costs of improvements because they are an *incertum*. A result is that identical facts give rise to a different causative framework depending on whether the benefit is certain or uncertain. For example, a payment under a void contract is recoverable on the basis of a *condictio* but the value of a service in building a house under an identically void contract cannot be a *condictio* because the benefit is an *incertum*. In a properly conceived law of unjustified enrichment that is “event” (cause of action; *e.g*. void contract) based, this makes little sense. What should be identical cases are forced into different lives and, as we will see, different cases (*condictio*/good faith possessor/occupier) are conceived as having identical lives. And it all impacts upon outcomes.

*South African Law on Improvements*

(1) *Background*

*Rubin v. Both*[[29]](#footnote-30)

P and D agreed a lease that P was to use land for 10 years for no monetary rental and that P was to erect buildings upon the land which at the end of the lease period were to become D’s. The lease was found to be null and void and P was ejected from the land by D after 3 years usage. De Villiers CJ observed that:[[30]](#footnote-31) “D took advantage of the law”. P claimed the net cost of his outlay (£1000) on the buildings on the reasoning that he was *good faith possessor* of the land. D offered £300 and P sued for the balance of £700. P’s claim was seen to be problematic by the court because he could not strictly be classified as a good faith possessor since he knew that he was not owner. The majority approach was to allow his claim as a “good faith *occupier*” on an analogy with the good faith possessor/improver entitlement. The understanding was that P was mistaken as to his title (mistaken lessee in the land) just as a good faith possessor is mistaken as to this title. However, there was not unanimity in this approach. Innes J gave the minority judgment. He said that:

Both parties acted in accordance with the terms of the contract of lease which they thought to be binding, but which was discovered to be null and void..it was open to the owner to consent to the rectification of the informality, or to allow the plaintiff the use of the property for the remainder of the term…: Both parties thought that their rights were regulated by the invalid contract…But then it was argued that the plaintiff was a *bona fide* occupier, entitled to full compensation as if he had been a *bona fide* possessor. That is not the way in which the matter presents itself to my mind**”**. [[31]](#footnote-32)

*Good Faith Possessor and Good Faith Occupier*

While in *Rubin* P was indeed mistaken as to his title to hold, it seems questionable to found upon this as the basis of his claim. Firstly it has had the consequence of creating a rule that good faith occupiers are as entitled to the cost of improvements as good faith possessors. But this cannot always be the case unless a good faith occupier is sometimes to be treated, as a matter of principle, more favourably than a lawful occupier. For example, an occupier who thinks that he is a tenant is put in a better position than an occupier who is a tenant, which seems odd since a tenant is not normally entitled to the costs of improvements. Secondly, as observed by Innes J., the reasoning of the majority ignores the fact that the more obvious cause (motivation) of P’s improvement lay in the agreement that he concluded with D.P built because he agreed, and he thought therefore that he was obliged, to do so under the terms of the agreement. We have, what would in terms of the modern reconceptualization of the condictio be, a straightforward case of performance (*causa solvendi*) of a void contract that constitutes the cause of action expressed by *condictio indebiti*. Thirdly, the failure to separate out the different causes of action (*condictio* rather than good faith occupier) in *Rubin* imports confusions concerning the appropriate measure of recovery. Where the cause of action derives from the performance of a void contract (*condictio*) enrichment law traditionally steps in to re-establish the *status quo ante*. Each party to the invalid transaction conferred a benefit willingly upon the other party and the aim of the law is to restore to the other the full amount of the benefit that each received. In the absence of special considerations like “loss of enrichment” any other solution – namely full restoration by each party of what had been deliberately conferred on the other - simply would not make sense. This is very different from the case where a good faith possessor (P) builds upon another’s land. In such circumstances one is not dealing with the deliberate conferral of a benefit but compensation of the builder in very special circumstances where the owner has legitimate counter-interests to protect. The result in such “imposition” cases is normally to award the lesser between D’s enrichment and P’s outlay costs.

