AGENTS AND ORGANISATIONS:
ATTRIBUTION RULES IN UNJUST ENRICHMENT CLAIMS

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Much of our commercial activity is conducted via agents. This is true of natural persons, but also of organisations, whether unincorporated or corporate entities. “Attribution” questions are therefore pervasive. Despite this, over 50 years since the publication of the first edition of Goff & Jones, there is virtually no learning on the attribution rules applicable within the law of unjust enrichment. This article makes a tentative attempt to set an agenda for future debate. It proceeds in two major parts. It begins with a bird’s-eye view of the landscape—highlighting a range of concerns that might legitimately shape the law’s approach to attribution in the context of organisational claims. Thereafter, it takes a closer look at a small but important part of that territory—the establishment of organisational claims in unjust enrichment based on the ground of mistake.

A. INTRODUCTION

Much of our commercial activity, broadly understood, will be conducted via agents, broadly understood. This is true of natural persons—if only because none of us could effect payment via non-cash means without enlisting the assistance of financial intermediaries. But it is also true of organisations, whether unincorporated or, more importantly in the commercial world, corporate entities.

Companies are artificial legal persons. They have a legal personality as a natural person does, but this legal personality is a quality of the company as an abstract entity. This abstract entity is capable of holding rights and powers, and of incurring duties and liabilities—eg of being recognised as the owner of property, as a contracting party, as the victim or perpetrator of a tort, and as the victim or perpetrator of a crime. However, this inevitably presents problems when explaining on what basis the abstract entity can become entitled, or can be held liable or responsible, in these ways. These artificial legal persons can only think and act via the agency of one or

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The following abbreviations are used:

Cane, Responsibility: P Cane, Responsibility in Law and Morality (Hart, Oxford, 2002);
Goff & Jones, 8th ed: C Mitchell, P Mitchell and S Watterson, Goff & Jones: The Law of Unjust Enrichment, 8th ed (Sweet & Maxwell, London, 2011);
more natural persons—officers, employees, agents—whose acts, knowledge and/or mind-states are attributed to them.

Such attribution issues are pervasive and long-standing. Despite this, over 50 years since the publication of the first edition of Goff & Jones, there is virtually no learning on attribution rules within the law of unjust enrichment, and certainly no comprehensive exploration of the central questions. The leading agency work, Bowstead & Reynolds on Agency, contains a few brief paragraphs, and cites only a handful of authorities—content to cross-reference unjust enrichment texts that deal sporadically, at best, with these issues. This will not do. Most modern unjust enrichment cases are cases involving corporate claimants and/or defendants, or, if not, are cases where agency at some point intrudes. If, as is apparent, companies can acquire rights and incur liabilities in unjust enrichment—and if the acts and mind-states of persons acting for them can affect those rights and liabilities—then we need a better understanding of how and why this is so, and of the pitfalls that may lie in wait when it comes to formulating appropriate rules.

Comprehensive exploration of the attribution problems that arise within the law of unjust enrichment requires a book-length treatment. This article’s concern must be narrower. It opts to focus on one deceptively simple problem—the basis on which an organisation, and in particular a company, can bring a claim in unjust enrichment on the ground of “mistake”. This is significant because it involves not only the attribution of conduct, but also—conventionally, and more importantly—a (vitiated) mind-state. The resulting dilemma should be obvious. If companies can bring unjust enrichment claims, and yet companies have no “mind” as such, then we are compelled to ask—whose mind counts? This question is barely broached in the authorities. It is worthwhile resolving for its own sake. But the process of addressing it also requires some broader questions to be faced, which may help to identify parameters for wider discussion of attribution questions.

To this end, this article proceeds in two major parts. It first offers a bird’s-eye view of the landscape—briefly highlighting the concerns that might shape the law’s approach to attribution in the context of organisational claims. It then takes a closer look at a small but important part of the territory—the establishment of organisational claims in unjust enrichment based on the ground of mistake.

B. UNDERLYING SHAPING CONCERNS

Viewing matters in the most general terms, what considerations might inform the design of the law’s attribution rules? There are at least six plausible candidates.

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1. Sensitivity to legal context

First, the law’s attribution rules must be context-sensitive. This is probably now perfectly familiar. There is no single set of attribution rules, of universal application. What rules apply depends on the context and, in particular, on the legal question in issue: whose act/knowledge/mind-state counts for this purpose as the legally salient act/knowledge/mind-state of the organisation/company? The law’s answers need not be and are not identical. They may differ according to whether one is concerned with eg whether an organisation can become party to a contract, or acquire or dispose of property, or incur liability in tort/for an equitable wrong/for a statutory wrong, or commit a criminal offence. Nor is it the case that, within these general categories, the rules are invariably identical.

This basic point might be overlooked if Lord Hoffmann’s seminal exposition of corporate attribution rules in *Meridian Global Funds Management Asia Ltd v Securities Commission*⁴ is not properly understood. Lord Hoffmann there suggested a three-fold taxonomy, distinguishing:

(i) the company’s “primary rules of attribution” (supplied by the company’s constitution and by company law);

(ii) the “general rules of attribution” (eg as supplied by the law of agency); and

(iii) “special rules of attribution”.

The last might, he thought, be required in “exceptional circumstances”, if the other rules were inappropriate, and would require an investigation into what rule was appropriate in the light of considerations of purpose and context.

This is open to misunderstanding, insofar as it might suggest that there is a necessary hierarchy in the attribution rules. That is an error. As Sarah Worthington has recently argued,⁵ there is no necessary hierarchy between the different rules of corporate attribution that Lord Hoffmann identified. Each of the rule-types—“primary”, “general”, “special”—is directed at answering the same attribution question. None is inherently superior or inferior to the others. Context is always key. The question must always be which of these particular rules is appropriately adopted within the context of the particular legal rule in issue.

2. Neutrality and equality of treatment

Second, it is widely and plausibly assumed in the literature that the law might legitimately aim for “neutrality” in its treatment of different organisational forms—ie the law should in some sense aspire to achieve a “level-playing-field” or “equal” or “consistent” treatment. On this view, it might look wrong, without good reason, to operate rules of private law in a manner that eg: would leave a principal who uses an agent significantly better or worse off than if he chose to act himself;⁶ or would leave

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a corporate entity significantly better or worse off than if it remained an unincorporated organisation;⁷ or would have an unwarranted differential impact according to the nature and size of the corporate entity.⁸ This might, it is argued, result in undesirable incentives to adopt certain organisational forms, eg to avoid certain forms of liability.⁹

3. Respecting the reality of organisational forms

Third, the law must be sensitive to the reality of different organisational structures—and in particular to the reality of more complex organisations. Unless a special “organisational private law” is to be developed¹⁰—which seems unlikely—any ambition to make the existing general rules of private law “work” for organisations demands attribution rules that can adequately accommodate that diversity and complexity.

4. Respecting the integrity and coherence of private law rules

Fourth, we must be alive to the risk that, in an effort to make the existing general private law rules work for complex organisations, their meaning and application may be intolerably distorted—eg claim-conditions or liability-standards may be effectively altered, in a manner that renders them substantially different from the claim-conditions or liability-standards that would generally apply to individuals. Such a risk can arise, eg, if the courts are prepared to “aggregate” the conduct and mind-states of multiple agents acting for an organisation, so as to fix the “organisation” with liability for a civil wrong or criminal offence.¹¹ Some degree of aggregation may be inevitable, given routine divisions between responsible decision-makers and ground-level actors in operational/executive roles.¹² It may be innocuous if it operates in a purely additive way—eg rendering a company liable in deceit because of a misrepresentation innocently made by A1, on the instructions of A2, who had the necessary dishonest knowledge/intent. More problematic is a form of transformative aggregation. This sees the cumulative attribution of acts and mind-states of several independent and

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⁹ A common assertion in the various contributions of Peter Watts: supra, nn 6–7.

¹⁰ Cf Corporate Manslaughter and Corporate Homicide Act 2007 (reforming the law on corporate homicide).


¹² Cf Cane, Responsibility, 156–159, arguing that “additive” aggregation may be a necessary response to divisions of labour characteristic of organisations, whereas the temptation to engage in a more aggressive form of “transformative” aggregation may be a response to the diffusion of knowledge that typically accompanies such divisions of labour.
individually innocent actors to yield what is, in effect, a “constructive” “organisational” culpability—eg rendering a company liable in deceit when neither A1 nor A2 had any dishonest knowledge/intent, A1 making a misrepresentation not knowing of its falsity, and A2 knowing the truth but not knowing of the representation.13

5. The role for instrumentalist/policy-based reasoning

Fifth, questions arise as to the role that instrumentalist/policy-based reasoning might properly play in informing the shape of attribution rules. Arguments of this nature are probably most often encountered in discussions of organisational liability rules. A particular rule of attribution may be called into question—or supported—on the basis that it encourages—or discourages—some form of “undesirable” organisational behaviour. For example, we might plausibly fear that attribution rules which focus exclusively on senior management knowledge or culpability may place an undesirable premium on strategic managerial ignorance of aspects of the organisation’s activities.

