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Comparative models and their limitations: Edwin Cameron's impact on the law of trusts and unjustified enrichment

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1 Transplants and models

> [T]his Court, administering Roman-Dutch law, is precluded from adopting a doctrine peculiar to English law and in conflict with the principles of our own. But I go further: I do not think it would be advisable to do so, even if it were permissible ... [T]he English doctrine forms part of a complete system regulating the validity of contracts; incomplete in itself, it is supplemented by the further doctrine that contracts by deed need no consideration to make them binding. Deeds in that sense are unknown to our law ... . To pluck the English doctrine from its surroundings and from a system of which it forms a well-understood part, and to graft it upon our legal system, to which in my opinion it is wholly foreign; to curtail its scope by excluding from its operation all contracts of donation; and to recognise in conjunction with it the inconsistent doctrine that contracts without consideration are valid for all purposes of defence – to adopt such a course would not, I think, be expedient even if it were possible.[1]

These words were written by James Rose Innes, then Chief Justice of the Transvaal, in *Rood v Wallach* in 1904. His context was the law of contract, and he was responding to sustained attempts by Henry de Villiers – Chief Justice of the Cape Colony since 1874 – to introduce the English doctrine of consideration into South African law (ultimately the matter was settled in Innes's favour by the Appellate Division in *Conradie v Rossouw* in 1919).[2] I have cited this passage not for the light it sheds on the evolution of South African contract law in particular, but for the remarkable insight it discloses into the development of private-law

1 *Rood v Wallach* 1904 TS 187 at 201-202.
2 *Conradie v Rossouw* 1919 AD 279. Innes himself, now Chief Justice of South Africa, did not sit in the case.

doctrine in the context of a mixed legal system – and for the important warning it contains against the dangers of ill-advised legal transplants.[3] One of the qualities that made James Rose Innes a great judge was his grasp of the importance of coherence in private law: that private-law rules form an interlocking system rather than an arbitrary jumble from which one can pick and choose as the situation demands. In recognising this essential truth, he did not in any way turn his back on the demands of equity, in the sense of justice and fairness between the parties to litigation. The same can be said of Edwin Cameron.

My subject-matter in this chapter is the South African law of trusts and unjustified enrichment. In respect of trusts, writing extra-judicially Edwin Cameron has played a central role in tracing their development.[4] On the other hand, his judgment in *Absa v Moore*[5] is undoubtedly the most important decision on unjustified enrichment of the last decade. My purpose in this chapter is to draw on these two bodies of work both to illustrate the point made by James Rose Innes in the passage with which I began, and to make a series of further, related points about the use of comparative models in private-law reasoning. The law of foreign jurisdictions may provide powerful stimulus for private-law reform; at a minimum, cross-border symmetry in the development of particular bodies of law is a useful sign that we are on the right track. But comparative models must sometimes be approached with caution. Just as the need for internal coherence within a legal system acts as a barrier to transplants from other legal systems, so also those seeking to develop a particular body of private-law rules in light of comparative models should be mindful of their wider doctrinal context. A problem apparently requiring regulation by those rules may in fact be dealt with elsewhere in the legal order. Conversely, the absence of rules or institutions elsewhere in the legal order may necessitate more ambitious development than comparative models appear to indicate. Differences in

3 Compare A Watson *Legal transplants: An approach to comparative law* (1974); M Graziadei 'Comparative law, transplants and receptions' in M Reimann & R Zimmermann (eds) *The Oxford handbook of comparative law* 2 ed (2019) 442.

4 See most significantly E Cameron, M de Waal & P Solomon *Honoré's South African law of trusts* 6 ed (2018).

5 *Absa Bank Ltd v Moore* [2016] ZACC 34.

their context may therefore require that even closely comparable bodies of rules develop differently.[6]

2 South African trusts: The legacy refused

As is well known, South African private law is largely civilian. Apart from the indigenous law of property, the core of private law – property, contract and delict – is derived from Roman-Dutch law, brought to the Cape by the Dutch when they established a colony there in the mid-seventeenth century.[7] But the occupation of the Cape by the British in the early nineteenth century led to 'the widespread importation of English legal forms and concepts'.[8] In some instances, the civilian substrate was overlaid with and influenced by English common law.[9] In others, common-law institutions took on a distinctive local form. This latter phenomenon is nowhere more clearly instantiated than in the law of trusts. While the courts initially sought to 'mount the body of the trust onto the skeleton of the Roman *fideicommissum*',[10] in fact the South African law of trusts

> constitutes the most striking instance of an import from English law which was received and developed in South African law so as to become an integrally South African institution, while at the same time never losing the distinctive patterning of its English forebear. South Africa has a trust which has no Roman roots, and is yet not fully English.[11]

How so? In both English and South African law the trustee is obliged to keep trust property separate and to administer it exclusively for the benefit of the beneficiary. But the English trust entails the automatic

6 This point appears to be implied by the functional method in comparative law: compare R Michaels 'The functional method of comparative law' in Reimann & Zimmermann (n 3).