By the time that *Fletcher and Fletcher v Bulawayo Water Company Ltd[[32]](#footnote-33)* was heard before the Appellate Division four years later Justice Innes had become Chief Justice. However, his opinion on the merits of his judgment in *Rubin* had changed in the interim. He said:

*Rubin v Botha*…”obliterated….the distinction between a *bona fide* possessor and a *bona fide* occupier who mistakenly believed that he was occupying under a lease, in so far as concerned the right to claim compensation for improvements[[33]](#footnote-34)

*Nortje v Pool*[[34]](#footnote-35)

Although the reasoning in *Rubin* by analogy with good faith possession was conceptually problematic, the correct result was reached. Arguably this was not the case in *Nortje v Pool*. P concluded a prospecting contract with the owner (D) of some land to search for kaolin. The contract was expressed in a written document. In the event of kaolin being found P was to have the exclusive right to exploit it. The land increased in value by R15,000 as a result of the discovery of kaolin by P but the contract was found to be void for lack of certification by a notary. The reasoning of the court proceeded on the analogy of the good faith possessor/improver. P were conceived to be *bona fide* occupiers who, on the authority of *Rubin*, were seen to have a claim for improvements as a matter of principle. But, in a finely balanced majority decision, because there had been no tangible improvement of the land as was required of a good faith possessor, only expenditure and effort by P that increased the value of the land, there was held to be no claim by the plaintiffs for the recovery of their expenses. The facts in *Nortje* in respect of the cause of action seem to be similar, if not identical, to those in *Rubin*. Although a distinction between the two cases can perhaps be drawn on the basis that in *Rubin* the plaintiff was acting in order to discharge an obligation unlike in *Nortje*.[[35]](#footnote-36) Both cases are nonetheless *condictio* claims. It may be argued that in *Nortje*, like in *Virdee*, the claimant was acting on the basis of an agreement, creating the expectation of a future right, which failed rather than in order to discharge an existing obligation. On a *condictio* analysis one can conceive of the defendant (Pool) as having been enriched by the receipt, not of improvements as such, but of the value of the prospecting service which he must give back.

(2) *Summary*

*Rubin* is the foundational authority in South Africa for the extension by analogy of an enrichment claim from the good faith possessor/improver to the good faith occupier. The analogy seems misconceived. It may have occurred because the facts could not be treated as the expression of a *condictio* cause of action because of the *certum* restriction and the mistake of law bar. However, there is no reference to such restrictions in the case itself. It may be that, as also happened in Scotland, it was the familiarity of counsel and the court with Justinian’s well known treatment of “improvements” which contributed to its analysis in terms of the good faith possessor/builder. *Nortje* proceeds on the authority of *Rubin*.The owner could have had the agreement notarised or he could have stood by its terms but there was a clear financial advantage in his insisting upon the technical invalidity. The Appellate Division supported sharp practice in *Nortje*.

*McCarthy Retail v Shortdistance Carriers CC*

(1) *Summary*

This brings us to a more recent high profile case involving a claim by the good faith/lawful occupier for the improvement of property. The owner of a truck (D), following an accident, had taken it to a garage (P) for repair. The owner instructed the garage not to proceed without the authorisation of his insurance company. The dispute arose after a visit by the insurance agent to inspect the vehicle. The trial judge ultimately found that no instruction had been given by the insurance company to proceed but that the garage representative, Mr Dinkel, had laboured under the *bona fide* but mistaken belief that it had. Mr Dinkel was found to be an impetuous individual prone to make unwarranted assumptions.[[36]](#footnote-37)

The garage repaired the truck but the insurer repudiated the owner’s claim for the costs. As it turned out the repudiation was without grounds but nonetheless it triggered a clause in the insurance agreement requiring the owner to raise any dispute within 6 months of the notice of repudiation. This period elapsed. The garage, after having had payment refused by the insurer then claimed against the owner on the basis of the *condictio sine causa*.

The case has deservedly attracted significant attention, although not for the fact that it is a claim by a good faith occupier for improvements. The focus has been on Schutz JA’s majority judgment and its discussion of a “unified general principle of unjustified enrichment”[[37]](#footnote-38) and the possibility of recognizing a “general enrichment action”.[[38]](#footnote-39) It was in *Nortje v Pool,*[[39]](#footnote-40) that Botha JA found that Roman-Dutch law had never recognized a general claim arising out of the unjustified enrichment of the defendant at the expense of the plaintiff, a finding which presented a significant obstacle to academic calls on the courts to recognize a general enrichment action.[[40]](#footnote-41) Schutz JA’s finding that *Nortje* was clearly wrongly on this point, and his subsequent support for the recognition of such an action, opened the door for a sea change in the South African law of unjustified enrichment. Visser notes that a reversal of this position is now “inconceivable” despite Schutz JA’s statements on the matter being an *obiter dictum*.[[41]](#footnote-42) Visser refers to the law as being in a “post-*McCarthy Retail* era”.[[42]](#footnote-43) Du Plessis, in another leading textbook presents a discussion of the general enrichment action and the various routes the law could take in its recognition that is indicative of an opinion very similar to that of Visser.[[43]](#footnote-44)

