Use value and interest in unjust enrichment

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It is accepted by judges and academics alike that the restitutionary liability of an unjust payee ought to encompass both the principal sum transferred and an additional sum that reflects its "use value" over the period between receipt and restitution. The issues that divide opinion concern the proper method of conceptualising and calculating use value. Two theories have predominated: the first is that the defendant should pay compound interest on the principal sum for the period of the enrichment, as complete restitution of an enrichment unjustly received; the second is that the defendant should pay simple interest on the principal sum for the period of the enrichment, at a rate that (broadly) reflects the claimant's loss of use of that sum. In this article, I argue that there is a third, better, option: the defendant should be entitled to discharge her restitutionary duty by restoring the principal sum at any date before or in compliance with a court order to that effect. There should be no attendant liability for interest, compound or simple, as the "use value" of money paid.

I. INTRODUCTION

On 1 April 2014, A directs her bank to pay £1,000 from her account to that of B, under the misapprehension that she owes B that sum. The bank complies with the (mis)instruction. Five years later, A discovers her mistake. She asks B to retransfer £1,000, and B obliges: £1,000 is credited to A's account on 1 April 2019. Should B also be required to pay A a sum that reflects the "use value" of money over the five-year period between 1 April 2014 and 1 April 2019?

That question has been answered with a unanimous "yes" both in and out of the courts. The issues that divide opinion concern precisely how "use value" ought to be conceptualised and calculated. Two theories have predominated: the first requires B to pay compound interest on £1,000 over the five-year period, as complete restitution of an enrichment unjustly received;[1] the second requires B to pay simple interest on £1,000 over

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1. *Sempra Metals v IRC* [2007] UKHL 34; [2008] AC 561. See also G Virgo, "Compound Interest Made Simple"(2007) 66 CLJ 510, 511; M Yip, "The use value of money in the law of unjust enrichment" (2010) 30 LS 586; M Yip, "Use Value of Money—the Defence of Exhaustion of Benefits [2012] RLR 99; M Hsiao, "A Shift in the Objective Measure of the Time Value of Money" [2015] RLR 92; and C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (Sweet & Maxwell, London, 2016) (hereafter "*Goff & Jones*"), [5.15].

the five-year period of the enrichment, as compensation for the loss of use suffered by A as a result of B's failure to effect restitution on 1 April 2014.[2]

Those who support gain-based liability for use value insist that B receives two forms of enrichment from A on 1 April 2014: (i) the principal sum (£1,000); and (ii) an independent opportunity to use that sum.[3] The opportunity to use then falls to be measured "objectively", as interest accrued on a notional loan of the principal sum for the period of the enrichment.[4] And, as interest on any such loan would be compounded, liability for use value falls to be calculated on compound interest terms.[5]

Those who support loss-based liability for use value insist that B receives only *one* enrichment on 1 April 2014, which is the principal sum (£1,000); that is the sum which B must restore to A.[6] However, as that duty arises at the moment of receipt,[7] it is treated as a debt upon which simple interest falls to be paid under the Senior Courts Act 1981, s.35A, the purpose of which is "to compensate the claimant for the loss of the use of the money".[8]

In this article, I reject both gain- and loss-based arguments for requiring B to pay for the use value of money received, and I make the case for a negative answer to our opening question: B, who has already restored the principal sum, should be liable for *no* interest, whether compound or simple.

In Part II, I set out the problem to which the gain- and loss-based theories have been offered as solutions: how should the court account for the passage of time between the impugned payment (1 April 2014) and restitution (1 April 2019)? In Part III, I show that the gain-based theory stems from a fundamental misunderstanding about the nature of money: B is enriched by £1,000 on 1 April 2014; she receives no independent (economic or non-economic) enrichment on that date. Of course, B may subsequently invest that sum to a profitable end; the question then arises whether there is a reason for requiring B to pay that gain to A. In Part IV, I argue that there is none. Unjust enrichment justifies reversing the defective transfer; it does not justify placing A in a better position than that which she occupied prior to the impugned payment.[9]

In Part V, I reject the argument that B should compensate A for her loss of use of £1,000. The loss-based theory stems from the assumption that we may simply ignore the reason why the relevant debt arises when awarding interest under s.35A; that assumption is, I argue, incorrect. There is no justification for requiring an unjust payee to compensate her payor for failing to comply with a duty to effect restitution; there is, therefore, no justification for attaching a liability to pay (compound or simple) interest—under s.35A or otherwise.

In the final part of this article, I address an alternative argument for requiring B to pay an additional sum to A that reflects the passage of time. This is an argument from revaluation, rather than compensation: A ought to be entitled to recover the real (relative)

2. *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39; [2018] 3 WLR 652.
3. *Sempra* [2007] UKHL 34, [33] (Lord Hope of Craighead).
4. *Ibid*, [102] (Lord Nicholls of Birkenhead).
5. *Ibid*, [186] (Lord Walker of Gestingthorpe).
6. *Prudential* [2018] UKSC 39, [71–72] (Lords Reed, Hodge and Mance).
7. *Ibid.*
8. *Ibid*, [73].
9. Thus, the maximum that B ought to be required to pay is whichever is the lesser of B's gain and A's loss.

value of £1,000 on 1 April 2019, which requires the court to take account of the decline in purchasing power of money as a result of inflation. I argue that, where both parties operate within the parameters of an inflationary environment, there is no justification for placing the burden of a value-decrease upon B.

I argue, in sum, for a negative answer to our opening question: B's payment of £1,000 on 1 April 2019 should be regarded as discharging her obligation to effect restitution in full; B should not be liable for any sum that reflects the "use" of money over the five-year period between 1 April 2014 and 1 April 2019.

II. THE PROBLEM

It is generally accepted that the goal of a claim in unjust enrichment is to reverse a defective "transfer"[10] or "transaction",[11] thereby restoring the parties to the *status quo ante*. In the following example, B can achieve that objective by transferring £1,000 to A on 1 April:[12]

Example 1: A has a bank account with Bank 1, which pays interest monthly at a rate of 2% p.a. and charges interest monthly at a rate of 4% p.a. B has a bank account with Bank 2 that pays interest monthly at a rate of 3% p.a., and charges interest monthly at a rate of 5% p.a. on the use of its overdraft facility. On 1 April 2014 ("T"), A directs Bank 1 to transfer £1,000 to B's account, under the misapprehension that she owes B that sum. Bank 1 complies.

Of course, restitution is rarely effected on the date of receipt; indeed, the circumstances that impugn the transfer often remain undiscovered until a substantial period of time has elapsed. So, let us complete the scenario:

Five years later, A discovers her mistake. She asks B to retransfer £1,000, and B obliges: £1,000 is credited to A's account on 1 April 2019 ("T5").

Questions now arise concerning whether and how the court—in seeking to restore the parties to the *status quo ante*—should take account of the difference between the facts as they are on 1 April 2019 (T5), and the facts as they would have been if the impugned payment had not been made at all, or if B had repaid £1,000 on 1 April 2014 (T), or at some point prior to 1 April 2019. It is accepted by judges and academics alike that B ought to be liable for a sum that reflects the potential or actual value of using £1,000 for the period of the enrichment, termed "use value". The matter that divides opinion concerns the proper method of conceptualising and calculating that sum.