6. Metaphysics and the law

Sixth, questions also arise as to the metaphysical assumptions that may properly inform the law. How should we conceive of the “thing” that is the “organisation”? The law certainly treats a corporate entity as having a legal personality of its own, and yet the reality is that it has life only via the acts and wills of natural persons. There is clear scope for philosophers to disagree about whether one should prefer to adopt eg a “nominalist” view of that reality (seeing the entity as ultimately reducible only to the acts and wills of individual actors) or a more “organic” or “realist” view (seeing the entity as more than the sum of its parts). Even though they do not directly inform the law’s shape, such debates may some have relevance in legal debates, such as those concerning whether it is meaningful and appropriate for the criminal law to develop distinctive conceptions of “organisational culpability” (or “corporate crime”).14

C. ORGANISATIONAL UNJUST ENRICHMENT CLAIMS FOR “MISTAKE”: SETTING THE AGENDA

1. The underlying problem

Conventionally understood, the basic requirements for recovery in unjust enrichment for mistake are defined in essentially “humanistic” terms. Recovery is assumed to require an intention, vitiated by an incorrect conscious belief or tacit assumption, which causes some benefit to be conferred.15 This apparent orientation presents some problems when explaining how the courts should deal with cases where a defendant benefited as the result of an automated process.16 Of more immediate relevance, it also presents problems for organisational claims, and in particular claims by

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13 This is not permitted: see Armstrong v Strain [1952] 1 KB 232. See further the cases on aggregation noted post, in nn 75–81.
14 A recurring topic of debate in the discussions noted supra n 8.
15 eg Goff & Jones, 9th ed, ch 9, esp [9.41–9.54].
16 Ibid, [9.55–9.60].
companies. A company, as an artificial legal person, and an abstract entity, has no mind or body \textit{as such}. How then can the law of unjust enrichment be made to work?

The law’s approach to this question is likely reflect some deeper metaphysical assumptions regarding the sense, if any, in which it is valid to inquire into subjective mind-states in the case of corporate entities. Three positions can be distinguished:

(i) that as companies have no minds of their own, they can have no relevantly vitiating intent (“no mind-no relevantly vitiating intent”);

(ii) that we can conceive of an abstract corporate mind-state which is susceptible to vitiation, which is distinct and potentially different from the mind-state of any natural person(s) acting for the company (“vitiating organisational intent”);

(iii) that the hunt for an abstract corporate mind-state is a fool’s quest—there is no such thing; any relevantly vitiating intent must be located in the “real” individual mind-states of one or more natural person(s) acting for the company (“vitiating individual intent”).

The English courts, when applying the law of unjust enrichment to companies, seem instinctively, and perhaps inevitably, to have proceeded on the basis of approach (iii).

Approach (i) could only be adopted at the cost of excluding corporate bodies from the status of claimants within (much of) the law of unjust enrichment, as it is presently conceived. This would sit uneasily with the goal of neutrality or equal treatment, and it does not represent accepted law: the courts have long allowed corporate unjust enrichment claims for mistake. Approach (i)’s radical premises are also inconsistent with the courts’ application of many other private law rules to companies, even when the conditions for their application appear to assume acts and mind-states that can only be the acts and mind-states of natural persons.\(^{17}\)

Approach (ii) could in principle accommodate corporate unjust enrichment claims. Yet this is achieved only by anthropomorphising the company in a manner that raises questions whose resolution requires sophisticated and contestable metaphysical theories to permit the “construction” of the material organisational mind-state.\(^{18}\) Without any accepted theory of this sort, how is the mystical—or mythical—organisational mind-state to be located, if not in the “real” minds of one or more relevant natural persons?

Approach (iii) eschews mysticism. It maintains that a company can be an unjust enrichment claimant, no less than a natural person or unincorporated organisation, via the pragmatic assumption that a company can have a subjective mind-state in the required sense via the knowledge, suspicions, beliefs, assumptions and intentions of natural persons, acting individually or collectively as its managers, employees or agents. One fundamental question then immediately demands attention—\textit{which natural persons’ minds count for this purpose?}\(^{19}\)

Although pervasive, this conundrum is only rarely confronted explicitly in the legal literature\(^{19}\) and in the case law.\(^{20}\)

\(^{17}\) eg rules on the formation of contracts, or on their avoidance for mistake or misrepresentation, or on the availability of the remedy of rectification for common mistake or unilateral mistake; eg torts, equitable wrongs and crimes defined in terms requiring some form of conscious fault.

\(^{18}\) Cf eg PA French, \textit{Collective and Corporate Responsibility} (Columbia University Press, New York, 1984), esp chs 3 and 4—an early attempt to identify a form of “corporate” intention, for the purpose of regarding a company as such as a fully-fledged, “responsible”, “moral person”.

\(^{19}\) The only extended discussion is found in \textit{Goff & Jones}, 9th ed, [9.66–9.91]—a development of the discussion that first appeared in the 8th edition, in 2011.

\(^{20}\) A rare exception is \textit{BP Oil International Ltd v Target Shipping Ltd} [2012] EWHC 1590 (Comm); [2012] 2 Lloyd’s Rep 245, [226–241] (Andrew Smith J), where the judge’s discussion drew on \textit{Goff &
In many run-of-the-mill cases, the answers will seem so obvious that they do not require the articulation of any sophisticated theory. Indeed, no real challenge is posed by many ground-level mistakes. If a shop worker, by mistake, pays a customer too much cash as change, it is unlikely to much matter to the outcome whether the shop worker is a sole trader paying out his own funds, or an employee of a sole trader, a small one-shop company, or a large company operating a national supermarket chain.

There are, however, other cases that are significantly more complex, where the material questions, let alone the appropriate answers, remain under-explored. On examination, these problems are not peculiar to companies—they have little to do with the separate legal personality of companies as artificial legal persons. Instead, they are a by-product of the complex organisational structures which are certainly characteristic of companies of any significant size, but may also be present in large unincorporated organisations.

2. Structural features of “complex organisations”

There is undoubtedly a need to understand better how the law of unjust enrichment can be made to work in the context of claims by complex organisations. However, any solutions offered are likely to prove mistargeted, unless they can accommodate the reality of the structure and operation of the complex organisations, to which they purport to apply. Five structural features require attention. Not all are unique to complex organisations, but their constellation may well be.

(a) Divisions of function—of decision-making authority and labour

First, complex organisations are, above all, characterised by wide-ranging divisions of function—of decision-making responsibilities and labour—amongst multiple agents, for different purposes, in different parts and at different levels of the organisation. Some of these functions may be discharged via agents external to the organisation. As such, multiple agents, and thus multiple minds and bodies, may well play some part in the narrative of events on which an organisation’s unjust enrichment claim is based.

(b) The dispersal of material knowledge

Second, closely associated with this characteristic division of function is the risk that material knowledge may be dispersed between different parts of the organisation. What is known by one agent may not be known by another agent, for whose functions the relevant information might be immediately material. Divisions of function within the organisation may also mean that the materiality of the knowledge of one agent, for others within the organisation, may not be evident to him. Even if it is, there is no guarantee that he will communicate the relevant information to another agent who requires it.

Jones, 8th ed. Cf also recently Jazztel Plc v RCC [2017] EWHC 677 (Ch); [2017] 1 WLR 3869, [30–31] (Marcus Smith J).
(c) The transience of office-holders and the problem of “institutional memory”

Third, organisations are staffed by officers and employees whose position in the organisation, or in specific roles within the organisation, is more or less transient. Employees move employers, retire, cease work through ill-health, or die in work; at least as often, they may change role within the same organisation. It is only human to forget, but the “institutional memory” of an organisation also faces a further problem due to this transience of its office-holders—expertise, and with it, material knowledge, may be lost to the organisation, if not appropriately recorded or communicated, as office-holders shift.

(d) Agent misconduct

Fourth, there is the endemic problem of agent misconduct, broadly understood. An officer or employee may, in good or bad faith, act beyond the proper ambit of his responsibilities and associated authority. Or he may, in the purported performance of those responsibilities, conduct himself improperly—in breach of duty to the organisation, of which he is an officer or employee.

(e) Complex decision-making processes

Fifth, decision-making processes within an organisation may be far from simple. In particular, some decision-making authority may be invested in or delegated to a collective body made up of multiple individuals—eg a company’s board of directors, or a sub-committee. Alternatively, a particular action may be the product of a sequence of decisions of different individuals or bodies—eg receiving the “go-ahead” from two or more individuals, perhaps after scrutiny for different purposes.

3. Complex organisations as mistake claimants—five inquiries

The five structural features just identified suggest five key questions that merit attention, if the law of unjust enrichment is to have a sound footing in the context of organisational claims based on allegations of mistake.