Our immediate concern is different. It is the characterization of *McCarthy* by the SCA as a claim by a good faith/lawful occupier in line with the current law as outlined earlier. Schutz JA notes that the case is “a typical instance of necessary and useful improvements” and that it could “be solved by reference to established principles [of unjustified enrichment]”. Although Harms JA withheld his concurrence on the broader *obiter* discussion about the general enrichment action he agreed entirely with this aspect of Schutz JA’s judgment remarking that the case “fits neatly within the niche of the action of the *bona fide* occupier…”. Visser, in response, said that:

“the case was easily solved by reference to the ordinary and established principles of the law of unjustified enrichment, yet, somewhat incongruously these quite unremarkable facts have given rise to a decision which might come to be seen as one of the landmark cases of unjustified enrichment law in South Africa.” [[44]](#footnote-45)

However, he belies this claim to simplicity when he later notes that in addition to being a case of a *bona fide* occupier improving another’s property that *McCarthy* is “of course also a case of multiparty enrichment”. This contradicts the explicit finding by the court that it was not a multiparty case.[[45]](#footnote-46)

In Schutz JA’s judgment P’s claim could not be a *condictio sine causa* because of the manner of D’s enrichment:[[46]](#footnote-47) the truck was already D’s and the repairs became D’s by accession. There had therefore been no “transfer” to D as is required of the *condictio* if it is conceived as a remedy restricted to the recovery of money *paid* or specific items *transferred*. The enrichment effected by the services provided by the garage and/or the replacement of the truck’s parts could then only be characterized as improvements to the defendant’s property rather than “transfers” of goods and services to the defendant or anyone else for that matter.

Drawing on the modern reconceptualization of the *condictio,* both Visser and Du Plessis argue against the understanding of “transfer” applied in *McCarthy*, although not against this aspect of the decision specifically.[[47]](#footnote-48) They both develop a concept of “transfer” for use in unjustified enrichment along the lines of deliberate conferral of a benefit in Scots law which includes the transfer of money, property and also services. They use this conceptualisation to define the category of claims arising from “Enrichment by Transfer” broadly corresponding with what were the *condictio* claims. This is a perfectly sensible proposal and as noted by Helen Scott the view is “compelling, supported as it is by comparative law and arguments from principle.”[[48]](#footnote-49)

Applying this broader conception of transfer gives us an avenue to explore how it is that *McCarthy* could be a multiparty case as suggested by Visser. If the enrichment in *McCarthy* consists of the repairs to the truck, or more specifically the increased value of the truck arising from its improvement by being repaired, there is little or no scope for any ambiguity about the parties involved. The garage was the sole source of such repairs and the owner is the only party who could benefit from the increase in value of the truck. Schutz JA’s assertion that this was not a multiparty case, because there was no one else at whose expense the owner could have been enriched, makes sense. However, if the enrichment potentially consisted not in the repairs but in the performance of a service by the garage a potential third party is introduced, the insurer.

Where the enrichment is characterized as consisting of the service of repairing the truck it remains the case that the enrichment could only have come at the expense of the garage. However, it is no longer certain that it was the owner of the truck, Shortdistance Carriers, which was then the party being enriched. By repairing the truck the garage acted with the intention of discharging an obligation that it believed it owed to the insurer.[[49]](#footnote-50) It was on the insurer that the garage intended to confer the benefit of repairing the truck, and it was to the insurer that the “transfer” was made.[[50]](#footnote-51) Further, the insurer was potentially saved the expense of repairing the truck or compensating the insured, a legal obligation that it owed to the owner. On this analysis it is the insurer that was enriched by the “transfer” of the services provided to it at the expense of the garage. The absence of a valid contractual obligation owed to the insurer by the garage would make this enrichment unjustified and allow for the application of the *condictio indebiti*.