There are numerous ways in which the court might plausibly calculate "use value". B might be required to pay: compound interest on £1,000 for the five-year period at 2, 3, 4 or 5%; or simple interest on £1,000 for the five-year period at a rate of 2, 3, 4 or 5%. Rates of 2% and 4% reflect (more or less faithful) attempts to calculate A's loss, measured respectively as the interest return on her deposit, or her cost of borrowing. Rates of 3% and 5% reflect (more or less faithful) attempts to calculate B's gain, measured respectively as

10. See eg *Investment Trust Companies (in liq) v HMRC* [2017] UKSC 29; [2017] 2 WLR 1200 ("*ITC*"), [60] (Lord Reed, cited with approval in *Prudential* [2018] UKSC 39, [68]).
11. *ITC* [2017] UKSC 29, [48].
12. *Prudential* [2018] UKSC 39, [71].

the interest return on her deposit, or avoided cost of borrowing.[13] Alternatively, the court may substitute a proxy or "hybrid" rate, which is intended to reflect a market average of the rates available for borrowing or lending.[14] We can set out these options as follows:

Table A

Rate	Compound	Simple
2%	C2	S2
3%	C3	S3
4%	C4	S4
5%	C5	S5
Proxy	CP	SP

It is accepted, in and out of the courts, that the answer can be found *somewhere* in the table; three prominent apex decisions over the past decade have addressed the question of precisely where. The choice between simple and compound interest has attracted the most judicial attention, but courts have also been divided on the best approach to each variable—whether the appropriate response to *Example 1* reflects B's gain or A's loss (measured either as a borrowing or lending rate), and how closely each such response should reflect a counterfactual in which B repays the money at T.

There is, however, another option that falls outside the parameters of our table, and which has attracted almost no judicial or academic attention: B's transfer of £1,000 to A on 1 April 2019 might be regarded as discharging her obligation to effect restitution in full, with no attendant liability for interest. In what follows, I argue that the most unpopular response to Example 1 is the best one: the claimant who seeks to recover money by way of an action in unjust enrichment should be limited to restitution of the principal sum.

III. USE VALUE AS AN INDEPENDENT ENRICHMENT

In this part, I consider the argument that the correct response to Example 1 is C5—compound interest for the period of the enrichment, measured by reference to the borrowing rate available to B. This argument, which persuaded a majority of the House of Lords in *Sempra Metals Ltd v IRC*,[15] proceeds from the assumption that *two* enrichments are conferred at T: first, the principal sum (£1,000); second, the "use value" of £1,000—a form of "non-money" benefit independent of the principal sum.[16] Having no ready price-tag, the latter falls to be measured analogically: just as the "user principle" in tort law permits damages to be calculated on the basis of a hypothetical bargain for use, B's user-liability in unjust enrichment is the cost of a notional loan of the principal sum for the

13. The faithfulness of the calculation effort depends upon whether, and how closely, the court is willing to consider evidence concerning what would have happened but for the impugned transfer.

14. This is how the court approaches the calculation of simple interest.

15. [2007] UKHL 34; [2008] AC 561.

16. *Sempra*, [186] (Lord Walker).

period of the enrichment.[17] And as credit cannot be obtained on the basis of simple interest, that borrowing cost is calculated on compound interest terms.[18] Thus, B's outstanding liability in Example 1 is compound interest on the principal sum at the rate available for borrowing (5%):

Table A

Rate	Compound	Simple
2%	C2	S2
3%	C3	S3
4%	C4	S4
5%	C5	S5
Proxy	CP	SP

In what follows, I reject both the premise that the "use value" of money is an independent "non-money" enrichment, and the analogical argument from tort law. I argue that the use value of money can only be understood as a profit actually made in consequence of receipt, which is a form of consequential gain.

(a) The argument

Sempra Metals v IRC[19] concerned a test claim under a group litigation order in respect of advance corporation tax. It was not a claim *to* that sum: there was no allegation that the money paid had not been due at all; rather, the allegation was that the sum had been exacted by HMRC *before* it was due.[20] The questions before the House of Lords were, accordingly: (i) whether compound interest was payable, by way of restitution of an unjust enrichment, or by way of damages for a breach of statutory duty; and (ii) at what rate? Sempra preferred the claim in unjust enrichment because of the more favourable limitation period prescribed by the Limitation Act 1980, s.32(1)(c).[21]

The House of Lords concluded unanimously that there was a jurisdiction at common law to award compound interest as damages for a tortious or contractual breach, including both a breach of statutory duty and the late payment of a time-stamped debt.[22] A majority of the House also held that Sempra could recover compound interest by means of the restitutionary award sought, quantified by reference to the cost to HMRC of borrowing the principal sum for the period of the prematurity.

17. Whether or not B could or would have borrowed that sum.
18. *Sempra*, [183] (Lord Walker).
19. [2007] UKHL 34; [2008] AC 561.
20. Technically, the majority of these sums were exacted by the Inland Revenue, which formed part of a separate department prior to April 2005.
21. *Sempra* [2007] UKHL 34, [18] and [21] (Lord Hope); [101] (Lord Nicholls). The period runs from when the claimant discovers the mistake, or "could with reasonable diligence have discovered it".
22. *Sempra* [2007] UKHL 34, [16–17] (Lord Hope), [74], [89], [92], [94–97] and [100] (Lord Nicholls), [132] and [151] (Lord Scott of Foscote), [165] (Lord Walker) and [215–217] (Lord Mance).

This restitutionary claim to use value was treated as a "free-standing cause of action", independent of that which related to the principal sum transferred.[23] According to a majority of the House, constituted of Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Walker of Gestingthorpe, HMRC had received two kinds of enrichment: first, the sums of tax;[24] and, secondly, "the opportunity to turn that money to account during the period of the enrichment", which was a "non-money benefit" called "use value".[25] Noting that a "comparable objective measure is well established in the analogous case of valuing the benefit derived by a defendant from unauthorised use of the claimant's land or goods",[26] Lord Nicholls described Sempra's payments as "the equivalent of a massive interest free loan".[27] That loan stood to be quantified by reference to "the reasonable cost the defendant would have incurred in borrowing the amount in question for the relevant period",[28] absent evidence of whether such a loan would in fact have been acquired.[29] And, as such a loan could not have been obtained on the basis of simple interest,[30] a "just outcome"[31] required use value to be calculated on compound interest terms.

In what follows, I turn first to the argument for conceptualising the use value of money as an independent "non-money" benefit. I argue that B in *Example 1* receives: (i) money (an increase in the value of her bank-debt); and (ii) a profit in the form of an investment return (interest), which is a consequential gain. There is, I argue, no third category of enrichment by the "opportunity to use" money.

(b) Use value

We have seen that the majority in *Sempra* conceptualised the relevant enrichment as the "opportunity to use" money—a "non-money benefit" enrichment independent of (though appurtenant to) the principal sum.[32] According to this view, B in *Example 1* receives two forms of enrichment from A at T: (i) the principal sum (£1,000); and (ii) the opportunity to use that sum.[33] B may subsequently *also* receive a third enrichment—a consequential gain, in the form of interest.[34] For ease of reference, I shall call this the "triple-enrichment thesis". The triple-enrichment thesis appears in two forms in the academic and judicial literature: one version views the use value of money as a form of non-economic utility that is distinct from market or "exchange" value;[35] the other views use value as an economic benefit that is nevertheless distinct from a profit actually

23. *Ibid*, [25] (Lord Hope).
24. *Ibid*, [102] (Lord Nicholls).
25. *Ibid*, [33] (Lord Hope).
26. *Ibid*, [116] (Lord Nicholls).
27. *Ibid*, [102].
28. *Ibid*, [103].
29. *Ibid*, [33] (Lord Hope).
30. *Ibid*, [52] (Lord Hope).
31. *Ibid*.
32. *Sempra* [2007] UKHL 34, [187] (Lord Walker).
33. *Ibid*, [187] (emphasis added).
34. Man Yip argues that the mistaken payee "makes three gains: (a) the principal sum; (b) the opportunity to use money; and (c) the interest earnings": M Yip, "The use value of money in the law of unjust enrichment" (2010) 30 LS 586.
35. *Sempra*, [183] (Lord Walker).

made.[36] In what follows, I argue that each version of the triple-enrichment thesis is unsound: at T, B is enriched by £1,000; over the course of five years, she may also receive a profit in the form of interest made or avoided (a consequential gain). B does not receive any other economic or non-economic enrichment.

