The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?

**Abstract**: The fact that surrogacy contracts are unenforceable can cause problems if a surrogate decides that she wishes to keep the child. When this happens, the intended parents cannot bring a claim *in contract* compelling her to give the baby up to them or even for the return of money paid to the surrogate. Intuitively, it appears unfair that the surrogate can keep the child *and* the money while the intended parents are left with nothing. However, enforcing such contracts could be oppressive to the surrogate and detrimental to the child’s welfare. In this article, we consider whether the law unjust enrichment will allow for the return of money paid under such contracts. We argue that this branch of the law can provide a solution to the problem of unenforceable surrogacy contracts that strikes a fair balance between the interests of the surrogate and intended parents while also placing the child’s lifelong welfare paramount.

# INTRODUCTION

Surrogacy involves one woman, the surrogate mother, carrying a child for another, the intended parent(s), with the intention that the child should be handed over after birth.[[1]](#footnote-1) The Law Commission recently announced that the law regulating this practice would be reviewed as part of its 13th Programme of Law Reform.[[2]](#footnote-2) This news did not come as a surprise. The law in this area has attracted widespread criticism, being variously described as ‘confused, incoherent, and poorly adapted to the specific realities of the practice of surrogacy’,[[3]](#footnote-3) ‘outdated’[[4]](#footnote-4) and ‘failing to adequately protect the best interests of children and families’.[[5]](#footnote-5) Commentators have argued that the case for reform was ‘overwhelming’[[6]](#footnote-6) and ‘long-overdue’.[[7]](#footnote-7) In this article we challenge this growing orthodoxy that wholesale statutory reform of the law of surrogacy is necessary and argue that the common law may be able to provide a solution to one its most problematic aspects: the fact that in England and Wales surrogacy contracts are unenforceable.[[8]](#footnote-8)

While some surrogacy arrangements are altruistic – often involving the surrogate acting for a relative – few women would wish to endure a pregnancy for another individual and end up out of pocket.[[9]](#footnote-9) Money usually changes hands in the guise of ‘reasonable expenses’.[[10]](#footnote-10) This can cause problems if a surrogate decides that she wishes to keep the child and raise it herself. When this happens, the intended parents cannot bring a claim *in contract* compelling her to give the baby up to them or even for the return of money paid to the surrogate.[[11]](#footnote-11) This is the case even though they may have paid her a significant sum of money.[[12]](#footnote-12) Intuitively, this appears unfair. Why should the surrogate be able to keep the child *and* the money while the intended parents are left with nothing? It is for this reason that some scholars have called for the law to change so that such contracts should be enforceable.[[13]](#footnote-13)

On the other hand, making surrogacy contracts enforceable could potentially cut across family law’s requirement that the welfare of the child (throughout the child’s lifetime) be the court’s paramount concern.[[14]](#footnote-14) It will not always be in the child’s best interests to be handed over to intended parents but if the equitable remedy of specific performance was ordered the surrogate would compelled to do so. At the very least, damages for breach of contract would have to be paid.[[15]](#footnote-15) This means that enforceable surrogacy contracts might be oppressive to the surrogate. As such, some have opposed changes to this aspect of the law.[[16]](#footnote-16)

The clash of family law’s concern with the welfare of the child and contract law’s concern with party autonomy appears to be an intractable difficulty faced by those seeking to regulate surrogacy. Taking the existing law as a starting point, we consider whether, given such contracts cannot be enforced by the courts, an alternative mechanism – the law of unjust enrichment – might resolve this problem and allow for the return of money paid under such contracts. This branch of the law is ‘designed to correct normatively defective transfers of value usually by restoring the parties to their pre-transfer position’.[[17]](#footnote-17)

The availability of this response has been completely overlooked in the existing literature.[[18]](#footnote-18) This is unfortunate as the unenforceability of surrogacy contracts is not merely a theoretical interest. The prevalence of surrogacy is increasing[[19]](#footnote-19) and it is now ‘accepted as a method of enabling childless couples to experience the joy and fulfilment of parenthood’.[[20]](#footnote-20) Revisiting the law on surrogacy is therefore timely in itself but this article makes an original contribution to the debate on surrogacy reform by refuting the widespread myth that intended parents cannot recover payments made to the surrogate under the current law. Our conclusion that intended parents should be able to recover payments made to surrogates in the law of unjust enrichment not only produces an outcome that is fairer in financial terms to intended parents than the status quo and to surrogates than making surrogacy contracts enforceable, but also ensures that the best interests of the child are not subordinated to contractual rights and obligations. It therefore has the potential to be supported by both sides of the debate and does not require any statutory changes. This means any law reform efforts can be devoted to other aspects of surrogacy, where they are needed most.[[21]](#footnote-21)

This article takes the following form. The next section will give an overview of the current legislative framework governing surrogacy arrangements. Problems associated with the unenforceability of surrogacy contracts will then be outlined in more detail. The main body of this article will then demonstrate that the law of unjust enrichment presents a solution to this problem. Finally, we argue that allowing claims in unjust enrichment for payments made to surrogates would provide a fairer outcome for all parties than allowing surrogacy contracts to become legally enforceable.

# THE LAW ON SURROGACY

## *History*

In 1982, a Committee of Inquiry, chaired by Dame Mary Warnock, was established to examine the social, ethical and legal implications of developments in the field of human assisted reproduction. Part of its remit was the law of surrogacy. The majority of the Warnock Committee took the view that surrogacy was morally objectionable and recommended, among other things, that it be provided by statute that ‘all surrogacy agreements are illegal contracts and therefore unenforceable in the courts’.[[22]](#footnote-22)

These recommendations were not initially implemented. It was only after what Freeman refers to as the ‘moral panic’[[23]](#footnote-23) over the ‘Baby Cotton’ affair in 1985 – where Kim Cotton acted as a surrogate for an American couple – that legislation was introduced in the form of the Surrogacy Arrangements Act 1985. This statute did not implement all of the Warnock recommendations, although it did ban commercial surrogacy.[[24]](#footnote-24) The Human Fertilisation and Embryology Acts of 1990 and 2008 made further changes which made surrogacy contracts unenforceable and made provision for transferring legal parentage from the surrogate to the commissioning parents. In addition, the Human Fertilisation and Embryology (Parental Orders) Regulations of 2010 apply s 1 Adoption and Children Act 2002, stating that the child’s welfare throughout its life is the paramount consideration, to all applications for parental orders. The effect of these provisions is that the English[[25]](#footnote-25) position can be summed up as being: ‘whilst commercial surrogacy is unlawful, surrogacy itself is not’.[[26]](#footnote-26) In the rest of this section we will outline the relevant law in more detail so that the problems raised by the unenforceability of surrogacy contracts can be discussed in the next section.

## *Surrogacy Contracts are Unenforceable*

Nothing in the 1985 Act prevented intended parents from paying a surrogate to carry and hand over the child. As enacted, it did not clarify whether surrogacy contracts were completely prohibited or merely unenforceable. Perhaps this was because the Warnock Committee had ‘little doubt that the Courts would treat most, if not all, surrogacy agreements as contrary to public policy and therefore unenforceable’.[[27]](#footnote-27)

Section 36(1) of the Human Fertilisation and Embryology Act 1990 inserted section 1A into the Surrogacy Arrangements Act 1985 which states: ‘No surrogacy arrangement is enforceable by or against any of the persons making it’. This means that the intended parents cannot sue the surrogate mother *in contract law* if she refuses to hand over the child and she cannot sue them if they refuse to take the child after birth or fail to make any of the agreed payments.[[28]](#footnote-28) A case that exemplifies the harsh effect this has on intended parents is *Re TT*,[[29]](#footnote-29) where money had been paid to the surrogate. Despite her being able to keep the child,the intended father still had to pay the surrogate child support until the child’s 18th birthday.[[30]](#footnote-30)

## *Parenthood*

Given what the law states about parental responsibility, the unenforceability of surrogacy contracts gives the surrogate a significant amount of power. Until the marking of a parental order or adoption order, the surrogate will be the child’s legal mother. This will be the case whether or not it is a partial (where the surrogate’s eggs are used so she is the genetic mother) or full (where another woman’s eggs are used so that the surrogate is not the genetic mother) surrogacy arrangement. Section 33(1) HFEA 2008 states ‘The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child’.

Remarkably, the intended father will not necessarily be considered the legal father of the child even when his sperm is used. If the surrogate is married and IVF is used then, unless he can prove that he did not consent to the procedure, her husband will be the legal father.[[31]](#footnote-31) The surrogate will be registered as the child’s mother and her husband or partner will usually be registered as the father.[[32]](#footnote-32) If she is single then it is possible for the commissioning father to be registered.[[33]](#footnote-33) Given that these provisions do not reflect the reality of most surrogacy agreements, it is unsurprising that they have attracted criticism and there have been calls for them to be replaced with a pre-conception framework regulating parenthood in surrogacy agreements.[[34]](#footnote-34)

## *Parental Responsibility*

The only way in which the intended parents can become the *legal* parents of the child is via adoption or an application for a parental order. Section 30 of the Human Fertilisation and Embryology Act 1990 introduced the parental order as a less onerous alternative to adoption. Such orders are considered to be the ‘optimum legal and psychological solution’ for transferring parental rights to the commissioning couple as it ‘confirms the important legal, practical and psychological reality of [the child’s] identity.’[[35]](#footnote-35) They better reflect the nature of a child’s relationship with the intended parents than an adoption order.