7 Compare E Cameron 'Constructive trusts in South African law: The legacy refused' (1999) 3 *Edinburgh Law Review* 341 at 343.

8 Cameron (n 7) 343.

9 A typical example can be found in the influence of the English tort of negligence on the development of Aquilian liability during the early twentieth century, although the degree to which this occurred is disputed: D Hutchison 'Aquilian liability II (Twentieth century)' in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996), especially at 600-604.

10 Cameron (n 7) 348.

11 Cameron (n 7) 343. See also T Honoré 'Trust' in Zimmermann & Visser (n 9); M de Waal 'The core elements of the trust: Aspects of the English, Scottish and South African trusts compared' (2000) 117 *South African Law Journal* 548.

separation of legal title (which lies with the trustee) from equitable title (which lies with the beneficiary), whereas in South African law the beneficiary has only 'a protected right *in personam*'.[12] Indeed, English law's doctrine of estates is conceptually incompatible with the unitary conception of ownership (*dominium*) that South Africa inherited ultimately from Roman law.[13] Furthermore, English law does not insist on the formalities with which South African law has invested trusts and trusteeship: for example, there is no need for a trust to be created by written instrument or court order.[14] Finally, trusts in modern English law can arise in response to a range of events in the law of obligations: consent, wrongdoing, or unjust enrichment. In particular, the so-called 'constructive trust' arises quite independently of the parties' intentions. Again, this is very different from South African law, which recognises only express trusts.[15] This point appears to follow necessarily from the previous two: a system that does not recognise the concept of equitable title and which requires certain formalities for the creation of a trust is fundamentally incapable of extending the trust concept beyond express trusts in the way that English law has done.

It follows from these features that the modern English trust offers an attractive remedy to litigants seeking to avoid the effects of the trustee's insolvency in a wide variety of situations: for example, in respect of money (or its traceable proceeds) obtained through the breach of a fiduciary duty;[16] in respect of money obtained by fraud or stolen from a bank account;[17] and even in respect of money paid over by mistake, at least from the moment when the recipient realises the mistake.[18] Since

12 Cameron (n 7) 350, quoting T Honoré & E Cameron *Honoré's South African law of trusts* 4 ed (1992) at 473-82, 493. See now Cameron, de Waal & Solomon (n 4) 576-83, 598.

13 Cameron (n 7) 349-52.

14 Compare s 1 of the Trust Property Control Act 57 of 1988, and further Cameron (n 7) 353-55.

15 As Honoré and Cameron have conclusively demonstrated, the constructive trust has never been received into South African law: Cameron (n 7) 344-57; Cameron, de Waal & Solomon(n 4) 152-57 (and regarding resulting trusts, see 151-52).

16 *Attorney General for Hong Kong v Reid* [1994] 1 AC 324; see further J Hudson, B McFarlane & C Mitchell *Hayton, McFarlane and Mitchell: Text, cases and materials on equity and trusts* 15 ed (2022) 710-19.

17 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 715-16 (Lord Browne-Wilkinson).

18 Compare *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, as interpreted in *Westdeutsche* (n 17) 715 (Lord Browne-Wilkinson).

the rights it confers on the beneficiary are proprietary in nature, it is also capable of being enforced against the trustee's successors in title – for example, where he makes a gift of the stolen money to a third party – although the claimant's equitable proprietary rights in the money will be defeated by a good faith purchaser for value without notice.[19] Conversely, because the trust beneficiary in South Africa enjoys no proprietary interest in trust assets, he enjoys no protection from the trustee's insolvency in the absence of the explicit separation of trust property from the trustee's own envisaged by sections 11 and 12 of the Trust Property Control Act 1988.[20] Nor can he trace any such an interest through a series of substitutions into the hands of third parties,[21] being instead wholly reliant on the protection offered by the law of obligations, in particular, delict and unjustified enrichment.[22]

3 Unjust and unjustified enrichment

In contrast to the South African trust, the South African law of unjustified enrichment is relatively untouched by English influence: both at the level of individual rules and in its structure, South African unjustified enrichment is civilian.[23] As such, it bears a strong resemblance to other civilian legal systems, both codified and uncodified.[24] That said, despite its civilian character, over the course of the last century the development of South African unjustified enrichment has described a roughly similar trajectory to that of unjust enrichment in the English common law. In both jurisdictions, scholars have worked hard to generalise the narrow, predominantly actional categories inherited from an earlier stage in the law's development: for example, in the case of South Africa, the *condictiones* and extended *actio negotiorum gestorum contraria*, and in the