The first version of the triple-enrichment thesis takes seriously the idea that "use value" is a "non-money benefit", drawing to this end upon a well-established binary theory of value. Historically, theoretical economists have used the term "use value" (or "value in use") to describe the variety of advantages that might be derived from physical interaction with a particular thing, to be distinguished from market price. For Adam Smith, use value described the "utility of some particular object"—the practical advantage(s) that could be exploited by its holder.[37] For Marx, use value was a part of the "natural palpable existence"[38] of things that could be directed to "the satisfaction of a certain want"—bread as an article of food, linen or cotton as fabrics to be worn for warmth or beauty.[39]

Though Marx's list of relevant "uses" extended to a broader range of aesthetic and idiosyncratic wants, three features are common to each account. The first is that use value describes an advantage that *might* be conferred upon the object's holder, irrespective of whether she in fact exploits the object to her advantage. Thus, use value depends upon generalised patterns of behaviour; it does not describe (actual or perceived) benefit. Second, use value is to be distinguished from "exchange value": use value describes the ability to put an object to some useful end, exchange value is "the power of purchasing other goods which the possession of that object conveys"—a "quantitative relation" expressed as market price.[40] Finally, whilst the utility of an object may underpin the market by reference to which price is calculated, there is no *necessary* correlation between each kind of value: water, which is both abundant and necessary for human survival, is worth much less than a scarce, near-useless precious stone.[41] So, use value describes the potential advantage that may be had from interacting with a particular object; exchange value describes the relative purchasing power of that object. More of one does not necessarily entail more of the other.

If the use value of money were understood as a "utility" of the sort described by Smith and Marx, interest would merely be a rough and ready way of ascribing a monetary value to a relation that is *not* market price.[42] In *Sempra*, Lord Walker appeared to present use value in this way: "it is true", he said, "that the time value of money (as opposed to money itself) may be regarded as a non-money benefit";[43] nevertheless, "it is a benefit which

36. See eg Virgo (2007) 66 CLJ 510, 511; Yip [2012] RLR 99; Hsiao [2015] RLR 92. For a different view see P Ridge, "Pre-judgment Compound Interest" (2010) 126 LQR 279, 288 and R Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574, 596.

37. A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (public domain reprint, London, 2012), 11.

38. K Marx, *A Contribution to the Critique of the Political Economy* (Charles H Kerr, Chicago, 1904), 11.

39. *Ibid*, 24.

40. *Ibid.*

41. "Nothing is more useful than water; but it will purchase scarce any thing; scarce any thing can be had in exchange for it. A diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange for it": Smith, *Wealth of Nations*, 11.

42. This is the kind of exercise in which we are engaged when we ascribe a value to the loss of a limb—a particular number, drawn from a catalogue, that bears no strong logical connection to the item thereby priced.

43. Adopting Birks' terminology: P Birks, *Unjust Enrichment*, 2nd edn (OUP, Oxford, 2004), 53.

can readily be quantified in money terms; that has been, for many centuries, the function of interest".[44] According to this version of the triple-enrichment thesis, the relationship between use value and interest is the product of established judicial practice, rather than any compelling logic.

There are good reasons to reject this version of the triple-enrichment thesis out of hand. Cash is the *paradigmatic* example of an object with very little value in use, and a great deal of value (or, precisely its face value) in exchange. As an object of utility, a £5 note might find a use (or abuse) as paraphernalia for stimulants; it will only be an object of aesthetic desire to a "fetishist of little green paper".[45] Either way, it ought to be clear that this is not the sort of thing to which the label "use value" refers. And, of course, bank money, which has no "palpable existence", *only* has exchange value. If the triple-enrichment thesis justifies liability for use value, it is not on account of this sort of borrowing from fundamental principles of theoretical economics.

Some commentators acknowledge the distinction between utility and market value, preferring to conceptualise use value as a kind of economic benefit that is nevertheless distinct from a profit actually made. The present editors of *Goff & Jones: The Law of Unjust Enrichment* appear to have something like this in mind: "it is implausible", they say, "to deny that the opportunity to use money is a financially valuable benefit, given that such opportunities are regularly bought and sold on open markets".[46] Man Yip similarly argues that "The opportunity to use money is something that almost every individual in today's market driven economy considers as beneficial and the principle by which banks operate by requiring payment for the use of money".[47] According to this second version of the triple-enrichment thesis, the "opportunity to use" money is received as a discrete enrichment in tandem with the principal sum; that benefit then falls to be measured "objectively", as the amount for which the defendant would have had to pay to acquire a loan of the principal sum (whether or not such a loan could or would have been obtained).[48]

It is easy to see how this second version of the triple-enrichment thesis came to attract support: the "time" or "use" value of money is often expressed as the proposition that a capital sum held now is more valuable than a future capital sum, because money has an earning capacity (realisable as interest). Chambers calls this "the present value of a future income stream",[49] Ridge the "real commercial value of money".[50] Yet, none of this allows us to depart from the rule, described as "the principle of nominalism",[51] that the value of a sum of money is mandatorily equated to any debt to which it is arithmetically

44. *Sempra* [2007] UKHL 34, [187] (emphasis added).

45. R Dworkin, "Is Wealth a Value?" (1980) 9 JLS 191, 201: "Money or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper."

46. *Goff & Jones*, 9th edn (2016), [5.15].

47. "The use value of money in the law of unjust enrichment" (2010) 30 LS 586, 593.

48. *Goff & Jones*, 9th edn (2016), [4.07].

49. R Chambers, "Two Kinds of Enrichment", in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, Oxford 2009), 244.

50. Ridge (2010) 126 LQR 279, 280.

51. C Proctor, *Mann on the Legal Aspect of Money*, 7th edn (OUP, Oxford, 2012), [9.03].

equivalent.[52] The "use" or "time" value of money simply describes the idea that money will usually, over time, attract an interest profit. Of course, it does not always attract such a profit: is worth emphasising, because the language of "fruits" is sometimes associated with money,[53] that the capacity to earn interest is not a *feature* of money. If I put £1,000 in my sock drawer, I will have precisely £1,000 next year;[54] and if I put £1,000 in an account that requires me to pay for the privilege, I will lose money. The "use value" of money is an enrichment that accrues to the holder in the form of interest made (or avoided); that profit is the causal product of a particular spending choice.

This distinction between interest anticipated and interest accrued is best exemplified by way of the example with which we began. At T, B receives money in the form of an accretion to the value of B's bank account. B does not also receive a separate non-money benefit in the form of the "opportunity to use" that sum. Indeed, the right to receive interest pre-exists the money transfer. Nevertheless, because that contractual relationship includes a periodic payment of interest on the sum total of B's account, B's interest payment will be greater over the five-year period than it would have been if payment had not been made. Thus, B is better off at T5 than she would have been if she had repaid the £1,000 at T. That *is* a separate enrichment; the use value of money is a consequential gain in the form of interest made (or avoided).