(2) *Outcome of McCarthy as a condictio indebiti claim*

For such a claim to succeed the garage would need to prove that the insurer was in fact enriched by its services. Although it may be possible to argue that the insurer was initially enriched by the repairs, it would seem to be the case that the insurer was not enriched at the time the garage brought its claim. Let us put aside the difficulties of establishing that the insurer’s obligations to “reimburse the owner in one way or another should his truck be damaged”[[51]](#footnote-52) were discharged by the repairs. Instead we can focus on the question of whether or not the insurer was enriched at the time the garage brought its claim. By that time the owner would have been unable to enforce the claim against the insurer. As a result, it would seem that the insurer could argue that even if it was the case that it was initially enriched, it was no longer enriched after the claim became unenforceable. If the argument were accepted the condictio claim against the insurer would fail.

But what of the multiparty analysis one might ask. Could the garage, characterizing the enrichment as the service of repairing the truck, perhaps bring a condictio claim against the owner. This would have to be on the basis that Shortdistance Carriers was now the party holding the enrichment which had initially been “transferred” to the insurer? So for instance in German law where a claim is barred against the immediate recipient of an enrichment in terms of §818(3) of the Bürgerliches Gesetzbuch (BGB) because such party is no longer enriched, a claim can potentially still be made in terms of §822 BGB against a gratuitous third party recipient of such enrichment.[[52]](#footnote-53)

An immediate difficulty with this analysis arises on the facts of *McCarthy*, that being that the contract between the insurer and Shortdistance Carriers. Any “transfer” of the enrichment from the insurer to Shortdistance carriers would not have been gratuitous. Shortdistance Carriers had paid insurance premiums after all. The “transfer” would therefore have the insurance contract as its foundation. This would provide a basis for the “transfer” even if the indemnity obligation of the insurer could not be enforced by Shortdistance carriers. This conclusion is supported by the South African position on sub-contractors set out in *Buzzard Electrical (Pty) Ltm v 158 Jan Smuts Avenue Investments Pty) Ltd[[53]](#footnote-54)*  in terms of which similar claims by subcontractors are generally excluded.

*Classifying Claims Correctly*

Regardless of whether or not the claim would be successful, so far this discussion just seems to involve the identification of a further case that has potentially been misclassified by the courts. Much like *Rubin* and *Nortje*, although *McCarthy* superficially appears to be a case of unauthorized improvements a more careful analysis reveals that it can be analysed as a *condictio* or transfer case. What follows though is the necessity of arguing why the condictio analysis is preferable or even necessary. Or to put it differently, why is it that *McCarthy* should not be dealt with as an improvements case, it does after all involve the improvement of property. This is perhaps where McCarthy is more difficult to explain than *Rubin* and *Nortje*.

Dealing first with *Nortje,* it is perhaps the easiest to explain why it is not an improvements case. It is because the claimant’s prospecting services had done nothing to improve the defendant’s property. It was this absence of any tangible improvement that, in the appeal court judgments, appeared to prove the most significant obstacle to the claim. The English case of *Cobbe v Yeoman’s Row[[54]](#footnote-55)* and Lord Scott’s hypothetical locksmith are illustrative.[[55]](#footnote-56) The claimant had benefited the defendant by working to obtain planning permission for a development on the defendant’s land. In his judgment Lord Scott uses the analogy of a locksmith who fashions a key to open a cabinet in which a valuable treasure is believed to be located, the locksmith hoping to share in the treasure. He is successful and the treasure is found in the cabinet. Lord Scott notes that the owner would be enriched, likely unjustly, by the value of the service provided and not the treasure, which he already owned. In much the same way it is the service of obtaining the planning permission, rather than the change in the value of the land, which constitutes the enrichment in *Cobbe*. *Nortje* clearly responds to the same analysis. It was the provision of the prospecting services which enriched the defendant rather than any improvement made to the property. The claim for the conferral of beneficial services should have led to the award by the court for the claimant’s costs in engaging in the prospecting.