19 See eg Hudson, McFarlane and Mitchell (n 16) 650-51; C Mitchell, P Mitchell & S Watterson *Goff & Jones on unjust enrichment* 10 ed (2022) especially at 843-47.
20 Cameron (n 7) 351, 357; Cameron, de Waal & Solomon (n 4) 337-41 (on the nature of the trustee's ownership of trust assets) and 582-82, 589-92 (regarding the beneficiary's rights on the trustee's insolvency).
21 Cameron, de Waal & Solomon (n 4) 576-83, 598-99.
22 Cameron (n 7) 355-57; Cameron, de Waal & Solomon (n 4) 425-62.
23 But compare D Visser 'Unjustified enrichment' in Zimmermann & Visser (n 9), as well as H Scott *Unjust enrichment in South African law: Rethinking enrichment by transfer* (2013), especially ch 2.
24 See eg D Visser 'Unjustified enrichment in comparative perspective' in Reimann & Zimmermann (n 3).

case of England, the action for money had and received and *quantum meruit*. In both cases, this scholarship has given rise to a set of general principles or 'questions' that have exercised a high degree of influence over the law's development. And in both cases, recent scholarship has questioned the wisdom of such generalisation, or at least its degree.

Turning first to South Africa, the pioneering work of Wouter de Vos, whose book *Verrykingsaanspreeklikheid* was first published in 1958,[25] culminated in *McCarthy Retail (Pty) Ltd v Shortdistance Carriers CC* in 2001.[26] Handing down the majority judgment – in which Cameron JA concurred – Schutz JA gave judicial recognition to the existence of a general principle of enrichment liability or subsidiary general enrichment action which could be used either to extend liability to new, previously unrecognised cases or to rationalise existing claims. He explicitly approved the general principles of liability articulated by De Vos: the defendant must be enriched; enrichment must be at the expense of the plaintiff; and the enrichment must be unjustified.[27] The claim thus arising would lie in respect of either the defendant's enrichment or the plaintiff's impoverishment, whichever was the lesser.[28]

In the two decades following this decision there has been a huge increase in academic interest in the subject,[29] as well as an uptick in the frequency of litigation, perhaps prompted by a growing awareness of the subject on the part of practitioners. But working with the general principles articulated by De Vos has not proved straightforward. On the one hand, there is little evidence of the rationalisation of existing claims envisaged in *McCarthy*.[30] On the other hand, even in novel cases, these principles have proved too abstract to provide South African courts with useful guidance. Nor does it seem that they can after all be treated as

25 W de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1958).
26 *McCarthy Retail (Pty) Ltd v Shortdistance Carriers CC* [2001] ZASCA 14 paras 8-10.
27 *McCarthy* (n 26) para 8, referring to W de Vos *Verrykingsaanspreeklikheid* 3 ed (1987) ch 7.
28 De Vos (n 27) 180.
29 See eg J Sonnekus *Ongegronde verryking in die Suid-Afrikaanse reg* (2008); D Visser *Unjustified enrichment* (2008); J du Plessis *The South African law of unjustified enrichment* (2012); Scott *Unjust enrichment* (n 23).
30 For example, the requirement of excusable mistake in the context of the *condictio indebiti* has been consistently upheld in principle, although exceptions have been recognised: *Yarona Healthcare Network (Pty) Ltd v Medshields Medical Scheme* [2017] ZASCA 116.

independent elements of a unitary cause of action: as conditions that are necessary (individually) and sufficient (collectively) for a successful unjustified enrichment claim.

In my view the limitations of De Vos's general principles as a guide for legal reasoning and a framework for legal development are powerfully illustrated by the judgment in *Absa Bank v Moore*,[31] decided by Justice Cameron in 2016. The case arose from an apparently widespread scam, referred to in the judgment as 'the Brusson scam' after its initiator. The fraudsters, having obtained title deeds to the homes of participants, entered into mortgage agreements with banks whereby they borrowed large amounts against the security of the participants' property. Some of the proceeds of these secured loans were paid over to the participants, who understood the scam to be a form of debt-management scheme; most were appropriated by the fraudsters. In *Absa v Moore* itself, the plaintiff bank, Absa, had lent a substantial sum to one Kabini on the security of a mortgage bond supposedly held over certain immoveable property. Since that property was held to have belonged to the Moores throughout, this mortgage bond was held to be entirely void. Pre-existing mortgage bonds over the same property had been discharged, apparently in furtherance of the scam, of which the Moores were held to be innocent. Co-incidentally, Absa had also been the holder of these original mortgage bonds. It was argued by counsel for the bank that the Moores had been enriched at Absa's expense by virtue of the fact that the Moores' pre-existing mortgage bonds had been discharged using the funds that it had lent to Kabini, and, further, that in order to reverse that unjustified enrichment, the extinguished bonds should be reinstated in Absa's favour, counsel here drawing on the English doctrine of restitutionary subrogation. I have dealt with this further argument in detail elsewhere,[32] and I will defer discussion of it until part 4. My focus here is the claim itself: the argument that the Moores had been enriched at Absa's expense.