This distinction, between actual and anticipated gain, was acknowledged by the Supreme Court ten years after *Sempra*, in *Prudential Assurance Co Ltd v HMRC*.[55] Like *Sempra*, *Prudential* was a test case under a group litigation order, brought by Prudential Assurance Co ("PAC") against HMRC in respect of advance corporation tax ("ACT") levied on foreign-sourced dividends. It was common ground that the tax regime was contrary to EU law; the case involved various questions about how best to quantify HMRC's restitutionary liability.[56] HMRC conceded in advance of trial that PAC could recover compound interest on tax that had been set off against lawfully levied tax for the period between payment and the date of set-off; the primary question concerned whether compound interest was payable for the period between set-off and restitution as the "time value of utilised ACT".[57] For present purposes, the crucial question was: "Is PAC entitled to compound interest in respect of tax which was levied in breach of EU law, on the basis that HMRC were unjustly enriched by the opportunity to use the money in question?".[58] A unanimous Supreme Court concluded that it was not: compound interest could not be recovered by way of an action for restitution of the "use value" of money unjustly paid.

Several features of the judgment in *Prudential* warrant close consideration, and I return to the case in Parts IV and V. For present purposes, one example used by the Justices helps to elucidate "questionable features" of the argument that the payee receives two distinct

52. D Fox, *Property Rights in Money* (OUP, Oxford, 2008), [1.28].
53. See eg *Riches v Westminster Bank Ltd* [1947] AC 390, 398, cited in *Lomas v HMRC* [2017] EWCA Civ 2124; [2018] Bus LR 730, [23], [51].
54. *Sempra* [2007] UKHL 34, [233] (Lord Mance).
55. [2018] UKSC 39; [2018] 3 WLR 652.
56. *Ibid*, [2].
57. A third category, concerning "all other unlawfully levied tax" raises (as Wilmot-Smith notes) "no distinct issues of principle": F Wilmot-Smith, "A Prudent Decision" (2019) LQR 195, 196.
58. *Ibid*, [2].

enrichments at the moment of transfer: "If on 1 April the claimant mistakenly pays the defendant £1,000, with the result that the defendant is on that date obliged to repay the claimant £1,000, the defendants repayment of £1,000 on that date will effect complete restitution".[59] This much is straightforward, and provides clear support for the argument that I have made thus far: on the date of payment, the defendant payee is enriched by £1,000, not [£1,000 + the opportunity to use money]; thus, she can discharge her duty to effect restitution by repaying £1,000. She may, at some later time, be enriched by the profit made in consequence of investing money; a separate question then arises concerning the scope of liability for consequential gain.

It is to be regretted that the Justices chose not to reject outright the idea that the opportunity to use money is a plausible head of enrichment, framing their answer to the primary question instead by reference to the requisite *nexus* for liability in unjust enrichment: "The opportunity to use the money mistakenly paid can arise as a consequence of that transfer, but a causal link is not sufficient to constitute a further, independent, transfer of value".[60] This leaves sufficient room for subsequent courts to reanimate a version of the triple-enrichment thesis, by reimagining that nexus. Yet, it ought to be clear that the passage of time lends no more plausibility to the claim that the payee is enriched by an independent and amorphous "opportunity to use" money at some date after receipt. The Supreme Court can only have meant that a *profit* can arise in consequence of transfer: the defendant's enrichment consists of £1000; any profit (interest made or avoided) in consequence of receipt does not (because it is not sufficiently closely connected to the claimant) form part of the recoverable enrichment. This conceptualisation gives rise to various questions concerning the scope of liability in unjust enrichment, which I address in Part IV.

In short, the "use value" of money is not an independent enrichment; the interest made (or avoided) by investing it *is* an independent enrichment, in the form of a consequential gain. This raises a distinct question concerning whether consequential gain ought to be recoverable in unjust enrichment, to which I turn in Part IV.

(c) The comparable objective measure

We saw above that the award in *Sempra* was quantified by positing a loan of the principal sum to the defendant for the period of the enrichment. That mechanism is described as "objective" in the sense that it does not depend upon evidence that any borrowing would have occurred but for the impugned payment,[61] and it has since been adopted in spite of evidence that it *could not* have occurred.[62] Let us call this the "notional borrowing rate". In *Example 1*, the notional borrowing rate is 5%, which (according to the logic of *Sempra*) may be payable even if B is a net creditor. In *Sempra*, counsel for Sempra argued, and Lord Nicholls of Birkenhead accepted,[63] that the notional borrowing rate could be justified by

59. *Ibid.* See also Stevens (2018) 134 LQR 574, 597.
60. *Ibid.*
61. *Sempra* [2007] UKHL 34, [42].
62. *Kowalishin v Roberts* [2015] EWHC 1333 (Ch), [80].
63. *Sempra*, [116].

analogy with the so-called "user principle" in tort law. In what follows, I argue that is a poor analogy, and an inapt response to innocent receipt.

In *Sempra*, Lord Nicholls explained that valuing "the use of money" by reference to the notional borrowing rate could be justified by a "comparable objective measure" derived from "the analogous case of valuing the benefit derived by a defendant from unauthorised use of the claimant's land or goods".[64] To substantiate this analogy, Lord Nicholls drew upon two hypotheticals, known collectively as the "user principle", that were deployed as analytical devices in *The Mediana*[65] and *Watson Laidlaw & Co Ltd v Pott, Cassels & Williamson*[66] respectively. In what follows, I demonstrate that the justification for the user principle depends centrally upon a (particular type of) breach of duty owed by the defendant to the claimant.

The question before the House of Lords in *The Mediana* concerned whether compensation could be recovered for the loss of use of a lightship that had been damaged by the defendants' negligence,[67] despite the fact that—because they had access to a replacement lightship—the claimants' financial position was unaffected by breach. Awarding substantial damages, measured as the price of hiring a replacement ship, Lord Halsbury said:[68]

> "Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd."

Giving substance to the remedy, he continued:[69]

> "I know very well that as a matter of common sense what an arbitrator or a jury very often do is to take a perfectly artificial hypothesis and say, 'Well, if you wanted to hire a chair, what would you have to give for it for the period'; and in that way they come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner."

The point of such an "artificial hypothesis" was, he said, to allow the jury to "give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question".[70]

In *Watson Laidlaw v Pott, Cassels & Williamson*,[71] the claimants sought to recover damages for patent infringement. One of the defendants' arguments was that damages ought to be reduced to reflect the fact that the claimants did not have access to the Javanese market from which a substantial part of the defendant's profit had been made. Lord Shaw of Dunfermline gave that argument short shrift:[72]

64. *Ibid.*
65. *Owners of the Steamship Mediana v Owners of the Lightship Comet (The Mediana)* [1900] AC 113.
66. 1914 SC 18; (1914) 1 SLT 130; 31 RPC 104.
67. *The Mediana* [1900] AC 113.
68. *Ibid*, 117.
69. *Ibid.*
70. *Ibid.*
71. 1914 SC 18.
72. *Ibid*, 31.

"If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise'."

He concluded: "wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire".[73]

The effect of those decisions was summarised by Lord Reed in the recent Supreme Court decision in *Morris-Garner v One Step (Support) Ltd*.[74] In that case, the defendants had acted in breach of covenants against competition and solicitation. The claimants sought damages assessed by reference to a hypothetical bargain for releasing the defendants from those covenants, on the basis that their loss was difficult to calculate with any precision. Lord Reed rejected that argument, considering that "user damages" could be awarded only where the breach resulted in "the loss of a valuable asset created or protected by the right infringed".[75] Of the two cases considered immediately above, he said:[76]

"[T]he courts have treated user damages as providing compensation for loss, albeit not loss of a conventional kind … the person who makes wrongful use of the property prevents the owner from exercising his right to obtain the economic value of the use in question … Put shortly, he takes something for nothing, for which the owner was entitled to require payment."

Thus, "the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset",[77] and the "imaginary negotiation"—"how much would the claimant have charged for use?"—is "merely a tool for arriving at that value".[78]

Framed in the language of "loss" and "damages", the user principle can be difficult to understand. Take the following example:

Example 2: B takes A's bicycle without A's permission, stores it in her garage, and returns it two months later.