*Rubin* is somewhat trickier to explain as it seems to respond to either analysis. The claimant did improve the defendant’s property but did so with the intention of discharging a purported contractual obligation. This requires us to interrogate the basis on which these claims can be differentiated. Visser and Du Plessis distinguish between transfer cases as being those where the plaintiff intends to confer a benefit on the defendant and imposition cases which include situations where the plaintiff has improved the defendant owner’s property without their authorisation or consent.[[56]](#footnote-57) Du Plessis, drawing on an article by Evans-Jones,[[57]](#footnote-58) uses *Rubin* to illustrate this distinction. Agreeing with Evans-Jones, Du Plessis notes that because the improvements effected by the claimant were a form of rental, authorised by the owner, the case is better analysed as a transfer case.[[58]](#footnote-59)

This basis for distinguishing the cases does not however exactly match that offered by Evans-Jones in the article from which Du Plessis drew. Although Evans-Jones also argues that the “transfer” cases are defined by an intention to confer a benefit on the defendant he differs in how he defines improvement cases. Evans-Jones suggests that improvements cases arise where the claimant held a belief that the property that she improved was her own.[[59]](#footnote-60) On this analysis the reason why *Rubin* is best analysed as a transfer claim is not just because the claimant intended to benefit the defendant but also because, absent a belief that the property being improved was his own, this was not an improvements case.

*McCarthy* provides a convenient set of facts on which the relatively subtle difference between these two approaches can be demonstrated. On Evans-Jones’s analysis, which will be returned to below, the case can only be categorised as a transfer or deliberate conferral case. As in *Rubin*, the claimant did not have any belief that it was the owner and so intended to confer the benefit on another rather than acting for its own benefit. Applying the distinction used by Visser and Du Plessis however the case can still be placed in both categories. Although the garage was intending to discharge an obligation to the insurer it was also engaging in unauthorised repairs of the truck. The descriptions of both categories, as set out by Visser and Du Plessis, are satisfied.

Visser and Du Plessis thus appear to treat *McCarthy*, and claims by good faith occupiers of property generally,as an improvements case not on the basis of a principled distinction between the categories but rather because this is how the court approached the case.[[60]](#footnote-61) The approach of the court is again not a distinction based on principle but rather, as noted above, seems to arise from the historical treatment of similar cases and the fact that the South African law does not as yet recognise a “transfer” claim for services. The advantage of the analysis offered by Evans-Jones is that it does not allow for an overlap between the cases as the required intention which defines each category excludes the other. As Evans-Jones argues, this model also better reflects the historical origin and justification for what were two distinct legal claims.[[61]](#footnote-62)

*The General Enrichment Action*

However, *McCarthy* is not just a decision on a claim by a good faith occupier but also strongly signalled the introduction of a “general enrichment action” into the South African law. It elicits a response that points out, not that the argument presented above is wrong, but that it perhaps is not very significant. This exposes a deeper lying question, why is it necessary to differentiate these claims at all and whether anything turns on such a distinction. Where *Virdee v Stewart* brought into issue the relationship between the general principles and the established causes of action *McCarthy* by contrast brings into issue the relationship between the various established causes of action once general principles are acknowledged.

The introduction of a general enrichment action would bring together, what were previously separate causes of action, as claims originating out of the application of a general cause of action. Which specific category each claim falls into then potentially becomes much less relevant. The various facts patterns all form part of the same general cause of action in unjustified enrichment. Although specific rules applicable to the various fact patterns might differ, the different categories would not represent distinct causes of action each with its own rationale. In fact the overlap between the two types of claims that is illustrated by these cases could be taken to be a product of their general character. This is what we would expect of claims that were separated by historical accident with this separation now mainly promoting convenience of analysis.

This response would however gloss over how differently these two causes of action (and at the moment these are still two distinct causes of action) would play out if transfer claims were extended to include services. Under the claim as conceived by the court the garage was entitled to claim the value of the improvements to the truck from the owner of the truck. Where however the enrichment is conceived of as a service, the claim would be against the insurer for the value of the expense saved, being the cost of obtaining the repairs or compensating the insured.

In *McCarthy* the quantum had been agreed by the parties so the court simply assumed that this represented the increase in value of the truck as a result of the repairs but it is not clear that, even if this is the case, that it would be the same as the value of the expense which the insurance company was saved. The insured amount and the cost of repairing the vehicle could easily be either more or less than the increase in its value as a result of such repairs. Depending on how the claim is characterized it is potentially against different parties, for different values and, as noted above, the transfer claim would arguably fail where the improvements claim succeeded.