This argument was rejected by Cameron J, giving the unanimous judgment of the Constitutional Court. First, the mortgage bonds had

31 *Absa Bank v Moore* (n 5).

32 H Scott 'Unjustified enrichment' [2017] *Annual Survey of South African Law* 1196; 'Interference without ownership: The theft of incorporeal money in the South African law of unjustified enrichment' in T Naudé & D Visser (eds) *The future of the law of contract: Essays in honour of Dale Hutchison* (2021) at 366-70.

been discharged pursuant to a valid contractual relationship between the Moores and Brusson, in terms of which the Moores incurred liability, and their discharge therefore did not enrich the Moores. Even if these contracts were to be avoided (i.e. for fraud), the Moores might nevertheless be liable in unjustified enrichment to the fraudster who had discharged their original mortgage bonds. This meant that the Moores were not after all enriched.[33] Second, even if the Moores were enriched, it did not seem that the bank was impoverished: it retained its valid claim for repayment in terms of its loan contract with Kabini, a contract that it had elected to uphold. It was obliged to pursue that route.[34] Finally, the Moores' enrichment had not been shown to have been at Absa's expense. Specifically, the bank had failed to prove that the proceeds of the money lent by Absa to Kabini had been used to settle the Moores' pre-existing mortgage debts.[35]

Cameron J's conclusion – that no claim in unjustified enrichment had been made out – is certainly defensible and probably correct.[36] But it seems that in reasoning towards this conclusion he did not derive any real assistance from the general principles recognised in *McCarthy*. In a typical *condictio indebiti* case, such as one involving the payment of money by mistake, the 'enrichment–impoverishment' and 'at the expense of' elements are satisfied merely by virtue of the payment itself.[37] Once such a payment is established, no further analysis of these elements is necessary. The heavy lifting is done instead by De Vos's third element, 'unjustified': the outcome turns on whether the plaintiff's purpose in making the transfer – typically the discharge of an obligation – was achieved, or whether there was after all no basis or *causa* for the payment because a putative obligation turned out not to exist.[38] In *Absa v Moore*, on the other hand, these general principles played out very differently. Here, enrichment on the part of the Moores and impoverishment on the part of the bank were treated as independent elements of the bank's claim. Furthermore, the meaning attributed by Cameron J to these elements

33 *Absa Bank v Moore* (n 5) paras 45-48.
34 *Absa Bank v Moore* (n 5) paras 49-51.
35 *Absa Bank v Moore* (n 5) paras 45, 52-54.
36 I took a different view in Scott 'Unjustified enrichment' (n 32).
37 See eg *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).
38 This analysis is elaborated at greater length in H Scott 'What mistake can do' in N Jansen & S Meier (eds) *Iurium itinera: Historische Rechtsvergleichung und vergleichende Rechtsgeschichte* (2022) 627 at 635-40.

seemed to go beyond the straightforward gain (and corresponding loss) of a benefit, as in the case of a payment, to comprise also the absence of any corresponding obligation (on the part of the defendant) or claim (on the part of the plaintiff). Thus the Moores were said not to have been enriched by the discharge of their pre-existing mortgage debts because this discharge was not gratuitous but rather came at the cost of their new debt to Brusson,[39] while the bank was not impoverished by virtue of the fraudulently induced loan to Kabini because it retained a valid contractual claim (backed up by a default judgment) against him.[40] In other words, the requirements(s) of enrichment and impoverishment seemed to incorporate also elements of the 'unjustified' inquiry; but 'unjustified' itself did not feature explicitly. In the same way, 'at the expense of' played an independent role in Cameron J's analysis. The fact that the bank was unable to prove that the Moores' secured debts had been discharged using the proceeds of its loan to Kabini was in itself fatal to the bank's case. But the significance of this deficit in the evidence is not self-evident. Justice Cameron seems to have assumed that 'at the expense of' required that the proceeds of the money paid by Absa to Kabini were used to discharge the Moores' debts: that the bank 'provided the funds from which the Moores are now benefiting'.[41] Other passages in the judgment suggest a still narrower understanding of the requirement, namely, that the fraudster must have paid the debt with the bank's money.[42] As in the case of enrichment and impoverishment, it seems that the content attributed to De Vos's principle here is different to that attributed to it in the context of deliberate conferral, and that even in this context, where it plays a central role, its meaning is unstable. Indeed, it may be that no stable, unitary meaning of 'enrichment', 'impoverishment' and 'at the expense of' is possible.[43]