We might say that A has been deprived of her (positive) right to charge a sum for B's use; this is precisely how Lord Reed put it in *Morris-Garner*.[79] Yet, that would not be altogether accurate: no claimant has a right to the price of sale prior to any agreement to that effect. Rather, A may choose (for a fee) to waive her (negative) right that B *not* interfere with the bicycle. When B takes the bicycle without her permission, A's loss is not in the deprivation of that fee; thus, it does not matter whether she would in fact have waived her right.[80] The detriment that constitutes A's "loss" is B's infringement of her exclusionary right.[81] We can express precisely the same idea from B's perspective.

73. *Ibid.*
74. [2018] UKSC 20; [2018] 2 WLR 1353.
75. *Ibid*, [92].
76. *Ibid*, [30].
77. *Ibid*, [91]
78. *Ibid*, [91].
79. *Ibid*, [30].
80. *Morris-Garner v One Step* [2018] UKSC 20, [110] (Lord Sumption). See further R Stevens, *Torts and Rights* (OUP, Oxford, 2007), 68.
81. See further Stevens, *Torts and Rights* (2007), 63.

The user principle does not reflect any actual use or benefit had by B: it is irrelevant that B does not ride the stolen bicycle. Nor is the allegation that B should have bargained for it, so that it makes no difference that such a bargain would have been impossible to strike. Rather, it is that she owed a duty to stay away from A's bicycle, which duty she breached. B's "gain" is not use; it is *breach*.

Morris-Garner may in fact make it more difficult, not less, to set the scope of application of "user-damages": the idea that user damages should be limited to cases in which the defendant's interference is broadly analogous to an interference with property is belied by the examples given by both Lord Reed and Lord Sumption in that case.[82] Nevertheless, two conclusions may be drawn with confidence about the nature, if not the scope, of the user principle: first, there is a category of case in which a breach of duty falls to be measured by reference to a hypothetical bargain for release; second, that category includes (amongst others)[83] cases in which the right breached is a property right, and the defendant's breach produces no other economic loss for which damages would in the ordinary event be forthcoming. Thus, whatever else remains unclear in the wake of *Morris-Garner v One Step*, the decision lends clear support to the notion that user-damages respond to a breach of (a particular kind of) duty.

In *Sempra*, Sempra's argument for adopting the notional borrowing rate was framed analogically: if "the reasonable value of [a] period of use" is owing in cases involving land or chattels, "the enrichment a defendant gains by having the use of a claimant's money for a period of time should not be treated any differently".[84] Thus, the court did not need to consider what had actually happened in consequence of receipt, nor that a loan of the principle sum would have been impossible to acquire.[85] At first glance, this looks persuasive indeed. Money in all its forms is (for better or worse) considered to count amongst those "valuable assets" the use of which might be usurped by way of a breach of exclusionary duty.[86] Moreover, the counterfactuals chosen to shape the remedy in *Sempra*, and in Lord Halsbury's example above, are almost identical: "what would a reasonable person in the position of the defendant have had to pay to obtain access to *n*?", where *n* is a loan, or a chair. But this should not lead us to assume that the route to this calculation has the same underpinning logic. We have seen that what legitimises the "comparable objective measure" in the tort cases is the defendant's breach of a duty owed to the claimant. These cases provide no justification for the "user-rent" calculation where (as in our *Example 1*) there is no such breach—where, indeed, the injustice that grounds restitution of the principal sum is *A's* fault.[87]

In short, *Example 1* is not analogous to *Example 2*; the "user principle" provides no foundation for invoking the notional borrowing rate in lieu of an enquiry into actual gain, in order to determine the scope of B's liability for A's mistaken payment.

82. *Morris-Garner v One Step* [2018] UKSC 20, [95] (Lord Reed). See further C Bartscherer, "Two Steps Forward, One Step Back" (2019) 82 MLR 367.

83. The final, more ambiguous, claim is that the user principle may include other cases in which the right breached is *not* a property right, but is nevertheless "of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right".

84. *Sempra* [2007] UKHL 34 (argument of counsel).

85. *Kowalishin* [2015] EWHC 1333, [80].

86. *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486; [2011] QB 477, [48] (Toulson LJ).

87. *Sempra* [2007] UKHL 34, [146] (Lord Scott).

IV. USE VALUE AS CONSEQUENTIAL GAIN

There is some evidence to suggest that the majority in *Sempra* were not all committed, or not committed equally, to the idea that the notional borrowing rate should supplant an enquiry into actual profit: at various points in their speeches, Lord Hope and Lord Walker conceptualise that mechanism differently, as a rate of profit that the defendant is *presumed* to have made from the principal sum. Conceived of thus, the notional borrowing rate is merely a crutch for the claimant, and for the court; it is open to the defendant to demonstrate that her actual consequential gain took some other form. In what follows, I argue that there are reasons of principle, now supported by authority, for the proposition that consequential gain—presumed or proven—should be irrecoverable in unjust enrichment.

(a) Presuming gain

If the "opportunity to use" money were enriching *per se*, evidence of what the defendant has done ought to be of limited relevance: it might inform the court's view of the market rate available to the defendant, but it could not be used to disprove enrichment.[88] In *Sempra*, only Lord Nicholls pursued this logic through to its conclusion.[89] By contrast, Lord Hope and Lord Walker each described use value as "the benefit which the defendant is *presumed* to have derived from money in its hands";[90] concluding that it is "open to the recipient to demonstrate that there was *no actual enrichment* when the money fell into his hands notwithstanding the opportunity to turn it to account".[91]

There is a strong *prima facie* case against such a presumption: a claimant who sues for compound interest as damages for deceit must prove her loss;[92] one might expect as least as much in any claim for restitution of an unjust payment.[93] Yet, in any claim for interest as a gain made by avoiding interest on a loan of the principal sum, the claimant is peculiarly ill-placed to provide the requisite evidence—particularly where the defendant is in a unique borrowing position.[94] Thus, *if* there is a justification for making an award that reflects the defendant's profit (to which question I turn in what follows) there is a good reason for calculating it by reference to a presumed rate.

There are two caveats to this provisional support of the conclusion of Lord Hope and Lord Walker in *Sempra*. First, in light of its relationship to the facts, such a presumption ought to be tailored to both the characteristics and capital needs of the defendant,[95] which may be: a borrowing rate; a depositor rate (or other lending rate); a hybrid rate, or a rate that

88. *Sempra* [2007] UKHL 34, [117] (Lord Nicholls).
89. Use value, he said "is to be distinguished from the value of the benefits a defendant actually derived from the use of the money": *ibid*.
90. *Ibid*, [33] (Lord Hope; [180] (Lord Walker), emphasis added.
91. *Ibid*, [48] (Lord Hope) (emphasis added).
92. *Mortgage Express v Countrywide Surveyors Ltd* [2016] EWHC 1830 (Ch); [2016] P NLR 35.
93. Proctor, *Mann on the Legal Aspect of Money*, 7th edn (2012), [9.45].
94. See *Sempra* [2007] UKHL 34, [48] (Lord Hope).
95. *Goff & Jones*, 9th edn (2016), [5.15]. This is the approach that has been taken by the courts in quantifying simple interest: see eg *Challinor v Bellis* [2013] EWHC 620 (Ch); [2013] All ER (D) 06 and *Carrasco v Johnson* [2018] EWCA Civ 87. In the case of the government, the applicable rate would vary from either a conventional borrowing, or depositor rate: *Goff & Jones*, 9th edn (2016), [5.27].