The law on parental orders is now contained in section 54 the Human Fertilisation and Embryology Act 2008.[[36]](#footnote-36) There are a number of conditions that must be satisfied before such an order will be granted. First, the child must have been carried by the surrogate as a result as a result of artificial reproductive techniques rather than sexual intercourse.[[37]](#footnote-37) Second, gametes of at least one of the intended parents must have been used to bring about the creation of the embryo.[[38]](#footnote-38) Third, the applicants must either be married, civil partners or ‘two persons who are living as partners in an enduring family relationship’.[[39]](#footnote-39) This provision preventing a single person from applying for a parental order has been declared incompatible with Article 14 in conjunction with Article 8 of the European Convention on Human Rights.[[40]](#footnote-40) At the time of writing, a remedial order has been laid before parliament to remedy this.[[41]](#footnote-41)

The application for a parental order must be made within six months of the birth,[[42]](#footnote-42) at the time of application the child’s home must be with the intended parents,[[43]](#footnote-43) at least one of the intended parents must be domiciled in the United Kingdom[[44]](#footnote-44) and both intended parents must be over the age of eighteen.[[45]](#footnote-45) Section 54(6) states that the court must be satisfied that the surrogate and the child’s legal father have ‘have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order’. The surrogate’s agreement is ineffective if ‘given by her less than six weeks after the child's birth’.[[46]](#footnote-46) Also, as discussed in the next section, the court must be satisfied that, unless authorised by the court, no money or other benefit (beyond reasonable expenses) has been paid to the surrogate or legal father.[[47]](#footnote-47)

Whether an order should be made is governed by the Human Fertilisation and Embryology Regulations 2010. These regulations apply section 1 of the Adoption and Children Act 2002[[48]](#footnote-48) and state that the court must have regard to the child’s welfare throughout their life as the paramount consideration when determining whether to make a parental order. This means that ‘children’s welfare trumps and outweighs all other concerns; no other interests or values may affect the decision; children’s interests are the only ones that count.’[[49]](#footnote-49) In practice, as Jackson has observed, this means that:

If the surrogate mother does not want the child, unless the commissioning couple would obviously be woefully inadequate parents, it would rarely be in the child’s best interests for the parental order to be refused and the child to be taken into the care of the local authority.[[50]](#footnote-50)

The effect of granting a parental order is the same as adoption. The parental responsibility of the surrogate (and legal father) is extinguished and will rest with the intended parents.[[51]](#footnote-51)

Note, though, that, unlike in adoption law, there is no mechanism for dispensing with the consent of the surrogate and legal father even when it is in the best interests of the child to do so or where such consent is being unreasonably withheld.[[52]](#footnote-52) If a parental order cannot be made because the surrogate refuses to consent to it, then the alternatives for the intended parents are adoption proceedings or to seek a section 8 order under the Children Act 1989. Again, the court must treat the child’s welfare as its paramount consideration.[[53]](#footnote-53) If the child is living with the surrogate, she wishes to keep it and she is capable of looking after it then it is likely that it will be in the child’s lifelong welfare interests to remain with her. As the Brazier Review stated: ‘Unless the surrogate is, quite apart from the surrogacy arrangement, entirely unfit to parent the child, she is unlikely to be ordered to give up the child’.[[54]](#footnote-54)

## *Payments*

Of particular relevance for present purposes is the prohibition on payments. If intended parents cannot make payments to a surrogate that go beyond reasonable expenses, then the problem we are addressing appears illusory. This objection is misconceived. Even if the intended parents have only paid modest sums to the surrogate it is quite understandable that, if they cannot keep the child, they would not want her to retain these.

Furthermore, there is overwhelming evidence that in practice the sums paid far exceed reasonable expenses and that the courts consider themselves practically unable to decline to authorise them. In research conducted by the Surrogacy UK Working Group it was found that 95.4% of surrogates received compensation[[55]](#footnote-55) with 68.2% of those receiving between £10,000 and £15,000 and 4.7% receiving between £15,000 and 20,000. The mean average for compensation paid by intended parents to the surrogate was £10,859.[[56]](#footnote-56) In some cases it can be substantially higher. The mean average for compensation paid to the surrogate among respondents from overseas was £17,375.[[57]](#footnote-57)

The cases that come before the courts demonstrate that large sums of money are sometimes paid to surrogates. In *Re X[[58]](#footnote-58)* a couple domiciled in England entered into a surrogacy arrangement with a woman in Ukraine. They agreed to pay her €235 per month during the pregnancy and a lump sum of €25,000 on the live birth of the twins.

The fact that the surrogate intended to use some of the money to put down a deposit on the purchase of a flat demonstrates that this sum exceeded reasonable *expenses*. Hedley J maintained that this application could not succeed unless the court authorised these payments which ‘exceed expenses and so offend English domestic law.’[[59]](#footnote-59) Following the approach of earlier cases,[[60]](#footnote-60) he said there were two questions to consider:

1. Whether the payment was indeed for ‘expenses reasonably incurred’, a pure question of fact; and
2. If not, whether the court could or should authorise such payments.[[61]](#footnote-61)

He suggested that in relation to the latter public policy questions the court should pose itself three questions:

1. Was the sum paid disproportionate to reasonable expenses?
2. Were the applicants acting in good faith and without “moral taint” in their dealings with the surrogate mother?
3. Were the applicants party to any attempt to defraud the authorities?[[62]](#footnote-62)

In this case, Hedley J believed these three questions could be answered in the negative and so granted the order. He said that it was ‘almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child…would not be gravely compromised (at the very least) by a refusal to make an order’.[[63]](#footnote-63) Since then there have been several cases where the courts have authorised payments that go beyond reasonable expenses. Notable examples include the reported decisions of *Re S*[[64]](#footnote-64) (surrogate paid USD $23,000 *in addition* to her expenses) and *J v G*[[65]](#footnote-65) (surrogate paid a total of USD $56,750).

In practice, then, the courts have taken a ‘permissive approach’[[66]](#footnote-66) that means ‘recognition of parenthood as a result of a commercial surrogacy agreement is almost a foregone conclusion’.[[67]](#footnote-67) Whatever is stated in the statutory provisions, substantial sums of money are paid to surrogates and the parties involved may be aware that such payments will almost certainly be authorised by the courts. Natalie Gamble, the UK’s leading solicitor specialising in surrogacy arrangements, told us that, ‘Having been involved in many cases, I can honestly say that it no longer matters how much is paid.’[[68]](#footnote-68) It is therefore clear that when surrogacy agreements break down, in addition to any emotional burdens, there may be significant financial implications for the parties.

# THE PROBLEM DEFINED

The above overview establishes that surrogacy contracts are unenforceable in the courts, that the law is tilted towards allowing the surrogate to keep the child and that large amounts of money may be paid to the surrogate. However, the vast majority of surrogacy arrangements are successful. It is estimated that there are between 1,000 and 2,000 births by surrogacy in the United Kingdom each year.[[69]](#footnote-69) One surrogacy organisation – Childlessness Overcome Through Surrogacy (COTS) – estimate that 98 per cent of surrogacy agreements arranged by them have had a successful conclusion.[[70]](#footnote-70) The Surrogacy UK Working Group on Surrogacy Law Reform is emphatic on this matter: ‘Surrogacy is *not*risky – surrogates hand over the babies and don’t view themselves as the mother’.[[71]](#footnote-71) But just because the number of surrogacy agreements that break down is small does not mean that this is an unimportant concern. There will always be an ‘inevitable possibility’[[72]](#footnote-72) that such arrangements may go wrong and just because such unfortunate outcomes are relatively rare does not mean that we should be unconcerned with the rules governing them.

Furthermore, the incidence of surrogacy agreements, including ‘independent’ surrogacy arrangements, continues to increase, which is likely to result in a correlative increase in the number of cases where arrangements break down, (although the proportion may remain very low overall).[[73]](#footnote-73) There has been a number of reported cases where surrogacy arrangements *have* broken down. These include *Re P*[[74]](#footnote-74)(surrogate allowed to keep the child after becoming ‘assailed by doubts’[[75]](#footnote-75) about whether she should hand over the twins); *Re MW*[[76]](#footnote-76) (intended parents able to keep the children as they had been living with them for two and a half years); *C and C v S*[[77]](#footnote-77) (adoption order granted to the intended parents); *W and W v H*[[78]](#footnote-78) (this case had a conflict of laws element and it was held that the dispute should be decided in California); *Re P*[[79]](#footnote-79) (the surrogate had falsely told the intended parents that she had miscarried. It was in the child’s welfare interests to live with the intended parents but maintain good contact with the surrogate); *Re N*[[80]](#footnote-80)(residence was awarded to the intended parents after the surrogate ‘embarked on a path of deception’[[81]](#footnote-81)); *Re TT*[[82]](#footnote-82)(the surrogate was allowed to keep the child as it had formed an attachment with her); *H v S*[[83]](#footnote-83)(it was in the best interests of the child to reside with the intended father and his same-sex partner); and *H (A Child: Surrogacy Breakdown)* (it was in the child’s best interests to reside with the intended parents as the surrogate and her partner had put obstacles in the way of the child establishing a relationship with the intended parents).[[84]](#footnote-84) In 2014 a woman was sentenced to a term of imprisonment for faking pregnancies to trick intended parents out of thousands of pounds.[[85]](#footnote-85)

While not reflective of the majority of surrogacy arrangements, these cases provide evidence that surrogacy arrangements *do* break down. And these are just the examples that have reached the courts. We do not know how many cases intended parents have decided not to pursue after a surrogate has refused to relinquish the child.[[86]](#footnote-86) After all, if intended parents are aware that surrogacy arrangements are unenforceable they may feel that legal action is unlikely to be successful. Consequently, there may be a number of hidden cases of surrogacy breakdown.

Yet so far as we are aware there has not been a reported case where, after a surrogacy arrangement has broken down, the intended parents have sued for the return of the sums paid to the surrogate.[[87]](#footnote-87) This is understandable. If one is trying to convince a judge that the child’s welfare is best served by being removed from its gestational and legal mother an addendum stating ‘but if the court decides not to let me have the child, I’ll have my money back, please’ might project a nonchalant attitude towards the issue of the child’s welfare. Besides, given that the law clearly states the contract is unenforceable, intended parents might assume that a claim for the money to be returned has little or no chance of success.

Consider a situation where the intended parents have paid significant sums of money to the surrogate in order that the child be handed over to them after birth.[[88]](#footnote-88) If the surrogate refuses to relinquish the child then they will not be able to obtain a parental order. Unless there are issues with the surrogates parenting, it is unlikely to be in the child’s lifelong welfare for it child to be removed from its home and raised by the intended parents.[[89]](#footnote-89) While it is true that it is not possible to tell who will get the child until the welfare test is applied, in the face of a surrogate who changes her mind the law, as Alghrani notes, usually ‘provides little recourse, irrespective of whether the child is genetically related to the surrogate or not’.[[90]](#footnote-90)

Even if one thinks the surrogate should be able to keep the child, why should she *also* be entitled to retain the money? The intended parents will be out of pocket and will have received nothing in return. This is true even if only modest ‘reasonable expenses’ have changed hands, never mind the larger sums that courts inevitably authorise, or even if only some instalments of a larger agreed sum of expenses have been paid. Few people would pay for another’s travel expenses and maternity clothes out of altruism.