(i) Within a complex organisation of many minds and bodies, which responsible minds and bodies are legally salient for the purposes an unjust enrichment claim by the organisation based on “mistake”—either for the purpose of establishing a prima facie claim, or for the purpose of ruling out such a claim?

(ii) Where a responsible agent acts as a result of his ignorance of some material facts, what is the significance, if any, of the circumstance that these material facts are known elsewhere in the organisation?

(iii) Where a responsible agent acts as a result of his ignorance of some material facts, what is the significance, if any, of the circumstance that these material facts, though not presently known by him or by any other officer or employee, were previously known by him, or by a predecessor who has since moved roles or left the organisation, or by some other person within the organisation?

(iv) Where some relevant human agent involved in the chain of events was acting without authority or in some other sense improperly, what impact,
if any, will this have on the basis and viability of the organisation’s unjust enrichment claim?

(v) Where a material decision is reached via a complex decision-making process, how is the relevant mind-state, sufficient to support the organisation’s unjust enrichment claim for “mistake”, to be established?

The following three Parts undertake inquiries (i)–(iii)—investigating, in turn, the problems of identifying the salient minds, the relevance of “dispersed” knowledge, and the relevance of “forgotten” or “lost” knowledge, in the context of organisational claims for mistake. Due to limits of space, inquiries (iv) and (v) will require extended separate exploration on a subsequent occasion.

D. INQUIRY (I):
THE PROBLEM OF IDENTIFYING THE SALIENT MIND(S)

1. The underlying problem

It is a routine observation in explorations of complex organisations, and of concepts of responsibility within them,21 that traditional concepts of attribution, which attach responsibility to the acts and mind-states of particular individuals, can be difficult to apply due to characteristic divisions of function between different individuals and an associated diffusion of knowledge. This complexity presents various problems. Clearly, it can pose a forensic problem owing to the resulting “opaqueness”: it may be difficult as a matter of evidence to trace the decisions and acts of the “organisation” to the wills and actions of particular individuals. But the same complexity can also, more fundamentally, result in a problem when allocating moral/legal responsibility—what some call “the problem of many hands”.22 Where an organisation operates over time via a shifting and complex network of multiple minds and hands, it may be difficult to identify any one individual whose individually blameworthy conduct or breach of the law can be attributed to “the organisation”. As a result, despite the non-legal, “social” perception that the organisation may be “to blame”—sometimes grievously, as where corporate manslaughter is alleged—it can sometimes be difficult to articulate this via conventional legal principles. This problem is a particular concern for criminal law scholars, who have therefore sought to explore the viability of distinctive conceptions of “organisational”/“corporate” fault or culpability.23

The questions presented by organisational unjust enrichment claims for mistake are not identical to those posed within the criminal law, if only because they concern the organisation’s rights rather than its duties/liabilities, or questions of accountability, responsibility and blame. Nevertheless, the dilemma—a “problem of many minds and hands”24—is no less acute. It is an unavoidable corollary of the foundational premise of the courts’ approach to organisational claims. They do not

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22 eg Bovens (supra n 21), 45–50.
23 Cf eg Gobert (1994) 14 LS 393; Sullivan [1996] CLJ 515; Wells (supra n 11); Gobert & Punch (supra n 8); Cavanagh (2011) 75 JCL 414.
24 I am borrowing from, and adapting, the terminology of Bovens (supra n 21).
hunt for some mythical abstraction—a “vitiated organisational intent”. Rather, they adopt an “individuated” approach, which locates the necessary subjective mind-state in the “real” minds of natural persons who act as the organisation’s managers, employees etc—and thus in their knowledge, suspicions, beliefs, assumptions and intentions. Accepting this, which minds should be identified as the legally salient minds, within the organisation, for this purpose?

This is not a straightforward inquiry in the context of complex organisations, where multiple minds and hands may have contributed to the chain of events on which the organisation’s unjust enrichment claim is based. There are clear risks of under- and over-inclusion. There are also two different dimensions to this identification problem that must be recognised and separately addressed. One is a “qualification” issue: whose individual mind-state (and conduct) might be relied upon to found the organisation’s prima facie claim for “mistake”? The other is a “disqualification” issue: whose individual mind-state (and conduct) might serve to negate a claim that might otherwise be established based upon the mind-state (and conduct) of some other responsible actor?

2. “Qualification”—identifying claim-justifying vitiated minds

Neither the courts nor legal scholars have yet explored this first problem in any detail in relation to organisational claims for mistake. Nevertheless, the general parameters of an acceptable solution seem to be reasonably clear.

(a) The primary requirement—the need for flexible, context-sensitive rules

To be defensible in principle and workable in practice, the law of unjust enrichment’s approach to identifying the claim-justifying minds must, above all, be flexible and context-sensitive. There are numerous ways in which decision-making and execution responsibilities may be divided between different agents, for different purposes, inside and outside of the organisation. There are also numerous ways in which an unwanted or unintended distribution of the organisation’s resources—eg its funds—may occur. An approach which is too inflexible and insensitive to this context will be unable to accommodate the reality of a complex organisation’s structure and operations and, as a result, is unlikely to be able to deliver neutral or consistent treatment—whether between organisations and sole actors, or between different organisational forms.

(b) Key parameters of an appropriate context-sensitive solution

The primary requirement of context-sensitivity brings important specific corollaries.

(i) No categorical restriction to “internal” agents—“external” agents may count

First, the law’s identification rules cannot be categorically limited to “internal” agents—officers or employees of the claimant-organisation. They must be capable of accommodating “external” agents who perform similar functions. This seems correct in principle—an organisation’s resources may be equally affected by the conduct of

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25 See ante, Part C(1).
26 Cf Goff & Jones, 9th ed, [9.66–9.91].
such “external” agents when acting on the organisation’s behalf; and it may be a matter of chance whether a function is performed internally or externally. The authorities are also consistent with the same position. In routine cases where an organisation’s funds are paid away due to an employee’s mistake when acting on the organisation’s behalf, the courts have allowed the organisation to seek restitution based on that employee’s mistake. The same principles also seem to apply where a third party, operating outside of the claimant-organisation, pays its own funds on behalf of the claimant, but at the claimant-organisation’s expense—eg where a bank by mistake honours payment instructions drawn on the account of its customer (for which it charges the customer), or pays out pursuant to a letter of credit opened pursuant to instructions of the applicant (for which it charges the applicant). In both situations, the customer/applicant has been permitted to bring a claim based on the “mistake” of the bank as its paying agent. The distinction between “employees” and “independent contractors” which is material in other contexts—eg in defining the parameters of an organisation’s vicarious liability for civil wrongdoing—has no obvious place here.

(ii) No categorical restriction to “senior management”

Second, it would also be wrong to adopt a narrow approach to identification which exclusively identifies the relevant “minds” as the minds of the organisation’s senior management—eg those sometimes narrowly-identified as a company’s “directing mind and will”. This may remain the dominant default attribution rule applied within the criminal law, when an attempt is made to hold a company liable for a criminal offence requiring mens rea. Nevertheless, it is clear—and even more clear, after Lord Hoffmann’s influential discussion of corporate attribution in the Meridian case—that context is key. Different—and often wider—attribution principles will commonly be appropriate in other contexts.

This is unquestionably true of organisational claims for mistake. A narrow senior management-focused rule cannot be the primary, let alone the only, basis for identifying the legally salient mind(s). Sometimes, and for some purposes, an organisation’s senior management will be the “responsible” agents, whose mind-states assume primary or exclusive importance—eg where a significant transaction requires

27 eg Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd [1980] QB 677 (cheque paid by employee of bank, not appreciating that the cheque had been countermanded by its customer); Jones v Churcher [2009] EWHC 722 (QB); [2009] 2 Lloyd’s Rep 94 (employee mistakenly gave funds transfer instructions in favour of the wrong beneficiary); Goff & Jones, 9th ed, [9.66]. See too the cases cited infra n 66.


29 eg Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1) [2002] EWHC 1425 (Comm); [2002] 2 All ER (Comm) 705; Goff & Jones, 9th ed, [9.67].

30 For recent affirmation, see R v St Regis Paper Co Ltd [2011] EWCA Crim 2537; [2012] 1 Cr App R 14; Cf also AG’s Reference (No 2 of 1999) [2000] QB 796.


32 This is achieved in various ways: eg (i) by broadening the “directing mind and will” theory to capture a person who is the “directing mind and will” in relation to the particular function (see esp El Ajou v Dollar Land Holdings Plc [1994] 2 All ER 685); (ii) by recasting the “directing mind and will” concept as at most an ex post label for those identified as the relevant person(s) by the applicable attribution rules (cf Meridian [1995] 2 AC 500, 509–511 (Lord Hoffmann)); (iii) jettisoning the terminology of “directing mind and will” altogether in favour of alternative language, such as that of the “responsible” officer etc (see Moulin Global Eyecare Trading Ltd (in liq) v IRC (2014) 17 HKCFAR 218, [67] (Lord Walker)).
and receives senior management approval. However, within complex organisations, routine delegation of decision-making and execution-responsibilities means that the real problem may frequently lie elsewhere—with the erroneously-motivated conduct of more junior managers, or ordinary employees with ground-level responsibilities. A senior management-focused rule cannot accommodate such cases and would leave organisations—inexplicably—without a remedy for “mistake” in many routine cases where this is warranted. It would also fail to respect several of the basic considerations that should shape the law’s attribution rules: it would be insensitive to context; it would ignore the reality of an organisation’s structure and operations; it would fail to achieve neutral or equal treatment, if it denies organisations a restitutionary remedy when natural persons, acting on their own behalf or via agents, would have such a claim; and it may rest on some flawed metaphysics—i.e a flawed anthropomorphological vision of companies, which identifies the company’s “brain” with the senior management.