For reasons of this kind, Danie Visser and Jacques du Plessis have proposed that South African enrichment claims be analysed in more

39 *Absa Bank v Moore* (n 5) para 45.
40 *Absa Bank v Moore* (n 5) para 49.
41 *Absa Bank v Moore* (n 5) para 42.
42 *Absa Bank v Moore* (n 5) para 52.
43 Compare the argument made in respect of German law in S Meier 'Enrichment "at the expense of another" and incidental benefits in German law' in H Scott & A Fagan (eds) *Private law in a changing world: Essays for Danie Visser* (2019). For a more radical perspective, see N Jansen 'Farewell to unjustified enrichment?' (2016) 20 *Edinburgh Law Review* 123.

specific terms, drawing on the so-called Wilburg–von Caemmerer taxonomy of German law[44] to distinguish three different modes of enrichment: namely, cases involving the transfer or deliberate conferral of a benefit by the plaintiff on the defendant; cases involving the imposition of a benefit by the plaintiff on the defendant, a category which comprises both enrichment through unauthorised improvements to the defendant's property and enrichment through the payment of the defendant's debt; and cases involving encroachment on or interference with the plaintiff's right by the defendant.[45] This taxonomy acts as an intermediate generalisation between the general principles of enrichment liability and individual causes of action: whereas it is the failure of the purpose of the transfer that appears to justify restitution in the first kind of case, in the case of enrichment by interference the reason for restitution lies in the fact that the benefit gained by the defendant is in law attributed to the claimant as holder of the infringed right. The principles of 'enrichment', 'at the expense of' and 'unjustified' are clearly instantiated in each of these categories, but they bear different weight and carry different meanings in each context. Rather than the checklist approach adopted in *Absa v Moore*, furnishing three separate and highly abstract reasons why the bank's claim was bad, the best explanation for the failure of the plaintiff's claim in *Absa v Moore* may therefore be located simply in the fact that it could not be brought within any of the three modes of enrichment enumerated in this taxonomy. There was no direct transfer of a benefit from Absa to the Moores, but rather a series of transfers, with at least one intermediary, Kabini, standing between the parties. Absa had not itself paid the Moores' pre-existing debt, so this could not be analysed as a case of imposed enrichment. And neither was this a case of enrichment by interference with the rights of the plaintiff, since it could not be proved that the Moores' debt had been paid with Absa's money – indeed, it is difficult to see how electronic funds could be described as belonging to the bank – or even with the proceeds of that money.

Robert Goff and Gareth Jones's *Law of Restitution*, first published just eight years after *Verrykingsaanspreeklikheid*, had a similarly profound

44 For a brief outline of this taxonomy and its context see H Scott 'Comparative taxonomy: An introduction' in E Bant, K Barker & S Degeling *Research handbook on unjust enrichment and restitution* (2020) at 152-54.

45 Visser (n 29) ch 10; Du Plessis (n 29) chs 8-10.

impact on the English law of unjust enrichment.[46] Moreover, there is a remarkable similarity between De Vos's general enrichment action and the principles of unjust enrichment recognised in the first edition of *Goff & Jones*: that the defendant has been enriched by the receipt of a benefit; that he has been so enriched at the plaintiff's expense; and that it would be unjust to allow him to retain the benefit. Equally, there are strong parallels between the *McCarthy* decision and the decision of the House of Lords in *Banque Financière De La Cité v Parc Ltd* in 1998, in which Lord Steyn gave judicial recognition to these principles in the slightly updated form of four 'questions': '(1) Has [the defendant] benefited or been enriched? (2) Was the enrichment at the expense of [the claimant]? (3) Was the enrichment unjust? (4) Are there any defences?'[47]

But as in South Africa, in the twenty-odd years after *Banque Financiere* was handed down there has been considerable disquiet regarding the nature of these principles or questions, and in particular whether unjust enrichment at the claimant's expense is capable of functioning as a unitary cause of action, applicable to any set of facts. In order to operate in this way, 'at the expense of' in particular has had to be interpreted in such abstract terms as to be virtually devoid of content: it came to require only that the enrichment had come 'from' the claimant;[48] that '[the claimant's] loss and the defendant's gain were connected by a causal link because an event or transaction took place that caused the claimant to suffer a loss and the defendant to make a gain'.[49] These broad tests seemed to give rise to false positives, insofar as they supported the conclusion that an enrichment claim should lie in cases in which the relationship between defendant and claimant appeared too remote to give rise to a right–duty relationship:[50] particularly troubling were *Relfo Ltd (in liquidation) v*

46 R Goff & G Jones *The law of restitution* (1966).

47 *Banque Financière De La Cité v Parc (Battersea) Limited* [1999] AC 221.

48 But this is subject to the requirement that the defendant be 'the immediate enrichee' unless 'leapfrogging' was permitted: see P Birks *Unjust enrichment* (2003); 2 ed (2005) ch 4.