It may be countered that we should just enforce surrogacy contracts. Jackson recommends a contractual model for regulating surrogacy. She notes that contract law is ‘now accustomed to shaping the *content* of contractual arrangements in order to facilitate both planning and fairness’[[91]](#footnote-91) and that ‘insofar as there are those who believe that the surrogate mother’s right to resile from her undertaking to hand over the child should be paramount, contract law is also well adapted to resolving contractual disputes without violating individual freedom’.[[92]](#footnote-92) She maintains that a contractual model does not necessitate the surrogate being compelled to hand over the child:

Arguments against the enforceability of surrogacy contracts that derive from the premise that an order for specific performance would be insupportable are built upon a misunderstanding of contract law. There are many contracts where specific performance would be oppressive, and this is not generally regarded as a sufficient reason for them to be entirely unbinding. Rather, the ordinary remedy in contract law is damages.[[93]](#footnote-93)

She states this remedy:

…would protect the surrogate mother’s “right” to keep the child, while compensating the commissioning couple for at least some of their losses. It is perfectly plausible for a surrogate mother’s right to resile from her undertaking to hand over the child to coexist with the commissioning couple’s right to compensation for the losses resulting from their misplaced reliance upon the agreement.[[94]](#footnote-94)

However, this could be oppressive. If the contract is enforceable, it would not simply involve ordering surrogate mother to repay any fees paid to her but of ordering damages for breach of contract. It would be difficult to value the expectation losses of the intended parents and put them in the position of the contract being properly performed. However, if the surrogate had to pay the intended parents for their reliance losses then this would include expenses paid to the surrogate mother but also other items such as baby clothes, nursery items, and possibly lost wages from one of the intended parents giving up work. Furthermore, this will almost certainly be the kind of contract where damages for emotional distress would be permitted.[[95]](#footnote-95) The risk of having to pay breach of contract damages might act as a coercive pressure on a surrogate mother to hand over the child when she does not want to and even where she might have very good reasons for resiling from the agreement.[[96]](#footnote-96)

The undesirability, and current impossibility, of the intended parents bringing a contractual claim does not necessarily mean that the money paid to the surrogate cannot and should not be returned by utilising a different legal avenue. In the rest of this article we will consider whether they might be able to succeed in a claim in unjust enrichment for the return of the money they have paid. This solution, we maintain, avoids the unfairness of allowing the surrogate to keep the child and the money, while also avoiding the disadvantages associated with the enforcing surrogacy contracts.

# THE LAW OF UNJUST ENRICHMENT

The law of unjust enrichment is recognised as ‘a discrete set of rights and obligations in English private law.’[[97]](#footnote-97) In order to be successful in this cause of action a claimant must demonstrate:

1. That the defendant was enriched;
2. That this enrichment was at the claimant’s expense;
3. That the enrichment was unjust;
4. Consideration must then be given to any applicable defences.[[98]](#footnote-98)

If these requirements are satisfied an obligation to make restitution arises.[[99]](#footnote-99)

Birks has stated: ‘One context in which the law of unjust enrichment is frequently invoked is, broadly speaking, the mopping up operation which is often necessary after ineffective contracts’.[[100]](#footnote-100) When a contract fails, the parties involved will often bring a claim in unjust enrichment for the return of any monies paid.Before any claimmay be allowed on this basis, ‘it must first be established that the payments made, or work done, never were, or are no longer, regulated by a contractual obligation’.[[101]](#footnote-101) In the situations we are considering, where a surrogate declines to relinquish the child to the intended parents, this will be satisfied as, if the intending parents accept the repudiation, the contract will have been terminated for breach. Although the unenforceability of surrogacy contracts does not of itself mean that the parties’ relationship is not regulated by contractual obligation, there is persuasive precedent for the award of restitution in respect of the value of benefits provided under unenforceable contracts.[[102]](#footnote-102) In the rest of this section we will examine the requisite elements of an unjust enrichment claim to see whether it will allow for the return of money paid to surrogates.

## *Enrichment*

The first requirement of a claim in unjust enrichment is that the defendant has been enriched.

In the type of problem that we are considering, the surrogate will have received money. As previously stated, the widespread custom is to agree ‘expenses’ as a lump sum at the start of the surrogacy arrangement. This figure ‘is commonly set without any real reference to actual out of pocket expenses’ and the ‘going rate’ for UK surrogacy is now between £12,000 and £17,000.[[103]](#footnote-103) Usually, the intended parents will pay money to the surrogate. She will then spend (some of) this money on expenses associated with the pregnancy. As money is considered to be incontrovertibly beneficial,[[104]](#footnote-104) the surrogate will have been enriched and so the first element of an unjust enrichment claim will be satisfied.

What about situations where, rather than giving the surrogate money, the intended parents have paid for goods (such as maternity clothes) or services (such as travel costs) for the surrogate? Unlike money, benefits in kind have different values to different people.[[105]](#footnote-105) In *Benedetti v Sawiris*[[106]](#footnote-106) it was held that the objective value of an enrichment is the value to a reasonable person *in the defendant’s position*.[[107]](#footnote-107) In addition, it was accepted by the majority in that decision that the defendant should be able to argue that the value of an enrichment to her is not the same as its objective value. That is, she should be able to subjectively devalue the enrichment. Lord Clarke acknowledged that there is a narrow distinction between those factors that a defendant relies on in subjectively devaluing an enrichment and those which are indicative of ‘the defendant’s position’ for the purposes of assessing the objective value of the enrichment.[[108]](#footnote-108) However, *Goff and Jones* states that a defendant will be ‘held to have been enriched by the receipt of market value when he is relieved from the burden of paying for goods and services which it was factually necessary for him to acquire’.[[109]](#footnote-109) The courts take a broad view of this.[[110]](#footnote-110) If they are genuine expenses, it would have been necessary for her to pay for them herself if the intended parents had not and as such they would be deemed incontrovertibly beneficial.[[111]](#footnote-111)

An alternative basis for deeming the surrogate mother to be enriched if goods and services are paid for by the intended parents is by demonstrating that she freely accepted them.[[112]](#footnote-112) She would know that they were not being offered gratuitously, but in consideration of her having a baby for the intending parents, and she did not decline to receive them on that basis. She cannot devalue such necessary expenditure and claim she was not enriched when she has exercised a choice to accept such benefits that she knew were not being offered gratuitously. These methods of overcoming subjective devaluation can be used to establish either that the surrogate mother *does* value the benefit she has received or that she should be prevented from denying that the benefits are of value to her because of the circumstances in which she has accepted them. However, where they are less useful is in demonstrating the extent of the value that the surrogate mother places on the benefit. For example, the intended parents may have purchased more expensive goods or services for the surrogate mother than she would have chosen if buying them out of her own funds. In such circumstances it would be difficult to deny the force of the surrogate mother’s argument that she should only be considered benefitted to the value that she would have spent on such necessary or freely accepted items.[[113]](#footnote-113)

So if money or benefits in kind have been received by the surrogate she will have been enriched. It is arguable, though, that the benefit she has received is much greater than the cash value that has been paid to her. She also has the emotional benefits arising from being allowed to raise the child. Could it be argued that she should have to pay back more money to the intended parents to reflect these less tangible benefits?

The answer is almost certainly no. First, in ‘wrongful conception’ cases brought in the tort of negligence the House of Lords has refused to countenance claims for the financial losses associated with raising a (healthy) child born as a result of carelessly performed sterilisations (or negligent advice concerning the results of such procedures). One reason given was the impossibility of weighing the benefits and burdens of having a child. Any attempt to ‘quantify in money terms the value of the joys and benefits which the parents might receive’[[114]](#footnote-114) by raising the child would be ‘an exercise in pure speculation to which no court of law should lend itself.’[[115]](#footnote-115) As Lord Slynn stated in *McFarlane v Tayside Health Board*:[[116]](#footnote-116)

Of course there should be joy at the birth of a healthy child, at the baby’s smile and the teenager’s enthusiasms but how can these be put in money terms and trimmed to allow for sleepless nights and teenage disobedience? If the valuation is made early how can it be known whether the baby will grow up strong or weak, clever or stupid, successful or a failure both personally and careerwise, honest or a crook?[[117]](#footnote-117)

It is improbable that the courts, having refused to engage in such speculation in the law of tort about the emotional benefits of raising a child, would do so in unjust enrichment cases. Furthermore, the enrichments that are capable of supporting an unjust enrichment claim are those that have a monetary value. That is, money itself or goods and services with a market value.[[118]](#footnote-118) As *Goff* *and Jones* states, ‘The love and companionship of family members also make people happier, but these benefits cannot be bought and sold for money, and the law does not recognise claims in respect of them’.[[119]](#footnote-119) We therefore suggest that money and benefits in kind paid in exchange for surrogacy services will be classed as an enrichment but that any claim for other intangible benefits associated with raising the child will be doomed to failure.

## *At the Claimant’s Expense*

The intended parents must demonstrate that the surrogate has been enriched *at their expense*. The reversal of unjust enrichment is ‘premised on the claimant’s also having suffered a loss through his provision of the benefit’[[120]](#footnote-120) and this is usually unproblematic in simple claims where money or services have been directly transferred to the surrogate by the intended parent. If the intended parents transfer money, goods or services to the surrogate then they will have suffered a loss and she will have suffered a corresponding gain.

Furthermore, it has recently been confirmed that the interposition of a third party between the claimant and defendant does not prevent an enrichment being at the claimant’s expense.[[121]](#footnote-121) This means that a claim can still be brought where the intended parents pay a surrogacy agency, and the agency pays the surrogate.[[122]](#footnote-122) As such, this element of the unjust enrichment action is unlikely to be a hurdle for intending parents.

## *Unjust – Failure of Consideration*

Of greater difficulty for the intended parents will be demonstrating that the enrichment of the surrogate was *unjust*. To do this, the claimant must identify an ‘unjust factor’ – that is, a factor ‘which makes it unjust to allow the payee to retain the benefit.’[[123]](#footnote-123) As Lord Sumption recently reiterated:

English law does not have a universal theory to explain all the cases in which restitution is available. It recognises a number of discrete factual situations in which enrichment is treated as vitiated by some unjust factor. These factual situations are not, however, random illustrations of the Court’s indulgence to litigants. They have the common feature that some legal norm or some legally recognized expectation of the claimant falling short of a legal right has been disrupted or disappointed.[[124]](#footnote-124)

What unjust factor might the intended parents in our problem rely upon? The mere fact that the surrogacy contract is unenforceable is not itself a basis for ordering restitution.[[125]](#footnote-125) Just because a contract is unenforceable does not mean that it is not *valid*: the underlying agreement, and its rights and obligations, are still in place.[[126]](#footnote-126) As *Atiyah* notes, ‘An ordinary completed sale of illegal narcotics, for example, does not lead to an unjust enrichment: the transaction is voluntary and each party gets what he or she bargains for’.[[127]](#footnote-127)

The most likely unjust factor that intended parents might rely upon is known as ‘failure of consideration’. This factor is based on the idea that the consideration (or condition) for the transfer of the enrichment no longer exists and, absent fulfilment of that condition, it is unfair for the defendant to retain it. As Lord Wright said in the leading case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*.,[[128]](#footnote-128) it is ‘based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back’.[[129]](#footnote-129)

In *Fibrosa*, the respondents had agreed to supply machinery to the appellants, a Polish company. The appellants paid money to the respondents but before the machinery could be delivered war broke out between Germany and Poland. Great Britain then declared war on Germany. As a result, the contract was frustrated. The appellants asked for the return of the money but the respondents refused, stating that they had already started work upon the machinery. A claim was brought for the return of the money.