(iii) No categorical exclusion of persons in merely executive roles

Third, for many of the same reasons, the salient minds for organisational mistake claims cannot be categorically limited to those with “managerial” responsibility, or even any real “decision-making” responsibility. In practice, an organisation’s resources can be affected by the erroneously-motivated conduct of the most junior employees, acting in a purely “clerical” or “executive” role which involves no degree of discretion or judgement, but only the mechanical performance of task which nevertheless affects the organisation’s resources. On appropriate facts, the “mistake” of such persons can count. Cases of this type would include: a shop employee who, by mistake, pays too much cash as change to a customer; a bank employee who, by mistake, honours a countermanded cheque; or a clerical employee in a company’s accounts or payments department who draws up a payment order in favour of an incorrect beneficiary or for an incorrect amount.

(iv) The category of “responsible agents” is ultimately a flexible one, whose identification substantially depends on the mistake which is alleged to be causative

Fourth, the important upshot—consistent with all that has been said so far—is that the category of responsible agent whose mind-state and conduct are legally salient depends above all on the formulation of the mistake on which the organisation relies, and which is alleged to have been causative.

33 See ante, Part B(1).
34 See ante, Part B(3).
35 See ante, Part B(2).
36 See ante, Part B(6); cf HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159, 172 (Denning LJ), critically considered in Meridian [1995] 2 AC 500, 509 (Lord Hoffmann).
40 Cf the alternative facts contemplated by Andrew Smith J in BP Oil v Target [2012] EWHC 1590 (Comm); [2012] 2 Lloyd’s Rep 245, [228].
41 See esp ibid, [228]: “The question who is regarded as a [relevant] agent depends upon the nature of the mistake that [is alleged to have] caused by payment.”
This is well illustrated by BP Oil International Ltd v Target Shipping Ltd.42 BP had entered a voyage charterparty via its Chartering Department with shipowners, Target. It subsequently received an invoice for freight. Payment of the invoice was authorised by two responsible employees in its Demurrage Department, and payment was then processed by two other employees. BP sought restitution of the sums paid to Target, on the ground of mistake. Whose mind-states were properly in issue?

Had the problem arisen in the payment’s processing—eg because an order was given for a sum to be paid that, in error, exceeded the authorised invoiced amount—then the focus would properly be on the employees engaged at the last stage of payment processing. The fact that they occupied merely “clerical” positions, and that their role was only to “execute the decisions of others”, would not be relevant.43

BP’s actual allegation was, however, different: that the invoiced amounts were in excess of those contractually due—the invoice included amounts for “overage freight” which were not payable under the contract on its proper construction44—and that payment of the invoice had been authorised, when it should not have been, as a result of a mistake.45 This meant that it was the mind-states of the employees in the Demurrage Department, who had authorised the invoice, which were crucial. Andrew Smith J considered that their “mistake” as to BP’s liability to pay the invoiced sums was sufficient to support BP’s claim.

On other facts, any restitutionary claim might well have needed to focus on a different category of employee, even earlier in the narrative of events. Thus, if BP had sought to recover sums paid on the basis that it had entered the charterparty as a result of a mistake induced by Target’s misrepresentations, then the focus would be on those within BP—probably in its Chartering Department—who were the responsible agents in contracting. Similarly, if BP’s restitutionary claim rested on the contention that, whilst the written contract as executed provided for the sums to be paid, this was not what was intended—ie if it was contended that BP had executed the contract on the basis of a “unilateral” or “common mistake” sufficient to support the remedy of rectification. As the cases make clear, this would direct attention to the actual/apparent intentions of whoever within BP was in form or in substance the relevant “decision-maker” in relation to the contracting-process.46

These examples also usefully suggest that care is needed when it comes to the terminology used to denote the category of agents whose mind-state may found an organisation’s unjust enrichment claim. The 8th edition of Goff & Jones referred to the “activating agent”, and this was adopted as a “convenient label” in BP Oil.47 However, further reflection suggests that it may not be wholly apt, and that a more neutral label, capable of broader application, would be preferable. In the 9th edition of Goff & Jones, we suggest the label “responsible agent”,48 explaining that:49

43 Ibid, [228].
44 Ibid, [226] and following. Cf the different construction of the charterparty adopted on appeal, which made it unnecessary for the Court of Appeal to consider the restitutionary claim: [2013] EWCA Civ 196; [2013] 1 Lloyd’s Rep 561.
48 Cf the invocation of similar terminology in a different context in Moulin Global Eyecare (2014) 17 HKCFAR 218, [65] (Lord Walker).
Within a complex organisation in which decision-making may be devolved to one or more persons, and in which one or more other persons may be ultimately responsible for executing their decisions, it may be possible to identify a chain of ‘responsible agents’ whose conduct and states of mind are properly attributed to their employer or principal for the purposes of the transaction that results.”

To repeat, which of these various “responsible agents” is the proper focus in a particular case will ultimately depend on what has “gone wrong”, and on the nature of the mistake which is alleged to have been materially causative.

(v) Assuming a relevant causative mistake on the part of a responsible agent, there is no legal necessity to show any corresponding mistake on the part of all persons involved in the chain of events

Fifth, the preceding examples show that some care is needed when identifying the legally salient minds in the context of complex organisations. Although many minds and hands may be involved, there can be no legal necessity to prove, in every case, that every “agent” who may have been materially involved in the chain of events laboured under a mistake. Depending upon the circumstances, the mind-states and conduct of others may be material, but only insofar as (i) they bear on whether the mistake of one responsible agent was sufficiently causative, or (ii) they provide some other reason for “disqualifying” the claim.

To illustrate this, we can return to the BP Oil case, where there was a clear functional division between those with responsibility for contracting on BP’s behalf with Target, and those with operational responsibility, in different respects, in relation to the resulting transactions—eg scrutinising invoices, approving payment, effecting payment. What was alleged to have gone wrong was that the two employees with responsibility for deciding whether to approve Target’s invoice had laboured under a mistake that the invoiced sums were contractually due. Their vitiated decision was implemented by two other employees, who processed payment as instructed. This raises two questions.

First, on what assumption was it necessary to examine the mind-states of the employees who were subsequently involved in implementing the vitiated decision to approve the invoice for payment? In principle, it cannot have been necessary for BP to prove that they laboured under the same, or any, mistaken belief or assumption. Their responsibilities were merely executive—to effect payment as instructed. This role did not require them to make or scrutinise any assumptions about the basis of the instructions, and it was not necessary for BP’s claim to establish, or even assume, that they did so. The problem in BP Oil originated in the prior mistaken decision to approve the invoice. If this was the mistake relied on, then it was clearly necessary to prove that this mistaken decision was causative of BP’s payment to Target. Nevertheless, that finding did not require any particular assumption to be made about the mind-states of the employees who subsequently implemented that decision by processing payment. The mistaken decision was a “but for” cause of BP’s payment, whether those employees, acting as their role required, had simply followed their instructions without further thought, or instead had laboured under their own mistake. Difficult questions might certainly arise on different facts, if those employees could be shown to have actually known or believed that the sums in question were not due,

49 Goff & Jones, 9th ed, [9.73].
but they had effected payment nonetheless. However, this goes to the question of “disqualification”, which requires separate discussion—it would be necessary to ask whether their intermediation might then provide a reason for denying a restitutionary claim that would otherwise be available.

Second, on what assumption was it necessary to investigate the mind-states of any other responsible agents—eg those involved earlier in the chain of events, who had negotiated and entered the relevant contract, pursuant to which the invoiced sums were claimed? Once again, the best answer is that, given what was alleged to have gone wrong, BP could establish a prima facie claim by relying on the mistaken decision to approve the invoice for payment, and its subsequent implementation. If the mind-state and conduct of any other responsible agent was legally salient, it was in a claim-disqualifying form.

(vi) A question arises as to whether, in identifying the range of “agents” on whose conduct an organisation can rely, it is necessary or appropriate to resort to agency law’s concept of “authority” and its limits

Sixth, important questions can arise as to the relevance of agency law concepts of authority (and its limits) for an organisation’s ability to rely on the mistake of a responsible agent. More specifically, does it matter that the relevant agent, who was mistaken, may have acted beyond his authority?