49 C Mitchell, P Mitchell & S Watterson (eds) *Goff & Jones: The law of unjust enrichment* 8 ed (2011) at 6-05.

50 See eg the 'stamp' hypothetical discussed in A Burrows '"At the expense of the claimant": A fresh look' (2017) 25 *Restitution Law Review* 167 at 172; R Stevens 'The unjust enrichment disaster' (2018) 134 *Law Quarterly Review* 574 at 578; L Smith 'Restitution: A new start?' in P Devonshire & R Havelock (eds) *The impact of equity and restitution in commerce* (2019) at 99-100.

Varsani,[51] *TFL Management Services Ltd v Lloyds TSB Bank Plc*,[52] and the decision of the Supreme Court in *Menelaou v Bank of Cyprus UK Ltd*.[53]

Responding to these concerns, English academics began to propose a different understanding of the four 'questions' and a narrower interpretation of the 'at the expense of' element in particular.[54] In 2017 these views were endorsed by the Supreme Court in *Investment Trust Companies v Revenue and Customs Commissioners*,[55] a case that – like *Absa v Moore* – involved a chain of transactions or series of deliberate conferrals, the claimant and defendant being remote parties. According to Lord Reed in that case, Lord Steyn's four questions are not themselves legal tests, but are rather signposts towards areas of inquiry involving a number of distinct legal requirements.[56] As for 'at the expense of', a mere causal connection between the claimant's being worse off and the defendant's being better off was insufficient.[57] Instead, it was normally required that the claimant had directly provided a benefit to the defendant,[58] although the 'at the expense of' requirement would be satisfied also in certain other cases not involving such a direct transfer of value, either by virtue of the fact that these cases were essentially equivalent to direct transfer cases – where the agent of one of the parties was interposed between them; where an intervening transaction was

51 *Relfo Ltd (in liquidation) v Varsani* [2014] EWCA Civ 360.
52 *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415.
53 *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66.
54 See eg A Burrows *A restatement of the English law of unjust enrichment* (2012) at s 8 and accompanying commentary at 44-55. According to Burrows, the benefit in question must have been obtained by the defendant directly from the claimant, subject to a closed list of exceptions; even if the benefit did come directly from the claimant, the enrichment was generally not at the claimant's expense if the benefit was merely incidental to the furtherance by the claimant of an objective unconnected to the defendant's enrichment. See also C Mitchell, P Mitchell & S Watterson (eds) *Goff & Jones: The law of unjust enrichment* 9 ed (2016) at 6-09: 'the authors require a "transaction" between the parties, even while admitting that the claimant is not always required to be an active participant in the transaction, since it may take the form of an "involuntary extraction".
55 *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2017] UKSC 29, especially paras 46-58.
56 *ITC* (n 55) para 41.
57 See also *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39.
58 *ITC* (n 55) para 46.

found to have been a sham; where a series of co-ordinated transactions was treated as forming a single scheme; where the defendant received property from a third party into which the claimant could trace an interest; or where the claimant had discharged a debt owed by the defendant to a third party – or perhaps by way of exception.[59] It is not difficult to see the deep similarities between the Wilburg–von Caemmerer taxonomy of German law and this narrower conception of 'at the expense of' in the English common law.[60] Andrew Burrows has drawn extensively on the Wilburg–von Caemmerer taxonomy in advocating an approach to English unjust enrichment that principally confines 'at the expense of' to cases of conferral by the claimant and, less commonly, taking by the defendant.[61]

4 Unjustified enrichment without equity

Thus far we have seen one example of a potential legal transplant – the English trust – repulsed at least in part because of its incompatibility with the conceptual framework of South African private law. On the other hand, in contemporary unjust or unjustified enrichment we seem to see an example of the positive role played by comparative models in the development of private law. South African enrichment scholarship has been powerfully influenced by the Wilburg–von Caemmerer taxonomy, and such direct influence is detectable, as just mentioned, even in English law. At the very least, the degree of convergence between English and South African understandings of the 'at the expense of' element suggests that we are on the right path. But comparative models are sometimes misleading. The symmetry between recent developments in English and South African enrichment seems less obviously positive when it is observed that unjust and unjustified enrichment operate against the backdrop of fundamentally different laws of trusts. Apart from the formal and institutional factors set out in part 2 above, for Justice Cameron the principal reason for the incomplete reception of the English trust into South African law is that it is simply unnecessary:[62] in particular, 'much of the work performed by the constructive trust can be

59 *ITC* (n 55) paras 47-51.
60 Stevens (n 50) 601; Smith (n 50) 103-104.
61 Burrows (n 50) especially at 178.
62 Cameron (n 7) 355-57. See also Cameron, de Waal & Solomon (n 4) 154-57.

achieved through the law of obligations', particular delict and unjustified enrichment.[63] But is this so?