It was held that in the absence of a term in the contract dealing with what should happen in the event of frustration,[[130]](#footnote-130) ‘the rule that the loss lies where it falls cannot apply in respect of moneys paid in advance when the consideration moving from the payee for the payment has wholly failed.[[131]](#footnote-131) Instead, a claim could be brought by the party who has not received what they bargained for.[[132]](#footnote-132) As Lord Wright stated: ‘The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail’.[[133]](#footnote-133)

What is meant by consideration in these circumstances? It does not have the exact same meaning as in contract law (hence the terminological preference of some writers for calling this unjust factor ‘failure of basis’). In contract law, the doctrine of consideration is based on reciprocity.[[134]](#footnote-134) A gratuitous promise is unenforceable (unless contained in a deed).[[135]](#footnote-135) The doctrine of consideration requires ‘something which is of some value in the eye of the law, moving from the plaintiff’[[136]](#footnote-136) in order for an agreement to be binding. In contract law, then, the mere *promise* to do something is capable of constituting consideration. A contract may be ‘formed by an exchange of a promise for a promise, or by the exchange of a promise for an act’.[[137]](#footnote-137)

But when one speaks of failure of consideration in the unjust enrichment context ‘it is, generally speaking, not the *promise* which is referred to as the consideration, but the *performance* of the promise’.[[138]](#footnote-138) This is because ‘The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled’.[[139]](#footnote-139) Recovery occurs where there is a promise that has not been fulfilled.[[140]](#footnote-140) Viscount Simon LC gave the following example:

A simple illustration…is an agreement to buy a horse, the price to be paid down, but the horse not to be delivered and the property not to pass until the horse had been shod. If the horse dies before the shoeing, the price can unquestionably be recovered as for a total failure of consideration, notwithstanding that the promise to deliver was given.[[141]](#footnote-141)

It should be noted that the consideration must *totally*, rather than partially, fail.[[142]](#footnote-142) The total failure rule and the relevant authorities were considered in great detail in *Van der Garde v Force India*[[143]](#footnote-143)where Stadlen J considered that the reason for the rule was that entitlement to restitution depends on proof that the claimant received no consideration for a payment that he made. Receipt of even a small part of the consideration is inconsistent with such proof.[[144]](#footnote-144)

The rule does not apply where the benefits received by the claimant are ‘merely incidental to the performance of the contract’[[145]](#footnote-145) or where the claimant’s contractual obligations can be apportioned. In *Goss v Chilcott*[[146]](#footnote-146) Lord Goff stated: ‘in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on this ground’.[[147]](#footnote-147) This means that ‘it follows from the fact that there can be multiple bases for a transfer that recovery can be ordered on the total failure of one basis, although another has only partially failed, or indeed, has fully materialised’.[[148]](#footnote-148)

What does this mean for intended parents who have paid money to a surrogate who has subsequently refused to hand over the child? They will need to demonstrate that the consideration for which they transferred the money has *totally* failed. If they cannot demonstrate this then they will have to demonstrate that the bases for the transfer can be apportioned and that (at least) one of these have totally failed.

Whether there has been a total failure of consideration in an ineffective surrogacy contract depends upon how the obligations under the contract are constructed and, in the words of Mitchell, ‘what the parties commonly understood the consideration for the transfer of the money to have been’.[[149]](#footnote-149) Although this involves an objective test, it is determined from the perspective of the payer.[[150]](#footnote-150) This means that real benefits received can be ignored if they are not the benefits bargained for.[[151]](#footnote-151) An objective test does not mean that ‘evidence of the payer's subjective motive or purpose for entering the agreement is inadmissible if those intentions or motives were communicated to the payee before the contract was entered into’.[[152]](#footnote-152)

How, then, might surrogacy contracts be interpreted in this context? The answer to this may seem so obvious that it barely warrants an investigation. The intended parents entered into a surrogacy arrangement because they wanted a child. They have not received the child. By that very fact, there must surely be a failure of consideration as they have not got what they bargained for.

Yet matters are more complex than this simple analysis suggests, as the case of *Stocznia Gdanska SA v Latvian Shipping Co*[[153]](#footnote-153)illustrates*.* The defendant buyers engaged the claimant under a number of contracts for the *design, construction, completion and delivery* of refrigerated ships. Under each contract the price was payable in instalments. One of these instalments was payable within five days of receipt of notice of keel-laying of the vessels. After work had commenced on the first two ships the buyers failed to pay the instalment that was due on keel-laying and so the claimants rescinded the contracts. The sellers brought a claim for, among other things, the instalment due on keel-laying. The issue for the House of Lords was whether, if the instalment was paid under the contract, it could be recovered back by the buyers on the ground of failure of consideration. After all, the defendants had not received any vessels.

The House of Lords rejected this argument. The contract was not a contract for sale simpliciter. That is, it was not a contract for the delivery of a ship. Instead it was a contract for work and materials which included an obligation to transfer property to the buyer on completion. The *design* and *construction* of the vessels formed part of the consideration. As these had been completed and commenced respectively, the consideration had not totally failed.

Lord Goff stated that ‘failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract’[[154]](#footnote-154) such as the property in the ships in this case. If it were otherwise, then no successful claim for failure of consideration would succeed when a promisor undertakes to do work or render services which render no benefit to the promissee ‘for example where he undertakes to paint the promisee’s daughter’s house, no consideration would ever be furnished for the promisee’s payment’.[[155]](#footnote-155) Instead the test is whether the promisor ‘has performed any part of the contractual duties in respect of which the payment is due’.[[156]](#footnote-156)

Let us now consider how a surrogacy contract might be interpreted for these purposes. It may be that it is analogous to the contract for the sale of goods in *Fibrosa*. In such circumstances, the failure of the surrogate to hand over the child will mean that the consideration has failed: the intended parents will not have received anything they bargained for. Alternatively, it may be that the contract is analogous to the one in *Stocznia* and is one for the *service* of conception/implantation of embryo, and *carrying, delivering* and *handing* *over* of the child. As Lord Lloyd acknowledged in *Stocznia*,‘the distinction between a simple contract of sale, in which the only consideration is the transfer of title, and a contract of sale which also includes the provision of services prior to delivery, may sometimes be a fine one’.[[157]](#footnote-157) This is something of an understatement After all, the contract in *Fibrosa* also involved the *manufacture* and *delivery* of the goods in question.

There has been some discussion of this issue in the literature on surrogacy. The Brazier Review considered whether surrogacy could be equated with ‘baby-selling’. Rebutting arguments that the ‘fee paid to the surrogate can be regarded as payment for the pregnancy, ie payment for her services, not the baby’[[158]](#footnote-158) the Review stated that it was

unimaginable that a commissioning couple should enter into a contract that required simply that the surrogate become pregnant and give birth. The contract would have to contain a requirement that in return for the fee the child was handed over to those contracting the pregnancy, with penalties for failure to fulfil this aspect of the agreement.’[[159]](#footnote-159)

It concluded that ‘any financial arrangement that involves remuneration rather than simply expenses has to be regarded as a form of child purchase’.[[160]](#footnote-160)

These arguments attracted criticism, with Freeman stating that ‘Brazier is too readily dismissive of the distinction between payment for the purchase of a child and payment for a potentially risky, time-consuming and uncomfortable service’.[[161]](#footnote-161) Jackson, too, maintains that a surrogacy arrangement ‘may be more akin to a contract *for services*’.[[162]](#footnote-162)

Furthermore, there is some evidence that surrogacy contracts are structured as contracts for services rather than contracts for children. In *J v G* (mentioned earlier) the surrogacy contract stated, ‘By signing this agreement, you are signing to also confirm that you are in no way paying for baby(ies) [sic] in any way whatsoever’.[[163]](#footnote-163) Whether this should be taken at face value, though, is open to debate.

If a surrogacy contract should be interpreted as one for a service – carrying, delivering, giving birth to, and handing over, the child then the refusal to hand over the child does not result in the total failure of the consideration or basis of the contract even if the intended parents have received nothing of value in exchange for their money, as the surrogate will have performed part of the agreement by carrying the child.[[164]](#footnote-164)

Yet this interpretation is open to question.[[165]](#footnote-165) Responding to arguments that the intended parents are purchasing a service, Brazier states:

Were surrogacy contracts enforceable, it would be self-evident that the consideration for the contract is the surrender of the child…The consideration would be the delivery of the father’s or couple’s child into the world, the creation of their genetic offspring *not* the delivery over of the child to them. The surrender of their child is what the couple desire. Who would pay for the chance of the child?... I doubt there would be many who would pay up in the hope that the surrogate hands over the baby of her own volition. Yet such a contract is the only kind of surrogacy contract that does not in reality constitute buying a baby. [[166]](#footnote-166)

According to Brazier, the intended parents are not paying for the surrogate to carry and have a child but to have a child *for them*.[[167]](#footnote-167) This appears to be the more logical interpretation of the parties’ commonly understood purpose in surrogacy contracts.[[168]](#footnote-168)

It is possible to reconcile the different approaches to the question of what is the consideration for which the intending parents paid money ‘expenses’ to the surrogate mother. The intended parents do not pay simply to buy a baby from the surrogate mother. Intended parents will want a baby which is a healthy as possible and will want to take precautions so that the pregnancy has the best chance of a successful outcome. There may be stipulations in the contract that the surrogate mother refrain from smoking or drinking alcohol, eats healthily during pregnancy or attends for ultrasound scans and abnormality screening. It is more likely that the consideration will be seen by the courts to be to conceive, carry, deliver and give up parental responsibility for a baby to the intending parents.

However, the consideration should not be seen to have only partially failed where the surrogate has conceived, carried and perhaps given birth to the baby but then decides not to give it up to the intended parents. The conception, carrying and giving birth to the baby are, at best, merely incidental benefits if the surrogate mother does not ultimately hand over the baby.[[169]](#footnote-169) It was explicitly held in *Van der Garde v Force India* that, where a contract confers the right to receive and the obligation to provide a number benefits, the test as to whether receipt of any of these is inconsistent with total failure of consideration is whether they are the whole or main part of the benefit expected or bargained for, rather than merely incidental or collateral to it.[[170]](#footnote-170) Brazier is right that the intended parents have not bargained for the surrogate mother simply to conceive, carry and deliver a baby, but to do so in respect of a baby for the intending parents to raise themselves with sole parental responsibility. Considering the bargained-for benefit from the viewpoint of the payers (the intending parents), it should be seen that it is for the surrogate mother to conceive a child (or have an embryo implanted) for the intending parents to raise and for whom they will have sole parental responsibility; to carry an unborn child for the intending parents to raise and for whom they will have sole parental responsibility; to deliver a child for the intending parents to raise and for whom they will have sole parental responsibility; to give the child to the intending parents to reside with them and to consent to their having sole parental responsibility for the child.

Framing the consideration in this, admittedly long-winded way, means that if the surrogate mother declines to hand the baby over to the intending parents, consideration totally fails. This is because although she did conceive, she did so to have a child for herself, rather than for the intending parents and so on for each element of the consideration. This should mean that the intending parents have a prima facie right to recover in restitution all of the money that they have paid to the surrogate mother.