In some cases, a defendant may be enriched at an organisation’s expense as a result of an agent’s improper conduct, where there is no hope of presenting the claim as a claim for mistake—eg where an employee steals cash from his employer’s till for his own or another’s benefit. Here, the only material mind involved is fraudulent, and not mistaken. If the organisation has an unjust enrichment claim against the defendant, that claim must rest on a different ground—eg the ground that some controversially identify as either “lack of consent” or “want of authority”.

In other cases, however, the facts may be susceptible to dual interpretations—the relevant agent acted bona fide as a result of a mistake, but also in a manner that was unauthorised. For example, an employee might have given instructions for a transfer of organisation funds on behalf of the organisation as a result of an honest mistake—eg erroneously believing that payment was due to the defendant-recipient. If the proper analysis is that, in doing this, the relevant employee was acting in excess of his authority, what would this mean for the basis of any unjust enrichment claim? Must the organisation bring a claim based on the employee’s lack of authority for the disposal of its funds, or can the organisation rely, in the alternative, on the employee’s mistake?

The relationship between these grounds—mistake and lack of consent/want of authority—has not been much explored. In the present context, it will partly depend upon the basis on which the courts allow an organisation or other principal to rely on an agent’s mistake for the purposes of establishing a restitutionary claim. Whilst the preceding subsections have explored in general terms which agents might count for this purpose, the present question is more specific. How far does a principal’s ability to rely on an agent’s mistake in such circumstances depend upon the technical limits of the agent’s authority? There are two possible ways of answering this question.

The first and narrower approach relies on general agency law concepts. As such, the organisation as “principal” could potentially rely on the agent’s mistake if: (i) the

50 See esp Goff & Jones, 9th ed, ch. 8.
agent was acting within his actual authority; or (ii) whilst the agent was acting outside his actual authority, the organisation is able and willing to “ratify” what the agent did, as its purported agent; or (iii) if the organisation’s legal position has been affected by the agent’s acts as a result of ostensible authority.51

The second and broader approach is less closely aligned to these agency law technicalities: an organisation might rely on an agent’s mistake merely by showing that the agent was purporting to discharge his duties/responsibilities as agent in good faith. This broader approach does not require any close investigation into whether the agent acted within or outside any authority conferred on him. The organisation might rely on its agent’s mistake whether or not the agent acted with authority, and without any necessity for ratification.

The few cases that confront this problem seem more consistent with this broader approach. The key authority is Agip (Africa) Ltd v Jackson.52 Agip’s Tunisian bank had acted on a payment order which it had no mandate to honour—a proper payment order, duly signed by a senior officer, had been fraudulently altered to introduce a different payee. Agip sought to recover the amount debited to its account, pursuant to those instructions, via a restitutionary claim based on mistake.53 In response, the defendant-recipient of the funds denied that Agip could rely on the bank’s mistake for this purpose, if the bank had acted outside its mandate and thus could not be said to have acted as Agip’s duly authorised agent.54 However, both Millett J and the Court of Appeal seemingly held otherwise. Agip’s bank undoubtedly had a general mandate to effect payment from Agip’s account, on instructions given by or for Agip as the account-customer. This general mandate was apparently thought sufficient to regard the bank as an “agent” of Agip, upon whose mistake Agip might rely, where the bank had in good faith implemented instructions apparently given by or for its customer—notwithstanding that the bank, in honouring the particular instructions, had acted outside its mandate/without authority, ex ante or ex post via ratification.55

Adoption of the broader approach brings some implications that should be noted. First, it inevitably extends the circumstances in which a principal might rely on an agent’s mistake and want of authority as alternative (and consistent) grounds for restitution. The ability to rely on an agent’s mistake will not depend on the agent’s having acted with actual authority, ex ante or ex post via ratification. As such, there is no necessary inconsistency in the claimant’s relying on the agent’s mistake (for the purpose of one claim), whilst assuming the unauthorised nature of the agent’s conduct (for the purpose of other claims). The consequence of the broader approach, which Agip supports, is that, where an agent has some general authority to act, but honestly oversteps its boundaries in a particular case, a principal can—without ratifying the particular unauthorised transaction—either (i) rely on the agent’s mistake (the agent’s general authority being sufficient to categorise the agent, when acting bona fide, as an “agent” whose mind-state is material for the principal’s claim); or (ii) rely on want of

51 In case (iii), the assumption might be that the organisation should be permitted to rely, vis-à-vis the third party who pleads ostensible authority, on circumstances that vitiate the agent’s intent when the agent appears to act for the organisation (albeit without actual authority).
53 In principle, Agip could have relied on the ground(s) that Goff & Jones now identifies as “lack of consent” or “want of authority”: see Goff & Jones, 9th ed, ch 8, and esp [8.58–8.66], considering unauthorised funds transfers and the recent decision in Re Hampton Capital [2015] EWHC 1905 (Ch); [2016] 1 BCLC 374.
54 See the arguments noted at [1990] Ch 265, 284.
55 See esp, in similar though not identical terms: [1990] Ch 265, 284 (Millett J) (see too ibid, 285, where Millett J denied that ratification was necessary or relevant); [1991] Ch 547, 562–563 (Fox LJ).
authority (relying on the lack of authority for the particular transaction). Second, real practical consequences can turn on how the organisation’s restitutionary claim is presented. For example, there are some clear advantages for a claimant in being able to bring an unjust enrichment claim for mistake. In particular, the claimant could take advantage of the provisions of the Limitation Act 1980 on the postponement of the commencement of the limitation period for his cause of action, on the basis that the action is for “relief from the consequences of a mistake”.

3. “Disqualification”—identifying claim-negating minds and conduct

We can now turn to the “disqualification” question: ie whose individual mind-state and conduct might negate a claim that might otherwise be sufficiently established by reliance on the mind-state and conduct of another responsible actor? This problem is not unique to complex organisations: it can arise wherever an agent acts for a principal. Nevertheless, the scale and structural complexity of complex organisations mean that the disqualification question can be substantially more challenging.

In principle, it seems vital that the disqualification question, like the qualification question, is answered in a disciplined way. The “individuated” approach to organisational claims for mistake inevitably directs attention to the real mind-states of natural persons acting for an organisation. At the same time, however, it would be an obvious error to treat the mind-states of each and every agent within the organisation as potentially relevant to the disqualification question, however peripherally those agents may be connected to the particular chain of events in issue. There must be some more specific reason to treat the mind-state and conduct of some particular individual actor as legally salient, and a reason to give it precedence—so as to prevent a successful claim based on the vitiated mind-state of another responsible actor.

There are two key parameters when identifying an acceptable solution. First, the reasons for disqualifying the organisation’s claim should be defensible in terms of legal principle—in particular, they should be compatible with the grounds on which mistake claims may generally be denied. Second, the application of those grounds should also be faithful to the reality of an organisation’s structure and operation—above all, it should be sensitive to the distribution of decision-making and execution-responsibilities within the organisation. If it is not—and if eg the disqualifying rules attach significance to the mind-states of immaterial or peripheral actors—then those rules are likely to have peculiarly arbitrary consequences for the fate of organisational claims.

With these parameters in mind, if a responsible agent labours under a mistake which is prima facie causative of the conferral of a benefit by an organisation, it is suggested here that the question whether the mind-state and/or conduct of another responsible actor may prevent the prima facie claim should be answered in light of the following four propositions. First, knowledge of the true facts elsewhere in the organisation should not, without more, negate the claim—even if those facts are known to be relevant to the responsible agent on whose mistake the claim rests. Second, the organisation’s claim may be denied on the basis that there is no relevant mistake, if there is a “superior (unvitiated/not-mistaken) will”, within the organisation, that the benefit should be conferred. Third, the organisation’s claim may also fail if there is a general law bar or defence; depending on the facts, the existence

56 Limitation Act 1980, s 32(1)(c).
of the bar may rest on the mind-states and conduct of other responsible agents. Fourth, subject to the second and third propositions, the courts should be slow to conclude that the mistake of a responsible actor did not (in law) cause the benefit to be conferred, because of the intervention of another actor who did not labour under any mistake. These principles are elaborated, in turn, in the next four subsections.

(a) The (ir)relevance of “dispersed” organisational knowledge of the true facts

It is entirely conceivable that a responsible agent may act on the basis of a mistake, due to his ignorance of material facts, when the relevant facts are known elsewhere in the organisation. Will this wider “organisational knowledge” prevent an organisation’s claim, based on a responsible agent’s mistake? This is an important question: “dispersed knowledge” is an endemic risk/feature of complex organisations. In the next Part, it is argued that the best approach may be a narrow disqualifying rule—an “unvitiated material decision rule”. Adopting that approach, the presence of material knowledge somewhere within the organisation is of no independent significance, even if the party with the relevant knowledge also knew that it was material to the responsible agent on whose mistake the claim rests; it has no disqualifying effect without more. Knowledge within the organisation is material only if the subjective mind-state of the particular agent with the relevant knowledge is relevant to the success or failure of the organisation’s claim. Which agents will meet this condition is a question that falls to be determined in accordance with the principles discussed above, in Part C, and immediately below.