Here it is necessary to return to *Menelaou v Bank of Cyprus*, discussed briefly in the previous section. The facts of the *Menelaou* case were in outline as follows.[64] The plaintiff's parents owed £2.2 million to the defendant, the Bank of Cyprus. This debt was secured by two charges on the family home, which the plaintiff's parents owned. To enable them to sell that property for £1.9 million, so as to repay part of their debt to the bank and to purchase a new house for the plaintiff, their daughter, the bank agreed to release those charges, but only on condition that it would be granted a charge on the plaintiff's new house in order to secure the parents' remaining indebtedness. The plaintiff was unaware of the proposed charge on the new property, believing she was receiving it outright as a gift. The bank's solicitors negligently failed to secure her signature on the charge form. The family home was duly sold and the new house purchased. When the plaintiff became aware of the purported charge over the new property, she sought rectification of the register to remove it on the ground that it was invalid. The bank conceded the invalidity but counterclaimed that the plaintiff had been unjustly enriched at the bank's expense and that the bank was entitled to an equitable charge over the new property to the extent of her enrichment. The Supreme Court upheld this counterclaim. For the majority, insofar as the bank had mistakenly authorised the use of the proceeds of sale of the first property (which it could otherwise have required to be applied to discharge the debt owed to itself) to purchase the second property, it had indeed provided the plaintiff with a benefit at its expense. The bank was accordingly entitled to be subrogated to the (extinguished) unpaid vendor's lien over the second property, affording it a secured claim against the claimant.

In reaching this decision, Lord Clarke in particular adopted a causal approach to the 'at the expense of' requirement.[65] As we have seen, this approach was subsequently repudiated in *Investment Trust Companies* in 2017. Although the outcome in *Menelaou* was justified by

63 This quote is taken from the abstract of the article provided at 341.
64 This summary is based on the headnote provided in the official report: [2016] AC 176.
65 *Menelaou* (n 53) paras 23-25 and especially 27.

the Supreme Court on the basis that it involved a set of co-ordinated transactions amounting to a single scheme and in effect equivalent to a direct transfer,[66] this justification is arguably unconvincing. That does not mean, however, that the *Menelaou* case would be decided differently if it arose for decision today. While a majority of the Court analysed the case in terms of unjust enrichment, treating subrogation as a remedy for such enrichment, Lord Carnwath adopted instead 'a strict application of the traditional rules of subrogation'.[67] He took the view that the money held in the client account of the Menelaous' solicitors following the sale of the first property, which was then used to purchase the new property, was held on trust for the defendant bank, according to the so-called *Quistclose* principle.[68] This proprietary interest had its origin in an undertaking made by the Menelaou parents to the effect that the money released by the sale of the first property would be used to purchase the new property, and that the bank would acquire a substitute charge over that property in respect of their remaining indebtedness. Simply put, that money was not freely at the Menelaous' disposal.[69] It was then possible for the bank to trace their equitable title to the proceeds of the sale of the first property into the new property, and its subrogation claim followed 'relatively uncontroversially' from there.[70] The bank's proprietary interest was enforceable against the plaintiff, a third party to the Menelaou parents' undertaking, by virtue of the fact that she was not a good faith purchaser for value but rather a donee.

I am not arguing here that South African law should adopt the analysis proposed by Lord Carnwath in the *Menelaou* case. Apart from any other consideration, that solution is ruled out for the structural reasons set out in part 2 above: the very idea of 'equitable title' or a 'proprietary interest'

66 *ITC* (n 55) paras 48, 61-66, as well as *Menelaou* (n 53) paras 25, 65-68 (the sale of the first property and purchase of the second were 'part of one scheme').

67 *Menelaou* (n 53) para 107.

68 See *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567 and *Twinsectra Ltd v Yardley* [2002] 2 AC 164, discussed and applied in *Menelaou* (n 53) paras 133-140.

69 *Menelaou* (n 53) para 137. Compare the argument made in Stevens (n 50) 599 that the outcome in *Menelaou* is best justified on the basis that it had been agreed between the bank and the Menelaou parents that the proceeds of sale of the first property were still subject to the charge in favour of the bank: 'It is entirely orthodox that where an asset is subject to a charge, and that asset is used to buy a property in the name of a donee, the charge continues to bind the purchased property.'