A further benefit of constructing the consideration in this way is that if the surrogate mother miscarries or delivers a stillborn child, the consideration will not have totally failed, as she has conceived and, at least for some time, carried a child for the intending parents. If it was accepted that the consideration was simply to supply a baby to the intending parents in return for the expenses they paid, the surrogate mother could carry the baby to full-term but then have to repay all the money received if the baby died before she could hand it over. Similarly in a case of gestational surrogacy, the surrogate mother will have undergone IVF treatment in order to become pregnant with a child for the intending parents so any payments made to her for that part of the service will not be recoverable even if the IVF is unsuccessful. In cases where the surrogate mother does in fact change her mind about relinquishing the baby, but there has been an identifiable change in circumstances so that the surrogate mother can be seen to have good reason for doing so,[[171]](#footnote-171) then she should be considered to have completed all services up to that point for the benefit of the intending parents. Consideration would not therefore fail for the payments in respect of those services and the money would not be repayable.

One problem the intending parents may encounter here is if, after the surrogate decides to keep the child, the courts ordered that the child should reside with the surrogate mother, but should also have contact with the intended parents. This would not be what the intending parents bargained for, but it is also difficult to argue that having a relationship with the child through contact is merely an incidental benefit, even if it does not live with the intending parents. The intending parents would still have a type of parent-child relationship (one which many separated parents experience) and one parent may even have shared parental responsibility with the surrogate mother. In this situation, it may be successfully argued that consideration has only partially failed.

If the argument above as to the correct construction of the consideration is not accepted however, this type of contract is likely to be divisible (part of the contract is for carrying the child; part of it is for handing over the child etc.). The intended parents should be able to obtain the return of any money that was paid in exchange for handing over the child or agreeing to a parental order or adoption if this did not take place (assuming such an instalment had already been paid to the surrogate). The basis of the latter divisible part of the contract will have failed even if the basis of other parts of the contract had not. It is not necessary that the payments be made in separate instalments in order to apportion the consideration in this way.[[172]](#footnote-172) In the case of *DO Ferguson Associates v Sohl*[[173]](#footnote-173) builders had been paid approximately £26,000 for their work, but it was assessed that the value of the work they completed was only about £22,000. It was held that the claimants were entitled to restitution of £4,000 on the basis of apportionment notwithstanding the latter amount had not been paid as a separate instalment.

Given this, it is possible that an unjust enrichment claim could be made out because there has been a total failure of consideration. Allowing the surrogate to keep the child *and* the money would mean that she is unjustly enriched at the expense of the intended parents in the majority of surrogacy contracts.

## *Unenforceable Contracts: Undermining Contract Law?*

Even accounting for the above, the fact that a contract is unenforceable could potentially prevent intended parents obtaining the return of money paid to the surrogate. This is because although unjust enrichment is a separate cause of action to the law of contract, the courts are reluctant to allow this branch of the law to undermine the ‘the policy of the rule which rendered the contract unenforceable’.[[174]](#footnote-174)

There have been several cases where the courts have refused to allow a claim in unjust enrichment for failure of consideration because doing so would run counter to the statutory or common law policy rendering the agreement unenforceable. For example, *Orakpo v Manson Investments*[[175]](#footnote-175) involved a loan contract that was unenforceable under section 6(1) of the Moneylenders Act 1927. The statute required such contracts to be in writing and contain all of the terms of the agreement. The House of Lords refused to allow moneylenders to be repaid as to do so ‘would be to enable the court to express a policy of its own in regard to moneylending transactions which would be in direct conflict with the policy of the Act of 1927 itself’.[[176]](#footnote-176)

Lord Diplock also made an obiter statement that payments made voluntarily pursuant to the terms of an unenforceable contract would not be recoverable.[[177]](#footnote-177) Several cases since then have however resulted in a successful claim for restitution of a non-money benefit.[[178]](#footnote-178) It would be illogical to deny a claimant the right to recover money paid in the same circumstances and it is our view that the courts would now apply the same principles to claims for restitution of money as for the value of non-money benefits.

There have been several cases where a claim will be permitted based on consideration that has failed under an unenforceable contract. In *Cobbe v Yeoman's Row Management Ltd*[[179]](#footnote-179)the claimant was a property developer who had orally agreed with the defendants to buy a property that he would redevelop into town houses. Each party would then receive a share of the proceeds. As an oral agreement for the purchase of property, this agreement was unenforceable for want of writing.[[180]](#footnote-180) The claimant spent a considerable amount of money and time seeking planning permission. After this had been granted the defendants withdrew from the agreement and attempted to renegotiate it on terms which were significantly less favourable to the claimant.

The House of Lords held that the claimant was entitled to a *quantum meruit* (‘what one has earned’) in respect of the money and services that he had provided. The defendant knew the claimant was not offering these gratuitously.[[181]](#footnote-181) Lord Scott stated:

Where an agreement is reached under which an individual provides money and services in return for a legal but unenforceable promise which the promisor, after the money has been paid and the services provided, refuses to carry out, the individual would be entitled, in my opinion, to a restitutionary remedy.[[182]](#footnote-182)

This case indicates that the fact that money or services are exchanged under an unenforceable contract will not be a bar to an unjust enrichment claim based upon a failure of consideration.[[183]](#footnote-183) Further support for this view can be found in cases from other common law countries.[[184]](#footnote-184)

It therefore appears that a claim in unjust enrichment based upon a failure of consideration can succeed where ordering restitution would not be inconsistent with the policy reasons that render the contract unenforceable. Would allowing an unjust enrichment claim for failed surrogacy contracts undermine the policy reasons that render such claims unenforceable?

It is arguable that it would. In an early surrogacy case Sir John Arnold P expressed the *obiter* view that such agreements might be contrary to public policy. He said one view of the matter is that there may, in certain circumstances be ‘an element concerning the surrogacy agreement which is repellent to proper ideas about the procreation of children, so as to make any such agreement one which should be rejected by the law as being contrary to public policy.’[[185]](#footnote-185)Furthermore, the Warnock Report stated that where ‘one party broke the agreement the other party could not expect to invoke the court’s assistance’.[[186]](#footnote-186) If the surrogate mother decided to keep the child then the Warnock Report opines not only that it would be unlikely that a court would order her to hand the child over but also that the court would not ‘order the surrogate mother to repay any fee paid to her under the terms of the agreement’.[[187]](#footnote-187)

On the other hand, an attempt to declare that surrogacy contracts were ‘unlawful’ in addition to being unenforceable was made in 1986 with the Surrogacy Arrangements (Amendment) Bill but, again, this did not become law.[[188]](#footnote-188) Additionally, judicial and societal attitudes to surrogacy have changed since the 1980s.[[189]](#footnote-189) In *Briody v St Helens and Knowsley Area Health Authority*[[190]](#footnote-190)Hale LJ(as she then was) said of the statutory provisions dealing with surrogacy:

…do not indicate that surrogacy as such is contrary to public policy. They tend to indicate that the issue is a difficult one, upon which opinions are divided, so that it would be wise to tread with caution. This is borne out in the official publications which have considered the matter. If there is a trend, it is towards acceptance and regulation as a last resort rather than towards prohibition.[[191]](#footnote-191)

This view was recently confirmed in a case of clinical negligence, *XX v Whittington NHS Hospital Trust*,[[192]](#footnote-192) where the claimant was successful in obtaining damages to cover the expenses for a UK surrogacy arrangement. Sir Robert Nelson held that while a *commercial* surrogacy contract would be illegal and contrary to public policy, a non-profit one that complied with the UK statutory provisions would not be.[[193]](#footnote-193) Finally, the Minister of State for Health, Philip Dunne, when laying the remedial order permitting single people to obtain a parental order before parliament, recently stated that surrogacy ‘has an important role to play in our society’ and that the UK Government ‘recognises the value of this in the 21st century where family structures, attitudes and life-styles are much more diverse.’[[194]](#footnote-194)

As such, it is far from obvious that the underlying objective of the law rendering such contracts unenforceable is to allow the mother to keep the child *and* the money. It is our view that the relevant statutes seem more concerned with preventing *commercial* surrogacy than surrogacy *per se*.[[195]](#footnote-195) Whatever the view of the Warnock Committee, the governing statute does not say that surrogacy contracts are illegal and contrary to public policy nor does it say that an unjust enrichment claim should be barred. Indeed, it is arguable that the policy behind the unenforceability of surrogacy contracts is to prevent the surrogate being compelled to hand over the child when it is in the child’s best interests to reside with her. Permitting an unjust enrichment claim is not inconsistent with this.

## *Defences*

Based on the above analysis, if a surrogate has received money from the intended parents and decides to keep the child then she will have been unjustly enriched at their expense. What defences might be open to her?

The defences of illegality and estoppel are unlikely to be relevant to the problem we have identified. As discussed above, modern courts are unlikely to declare a simple surrogacy arrangement to be illegal or immoral.[[196]](#footnote-196) In any event, in the recent case of *Patel v Mirza*[[197]](#footnote-197) the Supreme Court has indicated that they will take a more generous approach to claimants who have acted illegally. Lord Toulson stated:

[A] person who satisfies the ordinary requirements of a claim in unjust enrichment will not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was an unlawful consideration.[[198]](#footnote-198)

As an illustration he said that bribes may be odious and corrupting ‘but it does not follow that it is in the public interest to prevent their repayment’.[[199]](#footnote-199) It is therefore unlikely that this defence has much relevance to our problem. Furthermore, the defence of estoppel will not be relevant as it highly unlikely that intended parents will make a representation to the surrogate that she can keep any money paid even if changes her mind.

Instead, where the surrogate mother has dissipated the money received from the intending parents she may have a defence of change of position. This defence is ‘available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full’[[200]](#footnote-200) and requires that the defendant has suffered a change of position or detriment that is causally linked to their receipt of money from the claimant.[[201]](#footnote-201) This requires some ‘extraordinary expenditure’[[202]](#footnote-202) by the defendant and not merely that they have spent the money on things they would have bought anyway. The defence will not be available to a defendant who has acted in bad faith or who is a wrongdoer.[[203]](#footnote-203)

This defence may be available to a surrogate. Where the money has been spent on items which have continuing value, the surrogate mother would be considered still to be enriched.[[204]](#footnote-204) This would be subject to any depreciation in value of the assets purchased which would be considered a change of position. Where, however, the money has been spent on items which would not have been bought, but for the receipt of the money from the intending parents and where these items do not retain a value eg a holiday, the surrogate mother may be able to rely on the defence of change of position so that she would not be required to repay the monies so expended.

Again, where a surrogate mother sought to rely on this defence she would be required to establish that she had changed her position in good faith. If she declines to hand the baby over to the intending parents this may require an inquiry into the timing of her decision to keep the child. Where she has spent the money prior to changing her mind, she may be considered to have acted in good faith, but not where she has spent the money after changing her mind. There may be some difficulty in being sure of reaching accurate answers due to the very nature of the inquiry, which is into the subjective intentions of the surrogate mother. She may not have manifested those intentions outwardly.

