Chapter 11
Contract, Unjust Enrichment and Restitution:
The Significance of Classification

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INTRODUCTION

Typically a contractual claim arises because the defendant failed to perform as he agreed, and the claimant is entitled to expectation damages to put him in the position he would have been in if the defendant had performed as agreed. There are certain other types of claim arising on the termination of a contract that are often said not to be contractual but restitutioary or unjust enrichment claims: these are the claim to recover a prepayment, and the claim to recover reasonable payment for work done under the contract.1 How should they be described, and does it matter how they are described? This has been a persistent problem in the literature on restitution and unjust enrichment, and it lurks in the background even when it is ignored.

A claim can be described in any number of ways, and different descriptions may be apt for different purposes. The question is, what does a particular description say about a claim? What feature of a claim does it highlight, and what significance does this feature have? What is needed here with respect to concepts such as contract, unjust enrichment and restitution is not a comprehensive study of the detail of doctrine and case law, but an understanding of what kind of concept each is, what its relationship to other concepts is, and what role (if any) that kind of concept has in legal reasoning. In other words, what is needed is to characterise each concept as a category in a scheme of classification, and to determine the significance of that classification in law and legal reasoning. The most important and the most commonly used types of classification in private law seem to me to be classification by justification, by remedy, by modality or normative type, and by convention. Distinguishing between these types of classification reveals what the real issues are in the controversy over how to describe the claims mentioned above, and other controversial claims in private law.²

1) CLASSIFICATION BY JUSTIFICATORY PRINCIPLE

A claim can be classified by reference to the general moral principle that justifies it. I will refer to this as classification by justificatory category. For example, it seems to me that contract is best understood as a category based on the general principle that agreements are binding. Contract law is the body of rules that give effect to this principle in a particular way. Thus contract law has a framework and a characteristic set of issues that arise from the nature of this underlying principle – issues such as what counts as an agreement, what conditions need to be satisfied for an agreement to be binding, what implied terms there should be, etc. In my view, tort and property are also best understood as justificatory categories, though this may be a more tendentious claim.

Some might accept the idea of a justificatory category and also the characterisation of contract law as such a category, but argue nevertheless that characterising a claim as contractual or as falling into some other justificatory category is not of any practical relevance, because in practice determining whether there is a valid claim is just a matter of determining whether on the facts the rules generate a claim, and for this purpose the nature of the underlying principle is irrelevant. Where the law is settled – where the case can be resolved by the application to the facts of a body of clear and authoritative rules – this is indeed the case, and one should not underestimate the extent to which the law

² The approach set out here is explained more fully in P. Jaffey, Private Law and Property Claims (Hart, Oxford 2007).