70 *ITC* (n 55) para 100 (Lord Neuberger).

is alien to South African law. Indeed, the attempt in *Absa v Moore* to introduce subrogation to extinguished rights as a response to unjustified enrichment into South African law foundered on the same sort of formal, institutional arguments: Cameron J held that it was beyond the power of the Court to exercise 'a general equitable jurisdiction' to determine the terms of a revived mortgage agreement between Absa and the Moores.[71] I have elsewhere attempted to salvage the possibility of subrogation to extinguished (secured) rights as a remedy for unjustified enrichment in South African law, at least on stronger facts than those at issue in *Absa v Moore*.[72] But it must be admitted that this is an uphill struggle. Again, the very idea of a proprietary response – as opposed to a real right – is foreign to South African law.[73]

Nor am I strongly contending that *Absa v Moore* would have been decided differently if heard by an English court. Insofar as the existence of a claim in unjust enrichment is concerned, it is likely that the facts of both *Absa v Moore* and *Menelaou* would today be analysed in a similar way as those at issue in the *Investment Trust Companies* case, as a chain of transfers, and the claim refused on that basis. That said, it is certainly arguable – following the reasoning of Lord Carnwath in *Menelaou* – that under English law Absa had acquired equitable title to the money lent to Kabini, insofar as the money was lent for the express purpose of purchasing immovable property (whereas in fact the purchase was a scam) and was lent on the express basis that the debt was secured by a mortgage bond over that immovable property (which it was not). If it could then have been demonstrated that the proceeds of the money lent to Kabini by Absa had indeed been used to discharge the Moores' secured debts, English law might well have permitted Absa to trace its equitable title in the money into the Moores' house. At least in the absence of a valid contract between the Moores and whoever paid off their debts, the bank's proprietary interest would have been enforceable against the Moores, insofar as they were not good faith purchasers for value.

I am, therefore, suggesting that the absence of the English trust from South African law should influence the way in which South African courts and academics approach English comparative models. As I have

71 *Absa v Moore* (n 5) para 43.
72 Scott 'Interference without ownership' (n 32) 368-70.
73 Scott 'Interference without ownership' (n 32) 370-71.

explained elsewhere,[74] the remedies developed by the civil law for dealing with the theft of corporeal money (and analogous cases) do not translate into the world of incorporeal money, that is, money held in bank accounts. Facts that would previously have given rise to a *vindicatio* – where funds are stolen or paid under the influence of a fundamental mistake – must now be dealt with exclusively in terms of the law of obligations. South African judges have forged ahead with this important project, rapidly developing a set of rules according to which the victim of the theft of incorporeal money is able to proceed even against third-party recipients, at least where no defences are available to them. The integration of these new rules into existing doctrinal frameworks has, however, proved challenging. On the one hand, these cases do not fall neatly into any of the four Wilburg–von Caemmerer categories: in particular, they do not seem, strictly speaking, to involve any interference with the plaintiff's rights. On the other hand, powerful theoretical arguments made by both common-law and civilian scholars in favour of a smaller law of unjust enrichment[75] – or indeed no law of unjust enrichment at all[76] – tend to militate against a more expansive approach. But the fact that the South African law of unjustified enrichment functions within a different institutional context to the common law, with no recourse to equitable proprietary remedies, is an important countervailing consideration. Just as Lord Carnwath's analysis in *Menelaou* might have produced a different outcome if applied in *Absa v Moore*, at least if the facts were strengthened to allow for tracing, so cases involving the theft of incorporeal money or payment under the influence of a fundamental mistake can readily be dealt with using the English law of trusts.[77] Recognising this may encourage South African academics to think more imaginatively about enrichment by interference with the rights of the plaintiff than they have previously done.

5 The limitations of comparative models

Arguments from coherence of the sort advanced by Innes CJ in *Conradie v Rossouw* militate strongly against the reception into South African law

74 Scott 'Interference without ownership' (n 32).
75 Smith (n 50).
76 Jansen (n 43); Stevens (n 50) (and see now also his *The laws of restitution* (2023)).
77 See part 2 above.

of institutions of English equity such as the trust and restitutionary subrogation. Edwin Cameron has played a vital role in resisting such legal transplants. But comparative models can be illuminating. It appears that the Wilburg–von Caemmerer taxonomy of German law offers a guide for legal reasoning an framework for future legal development that is more granular and therefore more useful to judges and academics than the general principles of enrichment liability first advanced (in the South African context) by Wouter de Vos. The fact that English law seems to have described a similar trajectory – initial over-generalisation leading to a more particularised approach that distinguishes sharply between different modes of unjust enrichment – tends to corroborate this German-influenced approach. However, comparison between the decision of Cameron J in *Absa v Moore* and the speech of Lord Carnwath in the almost contemporaneous judgment of the UK Supreme Court in *Menelaou v Bank of Cyprus* suggests a further, important point about the value of comparative models in developing private-law doctrine. In the absence of equitable institutions such as the common-law trust, it may be that South African unjustified enrichment is obliged to develop along bolder, more expansive lines than the English law of unjust enrichment if it is to do justice to litigants. In this case at least, there are limits to the utility of comparative models.