There are, as the Warnock Committee acknowledged, ‘[m]any unforeseen events [that] may occur between the moment of entering into the surrogacy agreement and the time for handing over the child, and these may alter the whole picture’.[[205]](#footnote-205) Alternatively, the surrogate may become aware of something about the intended parents that makes them unsuitable to raise the child. For example, in *Re TT* the surrogate was informed by the intended mother that the intended father was violent and had previously tried to strangle her with a seatbelt and so the court held that it was in the child’s best interests to live with the surrogate mother.[[206]](#footnote-206) In those circumstances, a surrogate would have justified reasons for changing her mind about the agreement and, as such, should not be required to return money that has already been spent. Other situations, such as those where the surrogate has deceived the intended parents about her intentions, may be ones where it is appropriate for her to repay all of the money that has been paid to her as she has not acted in good faith (assuming she is able to keep the child).[[207]](#footnote-207) This is a further reason why an unjust enrichment approach is superior to a contractual one. Change of position is not a defence in contract. As mentioned earlier, if a contractual approach is adopted then the risk of having to pay breach of contract damages, with the consequences for the surrogate mother’s own family that this would entail could act as a very significant pressure. This might lead to surrogate mothers reluctantly consenting to the intended parents having the child and the question of the best interests of the child never being fully considered by a court.[[208]](#footnote-208) Such an outcome would be especially objectionable in partial surrogacy arrangement where she is the genetic mother of the child. An unjust enrichment approach, while preventing a surrogate mother from keeping the money and the child, would be much less oppressive than enforcing surrogacy contracts.

# CONCLUSION: DOES UNJUST ENRICHMENT PROVIDE A SOLUTION TO PROBLEMS RAISED BY THE UNENFORCEABILITY OF SURROGACY CONTRACTS?

When a surrogacy agreement breaks down there will always be a losing party: either the surrogate or (more usually) the intended parents will not be able to raise the child they want. But there is no reason, when a surrogate keeps the child, for the intended parents to lose out twice over. It is unfair for the surrogate to be able to keep the child *and* the money that has been paid to her. Consequently, there have been calls for surrogacy contracts to be enforceable. This outcome, we have argued, would raise as many problems as it solves. The opportunity for the intended parents to claim breach of contract damages, together with a lack of ‘change of position’ defence, could place the surrogate under coercive pressure to hand over the child to the intended parents even when she has good reasons for changing her mind. As well as being harsh on the surrogate, this could be detrimental to the child’s welfare.

We have demonstrated that the law of unjust enrichment can provide a better solution to the problems associated with unenforceable surrogacy contracts by avoiding such inequitable outcomes without undermining family law’s concern with the welfare of the child. Few people want to criminalise surrogacy but this does not mean they wish an exploitative commercial model to be implemented. The case for allowing the return of (at least some of) the money paid to the surrogate, while still rendering surrogacy contracts unenforceable, is consistent with a middle ground position between these two extremes.

Moreover, this unfairness can be resolved by the existing law. While there may be a case for amending *aspects* of the law of surrogacy, such as the law on parental orders, wholesale change is unnecessary. Furthermore, if such modification involves the enforcement of surrogacy contracts, it would be oppressive and cause as many problems as it solves. In contrast, the flexibility of the law of unjust enrichment has the advantage of allowing judges to consider the particular circumstances of the individual case at hand. After all, the common law is ‘a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live.’[[209]](#footnote-209) It can provide a fairer outcome that properly balances the interests of the surrogate and intended parents while still placing the child’s lifelong welfare paramount. The Law Commission should therefore consider our novel, common law solution to the problems associated with the unenforceability of surrogacy contracts before they propose radical statutory reform.