(in a case like *Sempra*) reflects the government's unique spending practices. Secondly—and most obviously—it must be open to the defendant to adduce contrary evidence to rebut the presumed rate of interest made or avoided.[96]

If one accepts the argument that I have made thus far, that there is no justification for making an award of use value that *supplants* an enquiry into actual gain, the question is then: is there is an argument for making an award of interest that is designed to reflect (or approximate) actual gain?

(b) Proving gain

The idea that a proven consequential gain could be recovered in an action for restitution of an unjust enrichment was accepted even by the minority in *Sempra*. Dissenting from the conclusion that "use value" was recoverable by way of an action for a notional profit, Lord Mance and Lord Scott argued that enquiry should be directed towards "any actual interest benefit obtained by the revenue";[97] no such evidence having been presented, the claim either failed[98] or ought to be remitted to the High Court for an enquiry into actual gain.[99]

It is, however, far from obvious that liability in unjust enrichment ought to encompass gains made in consequence of the impugned transfer. Indeed, it has been argued persuasively that it is exceedingly difficult to explain why the unjust enrichee ought to be liable *at all*.[100] Elsewhere in private law, liability is justified on the basis of a bilateral wrong; in our *Example 1*, there is no allegation of wrongdoing—none, indeed, that B knew anything of the circumstances that impugned the payment at the time that it was made. The thrust of liability in unjust enrichment is that A is permitted, exceptionally, to reverse the defective transfer so as to "try again" to effect a transaction in pursuit of her chosen project.[101] Yet, that reason for restitution justifies disrupting the status quo only to the extent necessary to allow A to "reopen her options";[102] it does not justify making A *better off* (or B worse off)[103] than she would have been but for the defendant payment.[104] Thus, the justification for reversing the unjust transfer at most justifies

96. D Visser, "*Littlewoods Ltd v HMRC*: compound interest—not so simple in unjust enrichment cases?'"(2018) 2 BTR 184, 190. See further *Test Claimants in the FII Group Litigation v HMRC* [2016] EWCA Civ 1180; [2017] 1 CMLR 37, [267].

97. *Ibid*, [240] (Lord Mance, emphasis added). See further, C Mitchell, "Recovery of Compound Interest as Restitution or Damages" (2008) 72 MLR 290, and M Bhandari and C Mitchell, "Lessons of the *Metallgesellschaft* Litigation" [2008] RLR 1.

98. *Sempra* [2007] UKHL 34, [149] (Lord Scott).

99. *Ibid*, [241] (Lord Mance).

100. See F Wilmot-Smith, "Should the Payee Pay?" (2017) 37 OJLS 844.

101. See F Wilmot-Smith, "§ 38 and the Lost Doctrine of Failure of Consideration", in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Comparative and Critical Essays* (Hart, Oxford, 2013).

102. *Ibid*.

103. That is the thrust of the defence of change of position.

104. M McInnes, "The Measure of Restitution" (2002) 52 UTLJ 163; M McInnes, "At the Plaintiff's Expense: Quantifying Restitutionary Relief" [1998] CLJ 472; R Grantham and C Rickett, "Disgorgement for Unjust Enrichment" [2003] CLJ 159. In *Littlewoods Ltd v HMRC* [2015] EWCA Civ 515; [2016] Ch 373, [193], Arden LJ explained that the aim of the restitutionary claim is not "to confer some windfall on the claimant".

an award that is capped by whichever is the lower of: (i) the claimant's loss (interest accrued in replacing the principal sum, or interest lost on an investment that A would have made but for the impugned payment); and (ii) the defendant's gain (interest made by investing the principal sum, or interest avoided on a loan that the defendant would have secured but for the impugned payment).

This is not a novel argument, but it tends to be obscured by the conclusions drawn from two types of case. The first involves the award of a *quantum meruit* for the value of a service performed by the claimant for the defendant, where the parties failed to conclude a bargain for performance. Burrows argues that these cases prove that "an equivalence of loss and gain is not necessary", because the claimant need not demonstrate that she would have been gainfully employed but for the impugned performance.[105] After the Supreme Court decision in *Benedetti v Sawiris*,[106] this argument can be dealt with straightforwardly: that case stands as clear authority for the proposition that it is "the value of the services themselves"[107] which the court awards by way of a *quantum meruit*; the court does not seek to take account of what would have happened absent performance.

The second type of case is typified by *Trustee of FC Jones v Jones*.[108] In that case, Mr Jones had diverted funds from an insolvent firm of which he was a partner to his wife, Mrs Jones. She invested the funds thereby received, multiplying her investment fivefold. The Court of Appeal permitted the claimant trustee in bankruptcy to recover all of her profits, on the basis that Mrs Jones was "merely in possession of funds to which she had no title";[109] the trustee was "legal owner".[110] Birks took from *FC Jones* the proposition that "if I invest your money and double it, you are entitled to the doubled proceeds".[111] I have argued elsewhere that there is little merit in characterising bank money in this way, as the object of a property claim,[112] but those arguments do not bear repeating here. The point here has been a simple one: there is nothing in *FC Jones* that provides a foundation for disregarding the need for monetary equivalence in a *Sempra*-style case, where the claimant makes no allegation of proprietary entitlement.

In *Prudential*,[113] the facts of which I set out in Part II above, the court framed the question presently under consideration as an enquiry into whether the relevant gain was made "at the expense of" the claimant.[114] In 2017, the Supreme Court had decided in *Investment Trust Companies (in liq) v HMRC* ("*ITC*"),[115] that only a "direct transfer of value" could substantiate such a connection; a causal connection between loss and gain was insufficient. In *Prudential*, the Justices held that the principal sum was the only such "direct transfer of value" from PAC to HMRC; any use value was causally

105. A Burrows, *The Law of Restitution*, 3rd edn (OUP, Oxford, 2011), 64.
106. [2013] UKSC 50; [2014] AC 938.
107. *Ibid*, [14].
108. [1997] Ch 159.
109. *Ibid*, 167 (Millett LJ).
110. *Ibid*, 172 (Nourse LJ).
111. P Birks, *Unjust Enrichment*, 2nd edn (2004), 82.
112. T Cutts, "Modern Money Had And Received" (2018) 38 OJLS 1, 17–19.
113. *Prudential* [2018] UKSC 39.
114. *Ibid*, [68–80].
115. [2017] UKSC 29; [2017] 2 WLR 1200.

connected to that sum, and so irrecoverable under *ITC*.[116] There is a risk, therefore, that *Prudential* comes to be treated as irrelevant to the enquiry into the scope of the recoverable enrichment. That would be a category mistake. The two questions, "is the defendant enriched?" and "is the defendant's enrichment at the claimant's expense", are fundamentally connected: as Wilmot-Smith puts it, "there cannot be an enrichment, in the legal sense, that is not at the claimant's expense".[117] Investing the money to profitable effect made HMRC better off than they would have been but for the payment, but (said the court) a mere counterfactual increase in the value of one's assets is not enough to substantiate a claim in unjust enrichment.[118] Thus, the conclusion in *Prudential* that HMRC's gain was not at PAC's expense is a conclusion that consequential gain is irrecoverable in unjust enrichment.

Thus, there are reasons of principle, now supported by authority, to conclude that the *maximum* that B should pay A in *Example 1* is compound interest on the principal sum at a rate of 2%. In what follows, I turn to the question whether B ought to be required to pay that sum.