One rejoinder to this is to point out that Visser has specifically noted that issues surrounding the recognition of a transfer claim for the value of a service will be one of the challenges of implementing the general enrichment action.[[62]](#footnote-63) This then is perhaps just a matter of going through the probably difficult process of adjusting the rules to accommodate this change. Perhaps as Du Plessis suggests, using the improvements (or imposition) measure of value for valuing transferred services would be a good start.[[63]](#footnote-64) However, Lionel Smith in discussing causes of action in unjust enrichment notes that a defined cause of action should not “lump together juridically distinct justifications for legal recourses”.[[64]](#footnote-65) If any of the apparently significant differences between the claims is motivated by differences in the justification for allowing the claims, the claims should be defined as separate causes of action. The analysis offered by Evans-Jones certainly supports the argument that, at the relevant level of generality, the motivations for these claims do differ.

Evans-Jones defines both categories in terms of the intention with which the claimant acted. As noted, this means that the categories cannot overlap, the relevant intentions are mutually exclusive. That this is the critical distinguishing factor also suggests that the intention or purpose for which the claimant acted is a central element in each of the claims’ (distinct) justifications. Smith’s caution that we need to be precise about what exactly justifies a claim seems apposite.[[65]](#footnote-66) Further support for this need to clearly distinguish the two categories of claims can be found in other sources, such as for example Nils Jansen’s discussion in his farewell to unjustified enrichment.[[66]](#footnote-67)

This brings us back to a general enrichment action. The premise on which it is based is that the various causes of action recognized in the South Africa law of unjustified enrichment can be grouped together as a single cause of action. Although the discussion above does not provide a conclusive objection it does raise some concerns. An earlier decision by the Supreme Court of Appeals seemed to suggest that the South African law was heading in a different direction from that advocated in *McCarthy*. In *Kommissaris van Binnelandse Inkomste v Willers*[[67]](#footnote-68) the court had found that, contrary to the prevailing opinion, Botha JA’s judgment in *Nortje* did not require that the law of unjustified enrichment be developed only by incremental extension of the existing causes of action. Rather, courts could, in addition to this, also recognize novel causes of action deriving from the general principles underlying the existing claims.[[68]](#footnote-69)

Schutz JA’s discussion in *McCarthy* elides this distinction between general action and general principle.[[69]](#footnote-70) He begins his discussion by noting that although the South African law does not give “unqualified” recognition to a unified general principle of unjustified enrichment such general principle is nonetheless significantly relied upon. However, he then shifts the discussion from general principle to a general enrichment action. What he neglects to mention is that this role could just as easily be fulfilled by applying the approach in *Willers* as the alternative he presents in *McCarthy.* Visser suggests that the approach of Botha JA in *Willers* would have left the South African law without a clear framework for its development.[[70]](#footnote-71) *McCarthy*, he states, significantly changes this.[[71]](#footnote-72)

It is not entirely clear that this is the case. The four general requirements for liability in unjustified enrichment applied in South African law, when seen as the expression of general principle rather than as elements of a general cause of action, would seem to provide the framework for which Visser advocates. This also seems to be the direction in which the English law of unjust enrichment is going. So, in *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies (in liquidation)* the UK Supreme Court noted that the analogous “four questions” in the English law are “no more than broad headings”. [[72]](#footnote-73) This has the advantage of avoiding incorrectly lumping together the potentially different causes of action arising in the law of unjustified enrichment in South Africa.

*Conclusion*

As Scots law illustrates with the *Virdee* decision, applying the standards from one category of enrichment claim when deciding on a claim falling into a different category has its potential pitfalls. The application by Lady Smith of the general principle instead of dealing with the facts under one of the established causes of action was a source of confusion.

By failing to appreciate the differences between the two different categories of claims in terms of which the facts of *McCarthy Retail* can be analysed the South African Supreme Court has fallen into a similar trap as Lady Smith in *Virdee*. The South African judges did not apply a general principle inappropriately; they rather applied the wrong principles - those related to improvements - to the facts of a case to which “transfer” rules should have been applied. This happened because they failed to interrogate the basis on which they were categorising the case as one of improvements, which was essentially founded on historical accident. Principled arguments illustrate that the case is best analysed as one of “transfer” to which the rules on the *condictio* type claims should apply.