1. M Warnock (Chair), *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: HMSO, 1984) [8.1]. [↑](#footnote-ref-1)
2. Law Commission, ‘13th Programme of Law Reform’ <https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/> Last accessed 22 December 2017. [↑](#footnote-ref-2)
3. K Horsey and S Sheldon, ‘Still Hazy After All These Years: The Law Regulating Surrogacy’ (2012) 20 Med L Rev 67, 67. [↑](#footnote-ref-3)
4. A Alghrani and D Griffiths ‘The Regulation of Surrogacy in the United Kingdom: The Case for Reform’ (2017) 29 CFLQ 165, 186. [↑](#footnote-ref-4)
5. K Horsey, ‘Fraying at the Edges: UK Surrogacy Law in 2015’ (2016) 24 Med L Rev 608, 608. [↑](#footnote-ref-5)
6. E Jackson, ‘UK Law and International Commercial Surrogacy: “The Very Antithesis of Sensible”’ (2016) 4 *Journal of Medical Law and Ethics* 197, 211. [↑](#footnote-ref-6)
7. A Alghrani and D Griffiths ‘The Regulation of Surrogacy in the United Kingdom: The Case for Reform’ (2017) 29 CFLQ 165, 186. [↑](#footnote-ref-7)
8. Surrogacy Arrangements Act 1985, s 1A as inserted by Human Fertilisation and Embryology Act 1990 (HFEA 1990), s.36(1). [↑](#footnote-ref-8)
9. This is not to say, however, that payment and altruism are mutually exclusive. Kim Cotton, Britain’s first surrogate mother, has said her motivation was ‘to help an infertile couple achieve their dream and, in doing so, I could help my own little family financially.’ See K Cotton, ‘The UK’s Antiquated Laws on Surrogacy: A Personal and Professional Perspective’ (2016) 4 *Journal of Medical Law and Ethics* 229. [↑](#footnote-ref-9)
10. M Warnock (Chair), *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: HMSO, 1984) [8.3]. [↑](#footnote-ref-10)
11. Similarly, if the intending parents decline to accept the baby or to make agreed payments to the surrogate mother she would be unable to enforce their promises to do so. This scenario is beyond the scope of this article however, where discussion is confined to recovery of payments when the surrogate mother refuses to give up the child. [↑](#footnote-ref-11)
12. See the section ‘Payments’ below. [↑](#footnote-ref-12)
13. R Posner, ‘The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood’ (1989) 5 J Contemp Health L & Pol’y 21 and R. Arneson, ‘Commodification and Commercial Surrogacy’ (1992) 21 Philos Public Aff 132, E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001), 308 and L Van Zyl and R Walker, ‘Beyond Altruistic and Commercial Contract Motherhood: The Professional Model’ (2013) 27 Bioethics 373. [↑](#footnote-ref-13)
14. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985 applies Adoption and Children Act 2002, s 1, stating that the child’s welfare throughout its life is the paramount consideration, to all applications for parental orders. See also Children Act 1989, s 1(1). [↑](#footnote-ref-14)
15. E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001) 313. [↑](#footnote-ref-15)
16. MJ Radin, ‘Market-Inalienability’ (1987) 100 Harv L Rev 1849, E Anderson, ‘Is Women’s Labor a Commodity? (1990) 19 Philos Pub Aff 71 and M Brazier (Chair), A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (London: HMSO, 1998) [7.10]. [↑](#footnote-ref-16)
17. *The Commissioners for Her Majesty’s Revenue and Customs v The Investment Trust Companies* [2017] UKSC 29, SC at [42] per Lord Reed [↑](#footnote-ref-17)
18. The only mention of unjust enrichment in relation to surrogacy that we have been able to find is from Jackson who states that ‘allowing [the surrogate] to keep *all* of the money paid by the commissioning couple might amount to her being “unjustly enriched” at the expense of the commissioning couple.’ However, the issue is not the focus of her discussion. See E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001), 312. [↑](#footnote-ref-18)
19. M Crawshaw, E Blyth and O van den Akker, ‘The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice’ (2012) 32 JSWFL 267, 269. As part of this general rise, there is an increasing number of ‘independent’ surrogacy arrangements where surrogate mothers and intending parents make contact usually through social media platforms or otherwise via the internet and agreements are made without the advice, support and vetting of surrogacy organisations. In these cases the rate of contract breakdown may be expected to be higher. [↑](#footnote-ref-19)
20. *Re TT* [2011] EWHC 33, HC at [1] per Baker J. [↑](#footnote-ref-20)
21. Such as the law on parental orders and issues surrounding international surrogacy. [↑](#footnote-ref-21)
22. M Warnock (Chair), *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: HMSO, 1984) [8.19] [↑](#footnote-ref-22)
23. M Freeman, ‘Does Surrogacy Have a Future After Brazier?’ (1999) 7 Med L Rev 1, 2. [↑](#footnote-ref-23)
24. Section 2. Section 59(4) of the Human Fertilisation and Embryology Act 2008 Act inserted an amendment (s 2A) to the 1985 Act that a non-profit-making body does not contravene the Act if one of the acts listed above is done for reasonable payment. [↑](#footnote-ref-24)
25. The Surrogacy Arrangements Act 1985 applies to the whole of UK. However, we are only considering the law of England and Wales in this article, due to differences in the relevant common law applicable. Cross-border surrogacy raises complex problems of the conflict of laws that are outside the scope of this article. [↑](#footnote-ref-25)
26. *In re X and another (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 at [3] per Hedley J. [↑](#footnote-ref-26)
27. M Warnock (Chair), *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: HMSO, 1984) [8.5]. [↑](#footnote-ref-27)
28. E Jackson, *Medical Law: Text, Cases and Materials* (Oxford: OUP, 2016) 881. [↑](#footnote-ref-28)
29. [2011] EWHC 33. For an excellent commentary on this case see A Alghrani, ‘Surrogacy: “A Cautionary Tale”’ (2012) 20 Med L Rev 631. [↑](#footnote-ref-29)
30. See A Ahmed, ‘Surrogate mother who kept baby wins claim for child support’ *Bionews,* 18 April 2011 <http://www.bionews.org.uk/page\_93040.asp> Last accessed 5th August 2016. [↑](#footnote-ref-30)
31. HFEA 2008, s 38(1). Section 37 provides a number of conditions whereby a male partner of an unmarried surrogate can be considered the father of the child. [↑](#footnote-ref-31)
32. HFEA 1990, s 28. See also E Jackson, *Medical Law: Text, Cases and Materials* (Oxford: OUP, 2016) 884. [↑](#footnote-ref-32)
33. *ibid*. [↑](#footnote-ref-33)
34. See A Alghrani and D Griffiths ‘The Regulation of Surrogacy in the United Kingdom: The Case for Reform’ (2017) 29 CFLQ 165, 180. [↑](#footnote-ref-34)
35. According to Munby J in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 at [7]. [↑](#footnote-ref-35)
36. HFEA 2008, s 57(3) has repealed HFEA 1990, s 30. [↑](#footnote-ref-36)
37. HFEA 2008, s 54(1)(a). [↑](#footnote-ref-37)
38. *ibid* s 54(1)(b). [↑](#footnote-ref-38)
39. *ibid* s 54(2). The two persons must not be within prohibited degrees of relationship in relation to each other [↑](#footnote-ref-39)
40. See *Re Z (A Child) (No 2)* [2016] EWHC 1191. [↑](#footnote-ref-40)
41. Human Fertilisation and Embryology Act: Remedial Order (Vol 632, 29 November 2017) [↑](#footnote-ref-41)
42. HFEA 2008, s 54(3). This section is now effectively not enforced by the courts. See *A & B (No 2 – Parental Order)* [2015] EWHC 2080 where a parental order was granted when the child was eight years old at the time of the application. [↑](#footnote-ref-42)
43. HFEA 2008, s 54(4)(a) [↑](#footnote-ref-43)
44. Or in Channel Islands or Isle of Man. HFEA 2008, s 54(4)(b). [↑](#footnote-ref-44)
45. *ibid* s 54(5). [↑](#footnote-ref-45)
46. *ibid* s 54(7). However, no agreement is required from a person who cannot be found. [↑](#footnote-ref-46)
47. *ibid* s 54(8). [↑](#footnote-ref-47)
48. Human Fertilisation and Embryology Regulations 2010 SI 2010/958 reg 2 and Sch 1. [↑](#footnote-ref-48)
49. H Reece, ‘The Paramountcy Principle: Consensus or Construct’ (1996) 49 CLP 267, 267. See also *J v C* [1970] AC 668, 710 per Lord MacDermott. [↑](#footnote-ref-49)
50. E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001) 276. [↑](#footnote-ref-50)
51. HFEA 2008, s 54(1). See also Adoption and Children Act 2002, s 46. [↑](#footnote-ref-51)
52. See *Re AB (Surrogacy: Consent)* [2016] EWHC 2643. [↑](#footnote-ref-52)
53. Children Act 1989, s 1(1). [↑](#footnote-ref-53)
54. M Brazier (Chair), A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (London: HMSO, 1998) [3.37]. See also A Alghrani, ‘Surrogacy: “A Cautionary Tale”’ (2012) 20 Med L Rev 631, 637. *C.f.* *H and B v S and M (A Child)* [2015] EWFC 36. [↑](#footnote-ref-54)
55. K Horsey, ‘Surrogacy in the UK: Myth Busting and Reform’ *Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK, 2015) 20. [↑](#footnote-ref-55)
56. ibid, 23. [↑](#footnote-ref-56)
57. ibid, 24. [↑](#footnote-ref-57)
58. *(Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030. [↑](#footnote-ref-58)
59. *ibid* at [18]. [↑](#footnote-ref-59)
60. Namely, the approach of Latey J. in *Re Adoption Application (Payment for Adoption)* [1987] Fam 81 and Wall J in *Re C (Application by Mr and Mrs X under section 30 of the Human Fertilisation and Embryology Act 1990)* [2002] 1 FLR 909. [↑](#footnote-ref-60)
61. *Re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 at [19]. [↑](#footnote-ref-61)
62. *ibid* at [21]. [↑](#footnote-ref-62)
63. *ibid*. [↑](#footnote-ref-63)
64. [2009] EWHC 2977. [↑](#footnote-ref-64)
65. [2013] EWHC 1432. [↑](#footnote-ref-65)
66. C Fenton-Glynn, ‘The Regulation and Recognition of Surrogacy Under English Law: An Overview of the Case-Law’ (2015) 27 CFLQ 83, 87. [↑](#footnote-ref-66)
67. *ibid*. [↑](#footnote-ref-67)
68. By personal correspondence. [↑](#footnote-ref-68)
69. E Jackson, *Medical Law: Text, Cases and Materials* (Oxford: OUP, 2016) 875. [↑](#footnote-ref-69)
70. <http://www.surrogacy.org.uk/#!aboutsurrogacy/c1kjd> Last accessed 5th August 2016. [↑](#footnote-ref-70)
71. K Horsey, ‘Surrogacy in the UK: Myth Busting and Reform’ *Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK, 2015) 35. [↑](#footnote-ref-71)
72. E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001) 264. [↑](#footnote-ref-72)
73. See M Crawshaw, E Blyth and O van den Akker, ‘The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice’ (2012) 32 JSWFL 267, 269. [↑](#footnote-ref-73)
74. [1987] 2 FLR 421. [↑](#footnote-ref-74)
75. *ibid*, 422 per Sir John Arnold P. [↑](#footnote-ref-75)
76. [1995] 2 FLR 759. [↑](#footnote-ref-76)
77. [1996] SLT 1387. [↑](#footnote-ref-77)
78. [2002] FLR 252. [↑](#footnote-ref-78)
79. [2008] 1 FLR 177. [↑](#footnote-ref-79)
80. [2007] EWCA Civ 1053. [↑](#footnote-ref-80)
81. *ibid* at [4] per Thorpe LJ. [↑](#footnote-ref-81)
82. [2011] EWHC 33. [↑](#footnote-ref-82)
83. [2015] EWFC 36. [↑](#footnote-ref-83)
84. [2017] EWCA Civ 1789. [↑](#footnote-ref-84)
85. S Morris, ‘Surrogate mother jailed for faking pregnancies’ *The Guardian* 16 June 2014 <https://www.theguardian.com/uk-news/2014/jun/16/surrogate-mother-louise-pollard-jailed> Last accessed 26 July 2017. [↑](#footnote-ref-85)
86. M Brazier (Chair), A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (London: HMSO, 1998) [5.7]. [↑](#footnote-ref-86)
87. Natalie Gamble of Gamble Associates (the leading solicitor specialising in surrogacy) has not come across such a case. By personal correspondence. [↑](#footnote-ref-87)
88. According to Natalie Gamble, the usual practice is for the surrogate and the intended parents to agree an overall lump sum of expenses at the outset of the arrangement. Nonetheless, the payment of expenses may often be made by way of instalments. [↑](#footnote-ref-88)
89. There have been cases where it has been in the child’s best interests to reside with the intended parents. See *H (A Child: Surrogacy Breakdown)* [2017] EWCA Civ 1789. [↑](#footnote-ref-89)
90. A Alghrani, ‘Surrogacy: “A Cautionary Tale”’ (2012) 20 Med L Rev 631, 635-636. [↑](#footnote-ref-90)
91. E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001), 308. [↑](#footnote-ref-91)
92. *ibid*. [↑](#footnote-ref-92)
93. *ibid*, 313. [↑](#footnote-ref-93)
94. *ibid*, 315. [↑](#footnote-ref-94)
95. See *Jarvis v Swan’s Tours* [1973] QB 233 and *Farley v Skinner* [2002] 2 AC 732. [↑](#footnote-ref-95)
96. As in the case of *Re TT* [2011] EWHC 33 (discussed below). [↑](#footnote-ref-96)
97. C Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed.) *Principles of the English Law of Obligations* (Oxford: OUP, 2015) 239. See also *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578 per Lord Goff. [↑](#footnote-ref-97)
98. *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 per Lord Steyn. [↑](#footnote-ref-98)
99. C Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed.) *Principles of the English Law of Obligations* (Oxford: OUP, 2015), 241. This area of law is sometimes referred to as the ‘law of restitution.’ The difference in terminology represents the difference between event and response. Restitution is the remedy for an unjust enrichment but it can also be a response to wrongs. Rather than being concerned with the claimant’s loss, it requires the defendant to give up the gain they have made at the claimant’s expense. Given that we are only concerned with restitution as a response to unjust enrichment here, there is no problem with using the terms interchangeably. A claim for restitution by the intended parents will be based on the event of unjust enrichment. See also C Mitchell, P Mitchell and S Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment* 9th Edn (London: Sweet & Maxwell, 2016) [1-02]. [↑](#footnote-ref-99)
100. P Birks, ‘No Consideration: Restitution After Void Contracts’ (1993) 23 UW Austl Rev 195, 195. [↑](#footnote-ref-100)