V. USE VALUE AS CONSEQUENTIAL LOSS

In this Part, I consider the argument that the unjust enrichee should be liable to compensate her payor, by way of simple interest, for the consequences of failing to effect restitution on the date of receipt. This argument, which was accepted by the Supreme Court in *Prudential*, proceeds from the assumption that the duty to repay money received as an unjust enrichment arises at the moment of receipt; this creates a debt upon which interest is payable under the Senior Courts Act 1981, s.35A. Finally, though the Supreme Court did not address this question, we can assume that the principles of calculation align with those more broadly applicable to the calculation of simple interest under s.35A: the court does not seek to determine precisely what would have happened absent payment;[119] rather, it "seeks to assess a reasonably representative or proxy rate" through an exercise that is more "in the nature of "one size fits all" than "made to measure".[120] Thus, liability under *Prudential* is simple interest on the principal sum for the period of the enrichment, at a proxy rate:

116. *Prudential* [2018] UKSC 39, [71].

117. Wilmot-Smith (2019) LQR 195, 196.

118. The time value of the money transferred to HMRC made them better off than they would otherwise have been. But the counterfactual improvement of an individual's assets does not suffice to bring the gain within the law's remit.

119. *Carrasco v Johnson* [2018] EWCA Civ 87, [37].

120. That rate reflects both the claimants' level of sophistication, and whether they are net borrowers or depositors. In *Challinor v Bellis* [2013] EWHC 620 (Ch), [42] the court awarded a "blended" rate of 3% over base. See also *Carrasco v Johnson* [2018] EWCA Civ 87, [18]: where claimants do not "fall clearly into a category of those who would have borrowed or those who would have put money on deposit", a "fair rate" may "fall somewhere between" (Hamblen LJ).

Table A

Rate	Compound	Simple
2%	C2	S2
3%	C3	S3
4%	C4	S4
5%	C5	S5
Proxy	CP	SP

In what follows, I argue that the Supreme Court was incorrect to conclude that the reason for the duty to effect restitution is irrelevant to the conclusion that a liability to pay interest arises under the Senior Courts Act 1981, s.35A. There is, I argue, no justification for requiring the unjust payee to compensate her payor for the failure to comply with her restitutionary duty; there is, therefore, no justification for a s.35A award of simple interest.

(a) The argument

We have already seen that unjust enrichment differs in one crucial respect from other categories of private law. Across the breadth of torts and contract, compensatory liability stems from a bilateral wrong—the breach of a duty that has been assumed voluntarily, or which arises to protect a particular sort of valuable interest. In each case, the wrong shapes the defendant's liability: the defendant who fails to comply with a contractual duty must put the claimant in the position in which she would have been if the contract had been performed according to its terms; the defendant who commits a tortious breach must restore the claimant to the non-breach position. A claim in unjust enrichment, by contrast, makes no allegation of wrongdoing; the duty to reverse the transfer is a primary duty, which arises (at the earliest) upon the date of transfer. Thus, the argument for requiring the defendant to compensate the claimant is not that the defendant has breached a duty that pre-existed transfer; rather, it is that the defendant has failed to comply with a duty to restore the money, which duty arises *in consequence of* transfer.

We saw above that the Supreme Court in *Prudential* rejected the argument that the "opportunity to use money" grounded an independent claim to compound interest: HMRC's only duty was to restore the principal sum.[121] However, since that duty arose at the moment of receipt,[122] it represented a debt on which simple interest fell to be paid under the Senior Courts Act 1981, s.35A, the purpose of which was "to compensate the claimant for the loss of the use of the money".[123] Citing a passage of Lord Wright's speech in *Riches v Westminster Bank*,[124] the Justices said:[125]

121. *Prudential* [2018] UKSC 39, [72].
122. *Ibid.*
123. *Ibid*, [73].
124. [1947] AC 390, 400.
125. *Prudential* [2018] UKSC 39, [76].

"[T]he essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation."

Precisely the same analysis, they concluded, could be applied to a mistaken payment: the claim to interest is "not truly based on unjust enrichment but on the failure to pay a debt on the due date";[126] thus, interest should be awarded under the Senior Courts Act 1981, s.35A[127] as compensation for failing to effect restitution at the moment of receipt.

So, the argument for simple interest is not that the defendant ought not to have received payment at all; it is that she ought to have restored the principal sum immediately. Thus, she is liable to compensate her payor for "the loss of the use of the money",[128] calculated (under s.35A) on the basis of simple interest. In what follows, I consider the merits of that conclusion. I argue that there is no justification for requiring an unjust payee to compensate the claimant for her loss of use; there is, therefore, no justification for an award of simple interest under s.35A.

(b) Simple, compound or no interest at all?

In *Sempra*, the House of Lords was unanimous in recognising a capacity at common law to award compound interest as damages for the late or non-payment of a debt, or for any other (tortious or contractual) breach. Two claims underpinned this conclusion: first, the s.35A regime was not intended to be "an exhaustive code";[129] it concerned interest "on a debt or damages", rather than interest *as* damages for loss.[130] Thus, where the claimant could prove that it would have invested money on compound interest terms, or would have avoided borrowing on compound interest terms, the claimant could recover interest as damages for its loss. The second claim was that compound interest provided the only sensible way of measuring interest as damages: simple interest was an "artificial construct", which bears "no relation to the way money is obtained or turned to account in the real world".[131] The only basis on which credit is available to borrowers is as interest that is calculated and paid periodically; if that interest is not paid, it is compounded.[132] Thus, the claimant was either entitled to an award of compound interest as the proper measure of the defendant's gain (the claim in unjust enrichment) or it was entitled to an award of compound interest as the proper measure of its loss (the claim for breach of statutory duty).

The Supreme Court in *Prudential* was emphatic that "nothing in this judgment is intended to question" the decision in *Sempra* "so far as it concerns the award of

126. *Ibid.*
127. *Ibid*, [77–78].
128. [73].
129. *Sempra* [2007] UKHL 34, [98] (Lord Nicholls).
130. *Ibid*, [99].
131. *Sempra* [2007] UKHL 34, [33] (Lord Hope).
132. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890, 955 (Hobhouse J, cited with approval in *Sempra* [2007] UKHL 34, [183] (Lord Walker). See also Law Commission, *Pre-Judgment Interest on Debts and Damages* (Law Com No 287, 2004), [4.2] and Virgo, (2007) 66 CLJ 510, 512.

interest as damages".[133] It might, therefore, be tempting to argue that A who can prove that she would have invested on compound interest terms (or would not have borrowed on compound interest terms) but for B's failure to repay the principal sum can enfeeble *Prudential* by claiming compound interest—not as damages for breach of statutory duty, but rather as damages for the non-payment of a restitutionary debt. If that argument is correct, she should *also* be able to invoke the more favourable limitation period prescribed by the Limitation Act 1980, s.32: it would be a claim for damages for a breach of duty caused by a mistaken payment, and thus "for relief from the consequences of a mistake".

There is a simple and obvious reason why such an argument is a non-starter, and it relies upon the distinction with which I began this Part. It is not enough to show that the defendant has failed to comply with a duty to pay; we must also explain what it is about that duty that justifies (compound interest as) damages. The defendant who has breached a contractual duty to pay a time-stamped debt, or a duty of non-action prescribed by the law of torts, must put the claimant in the position in which she would have been if that (positive or negative) duty had been complied with. There is nothing equivalent that grounds a compensatory liability for an innocent unjust payee; there is, therefore, nothing upon which to build the case for compound interest as damages.

Crucially, this point is not confined to liability at common law. We have seen that the Supreme Court in *Prudential* considered the justification for the duty to effect restitution wholly irrelevant in setting the terms of the interest award: interest is "not truly based on unjust enrichment but on the failure to pay a debt on the due date".[134] As Burrows puts it, "the failure to pay a sum that is legally due (whether a debt or damages) is in itself being treated as a wrong for the purposes of the 1981 Act. [This] explains how it is that one can regard interest on restitutionary remedies as compensatory".[135] Thus, failing to comply with the restitutionary duty must sound in damages in precisely the same way as the breach of a contractual duty to pay a time-stamped debt.