(b) “No mistake”—the existence of a “superior” unvitiated/not-mistaken will

One good argument against an organisation’s claim amounts in substance to an assertion that there is no mistake on which the organisation can rely because of the existence of a “superior” unvitiated/not-mistaken will. In other words, where multiple minds potentially bear on events, it may be appropriate to think in terms of a “hierarchy” of wills—such that the mind-state of one person is given precedence over the mind-state of another and, if unvitiated, will prevent any claim for mistake.

This possibility is most simply illustrated where an agent pays money on behalf of his principal as a result of a mistake by the agent—eg paying a sum, thinking that it was legally due, when it was not. The principal can ordinarily rely on the agent’s mistake, and there is no need to inquire into the principal’s state of mind for the purpose of finding that he shared the agent’s mistaken belief. Nevertheless, it does not follow that the principal’s state of mind is wholly irrelevant—it may have a claim-disqualifying effect. If the principal was not himself mistaken, and if the principal intended that the payment should be made in any event, even though it was not legally due, it is difficult to see why a court would allow the principal to bring a claim based upon the agent’s mistake—a court would surely give precedence to the principal’s unvitiated intention. Had the principal himself made the relevant payment with that mind-state, he would not be able to bring a claim for mistake. Why is he fortuitously better off because he happens to employ an agent to achieve the same end?

A case in which this sort of objection could have been salient is Niru Battery Manufacturing Co v Milestone Trading (No 1), where Bank Sepah paid out pursuant

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57 See post, Part E.
58 [2002] EWHC 1425 (Comm); [2002] 2 All ER (Comm) 705.
to a letter of credit that Niru had opened for the purpose of discharging its payment obligations under a contract of sale. Moore-Bick J held that Niru could claim restitution of the money so paid on the basis of the mistake made by Bank Sepah that the documents presented to it were valid documents. The defendant had at one stage argued that, during the month that intervened between presentation of the documents for payment to Bank Sepah and payment by Bank Sepah under the letter of credit, Niru had become aware that the goods had not been dispatched and that the bill of lading presented was false, but had decided for other reasons to permit Bank Sepah to make the payment. 59 Moore-Bick J rejected that interpretation of the facts—concluding that both Bank Sepah and Niru had mistakenly believed that the goods had been dispatched and that the bill of lading was valid. However, had the facts been as argued, why—in the light of Niru’s unvitiated intention—should Niru have been permitted to plead Bank Sepah’s mistake?

A similar possibility arises within complex organisations. Within such entities, decision-making and execution-responsibilities are very likely to be distributed and devolved between multiple agents, for different purposes. Respect for that structural reality will sometimes require the courts to deny an organisation’s claim for mistake, based on the mistake of one agent, because of some superior, unvitiated will of another agent. It is not necessary to express this conclusion in causal terms—eg that the payment was not “caused” by any mistake. The key point is that, in relation to the relevant matter, the will of the person with the “real” or “true” or “superior” decision-making responsibility has precedence. If this will was relevantly unvitiated, then the organisation will be disabled from bringing a claim on the basis that “it”—via its responsible agents—proceeded on the basis of a “mistake”. The contrary conclusion—that the organisation’s claim might still succeed, based on the mistake of some other agent—seems illegitimate. It would involve the law giving precedence to the vitiated mind-state of that other agent, over the mind-state of the agent with the “real” or “true” or “superior” decision-making responsibility in relation to the relevant matter. In doing this, the law would be ignoring the organisation’s own internal distribution of decision-making responsibilities.

A useful illustration is a hypothetical scenario mooted by Andrew Smith J in BP Oil. 60 Recall that BP’s claim succeeded on the basis of a mistake made by two employees in its Demurrage Department, who had authorised the payment of Target’s invoice in the mistaken belief that the sums claimed were contractually due as overage freight under the charterparty between BP and Target. A potential complication nevertheless arose due to the state of mind of Mr Finlinson, the employee in BP’s Chartering Department who had responsibility for the chartering of the vessel. Mr Finlinson did not believe that the relevant freight was due, and he did not intend that it should be paid; he did not intervene to prevent payment from being made, simply because he did not believe that the responsible employees within BP’s Demurrage Department would have taken a different view and authorised payment. On the facts of BP Oil, this did not prevent BP’s claim based on the mistake of the two Demurrage Department employees. Nevertheless, Andrew Smith J did contemplate that there might be other circumstances in which Mr Finlinson’s mind-state might have been legally salient, and might have barred BP’s claim.

The essential thrust of Andrew Smith J’s reasoning was that Mr Finlinson had the relevantly “superior” will in relation to the question of what sum should be paid.

59 Ibid, [46–47].
by BP as freight. His position within the Chartering Department was such that he was the person within BP with responsibility for deciding how much freight should be paid; and it was within the ambit of his role to agree or otherwise decide that the disputed freight should be paid, even if it was not technically due within the original terms of the charterparty. At least if Mr Finlinson was acting properly—within his authority—in deciding that the disputed freight payment should nevertheless be made, BP could not recover the payment on the basis of the mistake of the Demurrage Department employees that the invoiced sum was the sum payable under the charterparty. Mr Finlinson’s unvitiated intention that the freight should be paid would be overriding, and would prevent BP from claiming that “it” had made a restitution-grounding mistake:

“BP’s claim should not succeed if Mr Finlinson, their relevant agent for deciding what freight should be paid, had decided that BP should pay full overage freight or had resigned himself to BP paying it if [Target] so demanded and for this reason [he] did not intervene to prevent the payment”.

The exact ambit of this disqualifying rule will depend on whether it applies only if the employee with the “superior” unvitiated/not-mistaken will was acting properly, within his authority. Andrew Smith J’s analysis in BP Oil certainly seems consistent with this being the case. He was contemplating a situation in which Mr Finlinson might have been acting properly—within his authority—in deciding that the freight should be paid. If this was indeed the case, then due respect for BP’s internal allocation of decision-making and execution-responsibility would dictate that BP should have had no claim in unjust enrichment. Since Mr Finlinson was the person with the relevantly “superior” will, his unvitiated intention that the payment should occur would be overriding; as such, BP could not recover on the ground of the mistake of the Demurrage Department employees nor (given the assumed ambit of Mr Finlinson’s authority) want of authority. However, it is doubtful that the same result would follow if an employee in the position of Mr Finlinson had acted improperly, outside of his authority. In those circumstances, although the organisation might rely on want of authority as a ground for restitution, it could probably also ground its claim on the causative mistake of the Demurrage Department employees. Its claim would not, and should not, be prejudiced by the intentions of an employee acting improperly, outside of his authority—even if he ordinarily has a superior decision-making role.

62 Ibid., [240].
63 An earlier passage in BP Oil suggests that Andrew Smith J would have sympathy for this view: ibid, [238]. He appeared to doubt that BP’s claim would necessarily fail, if an employee with a superior responsibility in the decision-making process had an unvitiated intention—such that that employee intended payment to be made “in all events”, whatever the true facts. Even if Mr Finlinson had been in such a superior position, Andrew Smith J apparently thought it unlikely that such an intention could be attributed to BP as his employer/principal, seemingly on the assumption that: (i) it was unlikely that an employee/agent would have authority to make payment on such a basis; and (ii) if he had had such an intention, it would be an improper intention which would not be attributed to his employer/principal, BP, so as to negate BP’s otherwise viable claim.
“Bars”—obstacles arising from defences and overriding rules of substantive law

A restitutionary claim for mistake will fail not only due to the absence of some relevant mistake sufficient to establish a prima facie claim. It may also fail because of the presence of some material bar or defence, which may well arise as a result of the conduct of one or more other responsible agents. If such a bar or defence exists, then it will typically cease to be material that some responsible agent acting for the claimant-organisation acted on the basis of a mistake. As with a restitutionary claim made by a natural person, the claim will fail regardless, because of the bar or defence.

An obvious obstacle exists where there was a valid and binding contract which required the benefit to be conferred which the organisation now seeks to recover—eg the contract required some payment to be made. If payment is made on behalf of the organisation in the discharge of that obligation, no restitutionary claim is available on ordinary principles—and it will not matter that some agent involved in effecting payment laboured under a mistake. A contrary conclusion could only be reached if the validity of the contract could be challenged, inter alia, on the basis that it was voidable because it was induced by some material misrepresentation, or because the relevant clause providing for payment was susceptible to rectification for unilateral or common mistake. Whether such arguments could be made out may well depend on an investigation of the conduct of other responsible agents—ie those materially responsible for the decision to contract.