The result of this failure was inappropriately to put the burden of the cost of the improvements on the owner of the vehicle, who had had no dealings with the garage on this point, rather than on the insurer, with whose agent the garage owner had been interacting. The simple assumption that this was a “typical” improvements case because it involved the improvement of property fundamentally misunderstands the principled basis on which “improvements” cases must be distinguished from “transfer” cases. This basis arises from the intention of the party conferring the benefit and not from the fact of the improvement of someone else’s property. As it was the insurer on which the garage intended to confer the benefit (rather than acting to benefit itself as owner/possessor) the case is a “transfer” case. This would mean that the claim should have been directed towards the intended beneficiary of the work, the insurer, thereby correctly allocating the risk of the costs of the repair as something to be determined between the garage and insurer.

The unjustified enrichment “revolutions”, if such they be, are yet young in Scotland and South Africa and it remains to be seen whether the recognition of general principle in unjustified enrichment is capable of giving content to a coherent unified structure to the subject. What this article makes clear is that the various established causes of action are significantly different from each other in important respects. They are more than just discernible mounds in the topography of the subject. The application of any general principle or action will therefore necessitate a careful consideration of the interrelationship between these causes of action and how the relate to such general principles or action.

1. N. Whitty, The Scottish Enrichment Revolution” (2001) 6 *SLPQ* 167. [↑](#footnote-ref-2)
2. 1995 SC 151. [↑](#footnote-ref-3)
3. 1998 SC 725. [↑](#footnote-ref-4)
4. 1996 SC 331; 1998 SC (HL) 90. [↑](#footnote-ref-5)
5. P. Birks “Six Questions in Search of a Subject - Unjust Enrichment in a Crisis of Identity" 1985 *Juridical Review* 227; P. Birks "Restitution: A View of Scots Law" (1985) 38 *Current Legal Problems* 57. [↑](#footnote-ref-6)
6. *Shilliday* (note 3) at p. 727A-B. [↑](#footnote-ref-7)
7. The direction of development has not been that argued for by Birks. [↑](#footnote-ref-8)
8. Whitty (note 1). [↑](#footnote-ref-9)
9. 2001 (3) SA 482 SCA. [↑](#footnote-ref-10)
10. Stair, *Institutions of the Law of Scotland* (1681), I.3.7–9. [↑](#footnote-ref-11)
11. See most recently, D. Carr, *Ideas of Equity* (Edinburgh Studies in Scots Law, 2017) chapt.3. [↑](#footnote-ref-12)
12. *Morgan Guaranty Trust* (note 2). [↑](#footnote-ref-13)
13. *Dollar Land* (note 4) at 99D-F. [↑](#footnote-ref-14)
14. *Shilliday* (note 3) at 728C–D. [↑](#footnote-ref-15)
15. *Dollar Land* (note 4) at 98H–I, 99E–F. [↑](#footnote-ref-16)
16. D. Visser *Unjustified Enrichment* (Juta, 2008) p. 46-54; J. Du Plessis *The South African Law of Unjustified Enrichment* (Juta, 2012) p. 1-10. [↑](#footnote-ref-17)
17. 1929 SC 461; 1932 SC (HL) 31; [1932] AC 562. [↑](#footnote-ref-18)
18. Visser (note 16) p. 12. [↑](#footnote-ref-19)
19. [2011] CSOH 50, Lady Smith. [↑](#footnote-ref-20)
20. Ibid at para 24. [↑](#footnote-ref-21)
21. Prescription and Limitation (Scotland) Act 1973. [↑](#footnote-ref-22)
22. *McCarthy Retail* (note 9) at 496 [↑](#footnote-ref-23)
23. [2012] CSOH 177, Lord Drummond Young. [↑](#footnote-ref-24)