101. E Peel, *Treitel on the Law of Contract* 14th Edn (London: Sweet & Maxwell, 2015) 1265. [↑](#footnote-ref-101)
102. *Pavey and Matthews Pty Ltd v Paul* [1987] HCA 5. [↑](#footnote-ref-102)
103. By personal correspondence with Natalie Gamble of Gamble Associates. [↑](#footnote-ref-103)
104. *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 799 per Robert Goff J. [↑](#footnote-ref-104)
105. C Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed.) *Principles of the English Law of Obligations* (Oxford: OUP, 2015), 247. See also *BP Exploration Co*, *ibid,* 799 per Robert Goff J. [↑](#footnote-ref-105)
106. [2013] UKSC 50 [↑](#footnote-ref-106)
107. *ibid* at [17] per Lord Clarke. [↑](#footnote-ref-107)
108. *ibid* at [22] [↑](#footnote-ref-108)
109. C Mitchell, P Mitchell and S Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment* 9th Edn (London: Sweet & Maxwell, 2016) [4-19] [↑](#footnote-ref-109)
110. For example in *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, 412 Greer LJ observed that the defendant company would have had to engage someone else to perform the services of a Managing Director if the claimant had not undertaken the role, although the company could have argued that it was not strictly necessary for them to employ anyone in that capacity. Also in *R (Rowe) v Vale of White Horse DC* [2003] EWHC 388 Mr Rowe might conceivably have chosen not to accept the provision of sewerage services by the local authority. Nonetheless it was conceded that he was incontrovertibly benefitted in circumstances where the only other reasonable option, installation of a septic tank, would have been a more expensive option. [↑](#footnote-ref-110)
111. *ibid*. [↑](#footnote-ref-111)
112. *Benedetti v Sawiris* [2013] UKSC 50 at [25] per Lord Clarke. [↑](#footnote-ref-112)
113. *ibid* at [26]. [↑](#footnote-ref-113)
114. *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309at [5] per Lord Bingham. [↑](#footnote-ref-114)
115. ibid. [↑](#footnote-ref-115)
116. [2000] 2 AC 59. [↑](#footnote-ref-116)
117. *ibid,* 75. [↑](#footnote-ref-117)
118. C Mitchell, P Mitchell and S Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment* 9th Edn (London: Sweet & Maxwell, 2016) [4-03] [↑](#footnote-ref-118)
119. *ibid*.See also *Walsh v Singh* [2009] EWHC 3219 at [66] per HHJ Purle QC. [↑](#footnote-ref-119)
120. *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies (in liquidation) (ITC)* [2017] UKSC 29at [43] per Lord Reed. [↑](#footnote-ref-120)
121. *ibid* at [43]-[48]. [↑](#footnote-ref-121)
122. This situation will rarely arise in the UK due to the law on commercial surrogacy, see above Part II. [↑](#footnote-ref-122)
123. *Kleinwort Benson Ltd. Appellant v Lincoln City Council* [1999] 2 AC 349 at 409 per Lord Hope. [↑](#footnote-ref-123)
124. *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32 at [22]. See also *Holt v Markham* [1923] 1 KB 504, 513 per Scrutton LJ *and Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678 at [26] per Laws LJ [↑](#footnote-ref-124)
125. *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All ER 695, 710 per Garland J. [↑](#footnote-ref-125)
126. *Grace* *v Black Horse Ltd* [2014] EWCA Civ 1413 at [33] per Briggs LJ and *Eastern Distributors v Goldring* [1957] 2 QB 600, 614 per Devlin J [↑](#footnote-ref-126)
127. SA Smith, *Atiyah’s Introduction to the Law of Contract* 6th Edn (Oxford: OUP, 2006) 235. [↑](#footnote-ref-127)
128. [1943] AC 32. [↑](#footnote-ref-128)
129. *ibid,* 72. [↑](#footnote-ref-129)
130. *ibid*, 42-43 per Viscount Simon LC. [↑](#footnote-ref-130)
131. *ibid*, 57 per Lord Russell. [↑](#footnote-ref-131)
132. The myth that restitutionary claims were based upon an implied contract between the parties has since been decisively rejected: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 710 per Lord Browne- Wilkinson. [↑](#footnote-ref-132)
133. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 65. [↑](#footnote-ref-133)
134. E Peel, *Treitel on the Law of Contract* 14th Edn (London: Sweet & Maxwell, 2015) [3-002]. [↑](#footnote-ref-134)
135. *Williams v Roffey Bros. & Nicholls (Contractors) Ltd.*[1991] 1 QB 1. 19 per Russell LJ. [↑](#footnote-ref-135)
136. *Thomas v Thomas* (1842) 2 QBR 851, 859 per Patteson J. [↑](#footnote-ref-136)
137. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48 per Viscount Simon LC. [↑](#footnote-ref-137)
138. *ibid* (emphasis added). This is only *generally* the case because sometimes a party may bargain for the promise itself. ‘Thus a person who insures against a thing by fire bargains for the insurer’s promise. If the thing is then destroyed by water the insured person cannot recover back his premium’ as he would have had the benefit of the insurer’s promise’ – E Peel, *Treitel on the Law of Contract* 14th Edn (London: Sweet & Maxwell, 2015), [22-003]. [↑](#footnote-ref-138)
139. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48 per Viscount Simon LC. [↑](#footnote-ref-139)
140. *ibid*. It is worth noting that although in our scenario we are concerned with money the House of Lords has recognised that this unjust factor can be used for services rendered. See *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752 and C Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed.) *Principles of the English Law of Obligations* (Oxford: OUP, 2015), 269. [↑](#footnote-ref-140)
141. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 49. [↑](#footnote-ref-141)
142. See F Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72 CLJ 414, 431 for support of the rule. [↑](#footnote-ref-142)
143. [2010] EWHC 2373. [↑](#footnote-ref-143)
144. *ibid* at [359]. [↑](#footnote-ref-144)
145. *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912, 924 per Kerr LJ. [↑](#footnote-ref-145)
146. [1996] AC 788. [↑](#footnote-ref-146)
147. *ibid*, 798. [↑](#footnote-ref-147)
148. C Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed.) *Principles of the English Law of Obligations* (Oxford: OUP, 2015), 267. See also F Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72 CLJ 414, 436. [↑](#footnote-ref-148)
149. Mitchell, *ibid*, 266. [↑](#footnote-ref-149)
150. *Van der Garde v Force India* [2010] EWHC 2373 at [286]. [↑](#footnote-ref-150)
151. *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912, 923 per Kerr LJ. [↑](#footnote-ref-151)
152. *Van der Garde v Force India* [2010] EWHC 2373 at [286]. [↑](#footnote-ref-152)
153. [1998] 1 WLR 574. [↑](#footnote-ref-153)
154. *ibid*, 588. [↑](#footnote-ref-154)
155. *ibid*. [↑](#footnote-ref-155)
156. *ibid*. [↑](#footnote-ref-156)
157. *ibid*, 600. [↑](#footnote-ref-157)
158. M Brazier (Chair), A Campbell and S Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (London: HMSO, 1998) [4.34]. [↑](#footnote-ref-158)
159. *ibid*. [↑](#footnote-ref-159)
160. *ibid* [4.35]. [↑](#footnote-ref-160)
161. M Freeman, ‘Does Surrogacy Have a Future After Brazier?’ (1999) 7 Med L Rev 1, 9. [↑](#footnote-ref-161)
162. E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001) 312. [↑](#footnote-ref-162)
163. *J v G* [2013] EWHC 1432 at [4] per Theis J. [↑](#footnote-ref-163)
164. C Mitchell, ‘Unjust Enrichment’ in Andrew Burrows (ed.) *Principles of the English Law of Obligations* (Oxford: OUP, 2015), 266. [↑](#footnote-ref-164)
165. See E Anderson, ‘Is Women’s Labor a Commodity? (1990) 19 Philos Pub Aff 71, 78. [↑](#footnote-ref-165)
166. M Brazier, ‘Can You Buy Children?’ (1999) 11 CFLQ 345, 351. [↑](#footnote-ref-166)
167. *ibid*. [↑](#footnote-ref-167)
168. It could rest upon the method by which the intended parents have paid the surrogate. If the intended parents have paid the surrogate a lump sum at the start, then it may be akin to a contract for goods. The consideration will be the handing over of the child, even if this necessarily entails the surrogate carrying it, giving birth to it etc. If the surrogate refuses to hand over the child then there will have been a total failure of consideration. Payment of the surrogate in instalments, however, with a separate sum for the handover of the child, might indicate that some of the money is for the service of carrying the child. In such cases the consideration might not have totally failed: the surrogate would have performed part of the basis of the agreement by being pregnant. The parents will not be able to get this money back. However, the fact that payment has been made in a lump sum as opposed to instalments will not exclude the possibility of the contract being divisible, referred to below (See *Van der Garde v Force India* [2010] EWHC 2373 at [302]). [↑](#footnote-ref-168)
169. And probably of no benefit whatsoever. [↑](#footnote-ref-169)
170. *Van der Garde v Force India* [2010] EWHC 2373 at [285] per Stadlen J. [↑](#footnote-ref-170)
171. See eg. *Re TT* [2011] EWHC 33. [↑](#footnote-ref-171)
172. *Van der Garde v Force India* [2010] EWHC 2373 at [302] per Stadlen J. [↑](#footnote-ref-172)
173. (1992) 62 BLR 95. [↑](#footnote-ref-173)
174. E Peel, *Treitel on the Law of Contract* 14th Edn (London: Sweet & Maxwell, 2015) [22-026]. An analogy could be drawn with the fact that ‘equity would not recognise an estoppel which would operate contrary to public policy as set out in a statute’ (*Evans v Amicus Healthcare Ltd* [2005] Fam 1, 64 per Wall J). [↑](#footnote-ref-174)
175. [1978] AC 95. [↑](#footnote-ref-175)
176. *ibid*, 114 per Lord Edmund-Davies. Similarly, in *Dimond v Lovell* [2002] 1 AC 384 an agreement governed by the Consumer Credit Act 1974 was not properly executed. The House of Lords refused to allow a claim for unjust enrichment for recovery of debts under the contract as it would be inconsistent with the purpose of the statutory provisions. The policy of the 1974 Act was to penalise creditors who did not enter into properly executed agreements. Lord Hoffmann stating: ‘Parliament contemplated that [the debtor] might be enriched and I do not see how it is open to the court to say that this consequence is unjust and should be reversed by a remedy at common law’ (at 398). [↑](#footnote-ref-176)
177. *ibid,* 106. [↑](#footnote-ref-177)
178. See *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752, *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] SCR 725 and *Pavey and Matthews Pty Ltd v Paul* [1987] HCA 5. [↑](#footnote-ref-178)
179. [2008] 1 WLR 1752. [↑](#footnote-ref-179)
180. Law of Property (Miscellaneous Provisions) Act 1989, s 2(1). [↑](#footnote-ref-180)
181. *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752at [42] per Lord Scott. [↑](#footnote-ref-181)
182. *ibid* at [43]. [↑](#footnote-ref-182)
183. See also the Court of Appeal decision of *Close v Wilson* [2011] EWCA Civ 5. This was a case involving gambling contracts, which were, at the time, null and void under the Gaming Act 1845. It was held at [31] per Toulson LJ that the unenforceable nature of the agreement itself was no bar to a restitutionary claim and this would not amount to enforcement of the agreement. [↑](#footnote-ref-183)
184. See *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] SCR 725(Canada) and *Pavey and Matthews Pty Ltd v Paul* [1987] HCA 5 (Australia). [↑](#footnote-ref-184)
185. *Re P* [1987] 2 FLR 421, 425 per Sir John Arnold P. [↑](#footnote-ref-185)
186. M Warnock (Chair), *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: HMSO, 1984) [8.5]. [↑](#footnote-ref-186)
187. *ibid*. [↑](#footnote-ref-187)
188. HL Deb 8 April 1986, vol 473, cols 160-86. [↑](#footnote-ref-188)
189. See BMA, *Changing Conceptions of Motherhood: The Practice of Surrogacy in the UK* (London: BMA, 1996). [↑](#footnote-ref-189)
190. [2002] QB 856. [↑](#footnote-ref-190)
191. *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856 at [11]. [↑](#footnote-ref-191)
192. [2017] EWHC 2318. [↑](#footnote-ref-192)
193. *ibid* at [45] and [49] [↑](#footnote-ref-193)
194. Human Fertilisation & Embryology Act 2008: Remedial Order: Written Statement (HCWS282, 29 November 2017). [↑](#footnote-ref-194)
195. See the fact that the surrogate and the intended parents are not caught by sections 2 and 3 of the 1985 Act. See section 2(2). [↑](#footnote-ref-195)
196. Unless, of course a commercial agency is involved but this is outside the scope of this article. [↑](#footnote-ref-196)
197. [2016] UKSC 42. [↑](#footnote-ref-197)
198. *ibid* at [116]. [↑](#footnote-ref-198)
199. *ibid* at [118]. [↑](#footnote-ref-199)
200. *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580 per Lord Goff. [↑](#footnote-ref-200)
201. *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369at [30] per Robert Walker LJ. [↑](#footnote-ref-201)
202. *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER 93at [38] per Lord Bingham and Lord Goff. However, a broad interpretation of this was taken in *Philip* *Collins Ltd v Davis* [2000] 3 All ER 808. This means that the defence will be available where surrogate has increased her expenditure because she received the money. [↑](#footnote-ref-202)
203. *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580 per Lord Goff. [↑](#footnote-ref-203)
204. *Credit Suisse (Monaco) SA v Attar* [2004] EWHC 374. [↑](#footnote-ref-204)
205. M Warnock (Chair), *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: HMSO, 1984) [8.7]. [↑](#footnote-ref-205)
206. [2011] EWHC 33. [47] per Baker J. [↑](#footnote-ref-206)
207. As in *Re N* [2007] EWCA Civ 1053. [↑](#footnote-ref-207)
208. If the surrogate (reluctantly) says to the court that she does not want the child then the court will probably grant a parental order. [↑](#footnote-ref-208)
209. *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 AC 349 at 377 per Lord Goff [↑](#footnote-ref-209)