Here, I think, the Supreme Court erred. The Senior Courts Act 1981, s.35A is not expressed in mandatory terms: the section provides that, in an action for the recovery of a debt, "there *may* be included in any sum for which judgment is given simple interest … on all or any part of the debt or damages in respect of which judgment is given".[136] The statute leaves open the possibility that, in an action for the recovery of a debt, simple interest may *not* be payable. It had been accepted in several cases prior to *Prudential*,[137] and the Justices confirmed in that case that the objective of such an award is compensatory: statutory interest was designed to compensate the claimant for being "kept out of" her money.[138] The question then arises whether there is a reason for requiring the defendant to pay compensation for failing to comply with the duty to effect restitution.

133. *Prudential* [2018] UKSC 39, [79].
134. *Prudential* [2018] UKSC 39, [72].
135. A Burrows, "Interest", in S Worthington and G Virgo (eds), *Commercial Remedies: Resolving Controversies* (CUP, Cambridge, 2017), 258.
136. Emphasis added.
137. See eg *Challinor v Bellis* [2013] EWHC 620 (Ch) and *Carrasco v Johnson* [2018] EWCA Civ 87.
138. *Ibid*, [17].

It certainly is not self-evident that such a duty exists at all, prior to a court order for restitution. Stephen Smith has argued vociferously to the contrary: he argues that B, who may be entirely innocent and unaware of the injustice that grounds A's claim, ought not to be subjected to any duty to repay £1,000 prior to a court order to that effect.[139] That argument raises difficult epistemic questions, with which this article cannot deal. However, to the extent that Smith's concern goes to the *consequences* for the payee of imposing such a duty,[140] his argument underlines an important point that is central to the discussion in this article: even if a duty were to arise at the moment of receipt, it does not automatically follow that the failure to comply with that duty should be regarded as a wrong that sounds in damages. I have argued that liability in unjust enrichment ought not to encompass the loss that A suffers as a result of B's failure to comply with a restitutionary duty of which she was unaware, on the basis of an injustice for which she was not responsible.[141] And, if there is no justification for requiring B to compensate A, there is no justification for attaching an award of interest—compound or simple—to B's duty to effect restitution.

None of this is to argue that the decision in *Prudential* was incorrect: HMRC made no argument to the effect that simple interest was irrecoverable; it was not, therefore, open to the court to arrive at the conclusion for which I have argued in this Part. Rather, it is to doubt the broader point that s.35A can be divorced from the justification for the debt to which the claimant seeks to attach an award of simple interest. If the argument *is* made, it ought to be open to a future court to conclude that no award of simple interest should be attached to an action for the recovery of a restitutionary debt arising from an unjust payment.

VI. USE VALUE AS REVALUATION

There is a final way of justifying B's liability to pay for "use value", with which I deal here. The argument is that B is liable, not for her gain or A's loss, but because arriving at a proper valuation of the defective transfer requires the court to take account of the real (relative) decline in purchasing power of money over the period between T and T5. In what follows, I show that this argument faces the same objections as those raised in Part V above: where both parties operate within the parameters of an inflationary environment, there is no justification for placing the burden of a value-decrease upon B.

(a) The argument for revaluation

The value of money can be expressed in terms of either its nominal value, which is constant; or as relative ("real") value, which varies—£10 may buy 10 bananas at T, but only seven bananas five years later, at T5. Thus, the relative value of a bicycle is expressed as price (the monetary sum for which it can be bought or sold); the value of money is expressed as

139. S Smith, "A Duty to make Restitution?" (2013) 26 Can J 156, 171.
140. *Ibid*, 173.
141. See *post*, Part VI(b), for an analysis of the claim that in this particular line of cases B *is* responsible.

purchasing power (the goods, services etc that it can buy). Indices that quantify the latter approximate inflation by producing an average of price changes across a "basket" of goods and services that the typical consumer will access over a given period.

One might assume that the substitutive award requires B to pay whatever is the present (relative) value of £10. Thus, if £10 is worth less than it was at T, B should pay no more than £10. But it is the idiosyncrasy of money's commensurating function that this will not reflect the full value of the impugned payment: if B receives £10 at T (when £10 buys ten bananas) and returns £10 at T5 (when £10 buys seven bananas), it is as if she received 10 bananas, and returns only seven. So, it is certainly plausible to argue that, if a restitutionary award is to reflect the real value of money over time, it should accommodate the decrease in relative purchasing power.[142]

It would, in principle, be possible to construct an inflation index that reflected the spending habits of either claimant or defendant (or the lowest common denominator). But there are two reasons why there will rarely be a case for adjusting for the real value of money. The first is that, unless A can prove that she would have escaped the impact of inflation by investing the money paid at T in a (profitable) non-money asset (or by reducing a debt with respect to which interest was charged at a higher rate than inflation), A would in any event have suffered loss for which she now seeks compensation. And, if there is no justification for requiring B to compensate A for her loss, there is certainly no justification for making B compensate A for a loss that she would have suffered even if she had not made the payment. The second reason relates closely to the first: unless B in fact escaped the impact of inflation by investing the money received at T in a (profitable) non-money asset (or reducing a debt with respect to which interest was charged at a higher rate than inflation), she should not be required to shoulder the decline in real value of £1,000. It is the thrust of the defence of change of permission that an action in unjust enrichment should not make the defendant worse off than she was prior to the impugned payment.

Thus, for so long as both parties operate within the parameters of an inflationary environment, there is no justification for placing the burden of the decline in real value of £1,000 upon B.

(b) Wrongs and unjust enrichment

One final point bears emphasis, and it concerns the difference between *Example 1* and the line of cases to which *Prudential* belongs, which involve tax unlawfully exacted. In the latter, each mistake went to the validity of a statute enacted and enforced by government, with which the claimant could only have been expected to comply. On such facts, it seems far easier to justify requiring the government to effect full compensation. There are, however, good reasons to reject such an argument. The reason why claims for the recovery of tax have been framed by reference to mistake, rather than (or as an alternative to) compensation for a breach of statutory duty, is that an extended limitation period is prescribed by the Limitation Act 1980, s.32(1)(c): the period runs from when the

142. See also Stevens (2018) 134 LQR 574, 596: "A right to be paid £1 million in 2016 is worth more than a right to be paid the same notional figure in 2018."

claimant discovers the mistake, or "could with reasonable diligence have discovered it". A claimant payor who frames her claim by reference to mistake does *not* seek to rely on the wrongful character of the defendant's conduct. Thus, any breach of statutory or other duty is irrelevant to the remedy in unjust enrichment. If the claimant wants to make an allegation of wrongdoing, she must also accept the less favourable limitation period. She cannot have it both ways.

VII. CONCLUSION

It has been accepted unanimously that an unjust payee must effect restitution, not only of the principal sum, but also of an amount that reflects its "use value" over the period between receipt and restitution. The controversial questions concern why that sum is payable, and how it ought to be calculated. In this article, I have considered and rejected the two prevailing theories about the shape of liability for use value: first, that the defendant ought to be liable for compound interest on the principal sum for the period of the enrichment, at a rate that (broadly) reflects her gain; second, that she ought to be liable for simple interest on the principal sum for the period of the enrichment, at a rate that (broadly) reflects the claimant's loss. I have argued that there no justification for requiring the unjust payee either to give up a gain made, or to compensate the claimant for a loss suffered, in consequence of payment. I have made the case for a different response to unjust payment: the claimant who seeks to recover money by way of an action in unjust enrichment should be limited to restitution of the principal sum. There should be no additional liability for interest made, lost or avoided, as the "use value" of money paid.