24. [2013] CSIH 115. [↑](#footnote-ref-25)
25. *Institutions* (note 10) I.7–9. [↑](#footnote-ref-26)
26. See generally Visser (note 16) and Du Plessis (note 16). [↑](#footnote-ref-27)
27. *Justinian, Institutes*, 2.1.30. [↑](#footnote-ref-28)
28. *Justinian, Digest,* 12.6.33 (Julian). [↑](#footnote-ref-29)
29. 1911 AD 568 [↑](#footnote-ref-30)
30. Ibid at 577 [↑](#footnote-ref-31)
31. Ibid at 579 [↑](#footnote-ref-32)
32. 1915 AD 636. [↑](#footnote-ref-33)
33. Ibid at 650. [↑](#footnote-ref-34)
34. 1966 3 SA 96 (A). [↑](#footnote-ref-35)
35. Du Plessis (note 16) p. 272. [↑](#footnote-ref-36)
36. *McCarthy Retail* (note 9) at [1] – [3]. [↑](#footnote-ref-37)
37. Ibid at [8] [↑](#footnote-ref-38)
38. See the significant discussion of this issue in Visser (note 16) in particular p. 46-54 Du Plessis (note 16) p. 1-10. [↑](#footnote-ref-39)
39. 1966 (3) SA 96 (A). [↑](#footnote-ref-40)
40. Visser (note 16) p. 49-53, Du Plessis (note 16) p. 4-5. [↑](#footnote-ref-41)
41. Visser (note 16) p. 53. [↑](#footnote-ref-42)
42. Ibid at for instance p. 113. [↑](#footnote-ref-43)
43. Du Plessis (note 16) p. 6-10. [↑](#footnote-ref-44)
44. Visser (note 16) p. 50. [↑](#footnote-ref-45)
45. *McCarthy Retail* (note 9) at [24]. [↑](#footnote-ref-46)
46. Harms JA concurred with this aspect of Schutz JA’s reasoning in *McCarthy Retail* (note 1) at [37]. [↑](#footnote-ref-47)
47. Visser (note 16) p. 223; Du Plessis (note 16) p. 60-4. [↑](#footnote-ref-48)
48. H. Scott *Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer* (2013) p. 6. [↑](#footnote-ref-49)
49. As was found by the trial judge in *McCarthy Retail* (note 9) at [24]. [↑](#footnote-ref-50)
50. Visser (note 16) p. 223; Du Plessis (note 16) p. 60-4. [↑](#footnote-ref-51)
51. *McCarthy Retail* (note 9) at [17] [↑](#footnote-ref-52)
52. See B. Häcker *Consequences of Impaired Consent Transfers* (2009) p. 225-6 for an explanation in English of the relevant German provisions. [↑](#footnote-ref-53)
53. 1996 (4) SA 19 (A). [↑](#footnote-ref-54)
54. [2008] UKHL 55. [↑](#footnote-ref-55)
55. Ibid at para 41 (Lord Scott). [↑](#footnote-ref-56)
56. Visser (note 16) p. 223; Du Plessis (note 16) p. 62. [↑](#footnote-ref-57)
57. Du Plessis (note 16) p. 272; Robin Evans-Jones “Seeking Imposed Enrichment in Improvements – Classifications and General Enrichment Actions in Mixed Systems: Scotland and South Africa) 16 *Restitution Law Review* 18 (2008). [↑](#footnote-ref-58)
58. Du Plessis (note 16) p. 272. [↑](#footnote-ref-59)
59. Evans-Jones (note 57) p. 29. [↑](#footnote-ref-60)
60. *McCarthy Retail* (note 9) at [11] – [18] (Schutz JA) [38] (Harms JA). [↑](#footnote-ref-61)
61. Evans-Jones (note 57) p. 30. [↑](#footnote-ref-62)
62. Visser (note 16) p. 223. [↑](#footnote-ref-63)
63. Du Plessis (note 16) p. 65. [↑](#footnote-ref-64)
64. L. Smith ‘Defences and the Disunity of Unjust Enrichment’ A. Dyson, J. Goudkamp and F.Wilmot-Smith (eds) *Defences in Unjust Enrichment* (2016) 39. [↑](#footnote-ref-65)
65. Ibid. [↑](#footnote-ref-66)
66. N. Jansen ‘Farewell to Unjustified Enrichment?’ (2016) *Edin LR* 20 (2) 123 [↑](#footnote-ref-67)
67. 1994 (3) SA 283. [↑](#footnote-ref-68)
68. *Willers* (note 10) at 333; Visser note 16) p. 51; Du Plessis (note 16) p. 5. [↑](#footnote-ref-69)
69. *McCarthy Retail* (note 9) at [8]. [↑](#footnote-ref-70)
70. Visser (note 16) p. 53. [↑](#footnote-ref-71)
71. Ibid. [↑](#footnote-ref-72)
72. *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies (in liquidation)* [2017] UKSC 29 at [45]. [↑](#footnote-ref-73)