This point is usefully illustrated by Platemaster Pty Ltd v M&T Investments Pty Ltd.64 M&T’s managing director had engaged Platemaster to undertake restoration work on certain machinery. Platemaster’s invoice was subsequently paid via a cheque signed by M&T’s manager and purchasing officer, drawn with the authority of the managing director. In fact, M&T did not own the machinery at the relevant time: it had previously been sold to a company run by the managing director’s daughters, for which M&T acted as a sales agent. M&T subsequently sought to recover the sums paid to Platemaster, relying on evidence that the purchasing officer had only signed the cheque as a result of the mistaken belief that M&T owned the machinery. The claim failed. One very simple answer was that, on the facts as found by Gower J, the monies were legally due. The managing director was found to have implied (actual) authority to contract for the relevant work to be done, even if the machinery was not actually owned by M&T. On that basis, there was a contract for the work under which payment was legally due. The payment, to which Platemaster was entitled in discharge of that contractual obligation, could not be recovered—whatever mistaken assumptions might have motivated M&T’s agents, when paying the invoice.

(d) “Causal” arguments—intervening conduct breaking the causal chain?

A final question concerns the role of causal arguments—and in particular, arguments that one responsible agent’s mistaken mind-state is not sufficiently causative of the conferral of the benefit in issue, owing to the subsequent intermediation of some other responsible agent, who did not labour under a mistake, and who may have had an improper intention that the relevant transaction should occur despite his knowing of the other’s mistake.

64 [1973] VR 93.
Consider a case where A, as the responsible decision-maker within an organisation, directed that a payment be made as a result of his mistaken belief that the payment was legally due. X then implemented A’s decision by effecting payment as directed, consistently with his formal role/responsibilities within the organisation, but, in so acting, X did not labour under a mistake—on the contrary, knowing of A’s mistake, X decided for improper reasons of his own to implement A’s decision regardless. Here A’s mistake-vitiating decision appears to be a “but for” cause of the payment of the organisation’s funds, but, in order to make out its unjust enrichment claim, the organisation must also necessarily rely on X’s acts. Will X’s unvitiated and improperly-motivated intention provide a reason for denying the claim? Given the nature of X’s involvement, any objection would probably be formulated in causal terms—most likely, that X’s intermediation should be treated as an intervening act, which breaks the causal chain that began with A’s vitiating decision, and thereby negates the organisation’s claim based on A’s mistake. The courts should probably be very slow to accept such an argument. However, circumstances of this sort raise difficult questions that are better left to extended discussion on a later occasion, in the context of a wider exploration of the significance of “agent misconduct”.65

E. INQUIRY (II):
THE PROBLEM OF “DISPERSED” KNOWLEDGE

1. The underlying problem

Complex organisations are characterised by a diffusion of knowledge—a by-product, at least in part, of divisions of function between multiple agents. One corollary is that some material facts may be presently known to or readily knowable by one individual within the organisation, but not to or by another. This presents a conundrum. If the latter had immediate responsibility for the events that trigger the organisation’s unjust enrichment claim—eg because he gave instructions for some payment to be made—and if his ignorance of those material facts means that he laboured under a material mistake, what is the relevance (if any) for the organisation’s claim of the other’s knowledge of the facts? This is not an unusual problem: it surfaces in many of the key cases on organisational claims for mistake.66 How does, or should, the law respond?

2. Legal solutions to the problem of dispersed knowledge—three options

On examination, there appear to be three major legal options for dealing with the problem of dispersed knowledge: a “simple aggregation rule”, a “known salience” rule, and an “unvitiated material decision” rule. These solutions have very different foundations, and widely varying implications for the ambit of organisational claims for mistake.

65 See inquiry (iv), as identified ante, in Part C(2) and C(3).
(a) *A simple aggregation rule*

A simple aggregation rule effectively treats a company as a composite. The knowledge of A1, or of any other relevant employee or agent of the company, is treated as the knowledge “of” the company. Once attributed to the company, this knowledge will disable the company from claiming that “it” laboured under a mistake, arising from ignorance of those facts. This is so even though the facts were not known to A2, the responsible agent who paid away the company’s funds—*ex hypothesi*, the payment was made “by” the company, in circumstances where “it” had to be regarded has having full knowledge of the facts. This was, in substance, an argument raised by counsel in an early leading authority, *Anglo-Scottish Beet Sugar Co Ltd v Spalding UDC,*\(^6^7\) where it was suggested that:

> “no payment can be recovered which is made with full knowledge of the facts, that the payment was the company’s payment, and the knowledge of its servants and agents was the knowledge of the company, and that therefore the company cannot be heard to say that it made these payments in ignorance of any relevant fact”.

(b) *A known salience rule*

A known salience rule is narrower. A1’s mere knowledge of some material fact is not decisive without more. However, this changes once A1 knows that his knowledge is salient—*ie* once A1 knows that some other responsible agent within the company, A2, is acting on an incorrect belief or assumption because of his ignorance of the material fact. The company is not then permitted to rely on A2’s mistake, which would otherwise be sufficient, for the purposes of an unjust enrichment claim.

(c) *An unvitiated material decision rule*

An unvitiated material decision rule is even narrower. It treats knowledge as legally salient only if it is knowledge held by some responsible agent within the company’s decision-making chain, and only if it renders unvitiated some material decision of that agent. Assuming that the knowledge is only held by A1, it is only if A1 has some material responsibility for the transaction that occurred, that A1’s knowledge might bar the company’s claim. Whether this is indeed the case will fall to be determined in accordance with the principles discussed in Part D. As such, it will be necessary to find (i) that A1 is an agent whose mind-state is legally salient, and (ii) that A1’s position within the organisation is such that, if his mind-state is relevantly unvitiated, this will prevent any claim by the company based on the mistake of *another* agent—most likely because, in the light of the distribution of decision-making authority within the company, A1’s will must be regarded as the “superior” (unvitiated/not-mistaken) will in relation to the particular matter.\(^6^8\)

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\(^6^7\) [1937] 2 KB 607, 617.
\(^6^8\) See *ante*, Part D(3), esp D(3)(b).
3. Legal solutions to the problem of dispersed knowledge—an assessment

From early on, the English cases—and Commonwealth authorities that build on them—have implicitly rejected a simple aggregation rule, and have preferred what amounts in substance to a known salience rule—though without ever actually invoking it as a ground for rejecting a restitutionary claim. The most recent authority seems inclined to adopt a narrower position, which looks very close to an unvitiated material decision rule. For the reasons that follow, this is the rule that should probably be preferred.

(a) Assessing the simple aggregation rule

On any view, the simple aggregation rule does not withstand examination if tested against the concerns that should properly inform the law. It has no obvious basis in principle or policy; it is insensitive to the reality of organisational form; far from being “neutral”, it will impact disproportionately harshly on large(r) organisations; and its metaphysical foundations—such as they are—seem flawed.

First, the simple aggregation rule is inconsistent with the basic premises on which the law of unjust enrichment is applied in practice to complex organisations. The rule might be more comprehensible if the law adopted a “holistic” approach, which required the identification of some abstract, vitiated “organisational” mind-state. Adopting this holistic approach, it might then be tempting to impute the “organisation” with the knowledge of all relevant agents and, on that basis, deny recovery for mistake if a natural person with that aggregated knowledge could not be relevantly mistaken. However, this is not the law’s approach. As explained in Part C, the law adopts an “individuated” approach, which locates the material vitiated intent in the “real” individual vitiated intent(s) of responsible agents acting for the organisation. Adopting this individuated approach, knowledge of some other agent is not, without more, legally salient—because it does not establish that the responsible agent acting for the organisation, upon whose vitiated intent the organisation’s claim rests, was not “mistaken”.

Second, when applied to organisational claims for unjust enrichment, the simple aggregation rule is objectionable for the same reasons as call into question any similar aggregated approach to holding organisations liable, for a civil wrong or a crime, based upon an aggregation of the conduct and mind-states of two or more agents. A recurring problem arises where two or more individual agents each independently act in an innocuous way—neither individually satisfies the relevant liability-conditions. Might one add together these independent, innocuous/innocent acts, and attribute them to the organisation, so as to tar the organisation with a form of faulty conduct

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69 See the cases cited supra n 66.
71 BP Oil [2012] EWHC 1590 (Comm); [2012] 2 Lloyd’s Rep 245, apparently responding to doubts expressed about the earlier dicta in Goff & Jones, 8th ed.
72 See ante, Part B.
73 See ante, Part C(1).
74 As was, in substance, argued before Atkinson J in Anglo-Scottish Beet Sugar [1937] 2 KB 607, 617 (quoted ante text to n 67).
that no responsible agent acting for it individually exhibits—eg a state of intentionally, recklessly or knowingly causing harm;\textsuperscript{76} bad faith, fraudulent or dishonest conduct;\textsuperscript{77} unconscionable conduct;\textsuperscript{78} or contumelious conduct.\textsuperscript{79} The overriding objection to this sort of “transformative”\textsuperscript{80} aggregation is that it will often—illegitimately—alter the nature of the law’s liability standards—ie it will establish a form of “constructive” (or “constructed”) fault, which amounts in substance to a form of strict or negligence-based liability. A similar problem arises in the context of organisational claims in unjust enrichment on the ground of mistake. An indiscriminate simple aggregation rule for dispersed knowledge is out of place, because it is inconsistent with the foundational premise that the existence of a mistake falls to be tested by reference to the “real” individual mind-state(s) of the responsible decision-maker(s). The mere presence of knowledge elsewhere in the organisation does not—as such—demonstrate that those responsible decision-makers are not mistaken. This conclusion could be reached only via a fictional deeming, which must by definition alter the substance of the applicable law.

Third, the simple aggregation rule seems capriciously blind to the “reality” of complex organisations and, as such, is inconsistent with the goal of neutral or equal treatment. The dispersal of knowledge—whereby material knowledge may be fragmented, and its present relevance for others within the organisation may not be appreciated—is an endemic risk/feature of such organisations. The simple aggregation rule is an indiscriminate disqualifying rule, based upon the mere presence of material knowledge somewhere in the organisation, and is likely to impact disproportionately and arbitrarily harshly on larger organisations. What legitimate purpose would be served by a rule of that sort, which is blind to whether it was possible or reasonable for the relevant knowledge to be shared?

(b) Assessing the known salience rule

At least at first sight, the known salience rule looks more soundly based. It has the support of an influential\textsuperscript{82} passage of Pilcher J’s judgment in Turvey v Dentons (1923) Ltd.\textsuperscript{83} It was, he thought, “clear” on the authorities that:


\textsuperscript{80} For this terminology, see Cane, Responsibility, 156–159, where Cane distinguishes between “additive” aggregation and “transformative” aggregation.

\textsuperscript{81} Cf cases where the liability rests on an objective standard of negligence/reasonableness: eg Efplioia Shipping Corp Ltd v Canadian Transport Co Ltd (The Pantanassa) [1958] 2 Lloyd’s Rep 449.

\textsuperscript{82} Subsequently approved in Mobil Oil v Storhoaks [1976] 2 SCR 147 (Sup Ct of Canada); Simos (1976) 45 FLR 97 (ACT Sup Ct). It is routinely cited in legal texts as clear law.
“where … a limited liability company is concerned and payments are made under a 
bona fide mistake of fact by an authorised agent [A2] of the company, the fact that 
some other agent [A1] of the company may have had full knowledge of all the facts 
does not disentitle the company to recover the money so paid, provided that the 
agent [A1] with the full knowledge does not know that the payments are being 
made on an erroneous basis.”

This second approach avoids some obvious objections to a simple aggregation 
rule. Nevertheless, there remain difficulties, of principle and policy.

First, the conceptual foundations of the known salience rule seem questionable. 
Why is knowledge on the part of someone else within the organisation legally 
significant in the context of an organisation’s claim for mistake? As formulated, the 
known salience rule will prevent a claim, based on a responsible actor’s vitiated 
decision, simply because another agent of the company has knowledge which he 
knows is relevant to the former—whether or not that knowledge is immediately 
material to the latter’s role, and possibly whether or not it would be imputed to the 
company as his principal in accordance with the principles of imputation typically 
adopted in the authorities. 84 Leaving this point to one side, however, the overriding 
problem is that this knowledge is not knowledge which is possessed by the person— 
the responsible decision-maker—on whose bona fide mistake the company’s unjust 
enrichment claim immediately rests. This responsible actor’s decision is no less 
vitiated because of the unknown presence of material knowledge elsewhere in the 
organisation. Here, then, is the central difficulty. The law adopts an “individuated” 
approach to the identification of a restitution-grounding mistake, and yet the 
knowledge assumed by the known salience rule does not negate the existence of a 
mistake on the part of the responsible actor. If the rule is to be justified, it would need 
to be justified as a form of disqualifying rule that operates independently of the basic 
requirement to establish a causative mistake.

Second, a disqualifying rule of this sort might conceivably be supported by 
policy-based/instrumentalist arguments. 85 The literature that explores the law’s rules 
on the imputation of an agent’s knowledge commonly suggests that rules of 
imputation may be justified by the need to avoid “perverse incentives” for persons to 
operate via agents rather than personally, or via a company or particular corporate 
structures, in order to shield themselves from “inconvenient” knowledge. 86 Such 
suggestions have superficial plausibility in the abstract, but their force ultimately 
turns on the validity of the underlying hypothesis that there is a risk of strategic 
organisational behaviour that needs to be addressed. Can this be empirically 
demonstrated? In truth, the choice of particular organisational forms seems much 
more likely to be a product of other considerations—and the diffusion of knowledge 
seems more likely, more often, to be an unplanned by-product of divisions of function 
within organisations of any significant size, rather than a feature which is deliberately 
cultivated and exploited. Furthermore, although one could certainly conceive of the 
deliberate adoption of structures designed to avoid an organisation from incurring loss

83 [1953] 1 QB 218, 224.
84 Cf the discussion of imputation of knowledge etc in Bowstead & Reynolds, 21st ed, ch 8(4).
85 See ante, Part B(5).
86 See eg DA DeMott, “When is a Principal Charged with an Agent’s Knowledge?” (2003) 13 Duke J 
Comp & Intl L 291; MR Scordato, “Evidentiary Surrogacy and Risk Allocation: Understanding 
Imputed Knowledge and Notice in Modern Agency Law” (2004) 10 Fordham J Corp & Fin Law 129; 
and various contributions of Peter Watts, supra nn 6–7.
(eg by shielding the organisation from the burden of inconvenient knowledge that might generate liabilities to third parties), in the context of unjust enrichment claims based on mistake, the institutional incentives seem to point in the opposite direction. It seems more plausible that an organisation would wish to avoid mistakes, and this would tend to produce incentives for greater transparency and exchange of material information within it.

A variation on this line of argument, which does not require any assumptions to be made about strategic organisational behaviour, might be that a disqualifying rule like the known salience rule could provide measured incentives for an organisation to ensure that its officers, agents or employees communicate material knowledge to the responsible decision-maker(s). However, is this really so clear? The known salience rule is certainly more proportionate than a simple aggregation rule—it is engaged only where material knowledge is known to be immediately material to another person within the organisation. Nevertheless, the disqualifying known salience rule still seems ill-framed to achieve its desired end: it is too absolute. An organisation is unable to rely on the bona fide mistake of a responsible decision-maker because of the knowledge of another officer, agent or employee—irrespective of whether it is feasible to communicate that knowledge before the responsible decision-maker acts. The rule could, no doubt, be qualified to address this. But the question would still remain: whose interests would such a rule protect? The party immediately at risk, if the material knowledge is not communicated, is the organisation—eg because a payment is made that would not have been made, resulting in a prima facie loss to the organisation. If such a payment is made as a result of the responsible decision-maker’s ignorance of material facts, then the recipient may of course be exposed to an unjust enrichment claim that he might otherwise have avoided. But is this a problem that warrants the known salience rule? Why is the balance between claimant-organisation and defendant-recipient not adequately struck by general unjust enrichment defences?

Third, the known salience rule raises a problem of “fit” or liability coherence in the context of claims in unjust enrichment. A disqualifying known salience rule— even if it might in principle be supported by instrumentalist/policy-based reasoning—is not easily reconciled with the long-standing position taken in the English cases that a person is not precluded from bringing a claim for mistake merely because of his negligence in not remembering, inquiring about or appreciating the “true” facts. In cases involving organisational mistakes, it is never thought fatal that the responsible decision-maker did not know material facts because of his own carelessness in overlooking facts once known to him, or in not making inquiries open to him, or in not discovering or appreciating the “true” facts. Nor has it been thought fatal that his ignorance was the result of the carelessness of other officers, agents or employees of the organisation, in not communicating the relevant information when they might be expected to. Despite this, if Pilcher J’s dictum represents the law, the position is different if there is some other person with the material knowledge, who knows of its salience. Then, that person’s knowledge may have adverse consequences for the

88 This is a concern that I have previously raised, in rather summary terms, in Goff & Jones, 9th ed, [9.78] (the rule would “in effect penalise the principal for a failure of internal communication within his own organisation—an outcome which sits uneasily alongside the long-established principle that a claimant’s own negligent failure to discover the truth will not prevent recovery on the ground of mistake”).
organisation’s position—the organisation may be precluded from recovering for the *bona fide* mistake of another responsible agent—irrespective of whether the failure to communicate by the agent with the material knowledge was the result of accident or oversight, or intentional, and, if intentional, honestly or dishonestly-motivated; and even if it might not have been possible to communicate the information in time. This seems a particularly odd rule to adopt, given that the immediate victim of this failure of communication is the organisation itself. Even if the matter is something which the agent with the material knowledge might have had a duty (and not merely an opportunity) to communicate, why should the failure to discharge that “internal” duty be fatal to the organisation’s unjust enrichment claim against a third party, which would otherwise succeed?

On examination, the root of the problem may be the peculiar genesis of the known salience rule. In *Anglo-Scottish Beet Sugar*, from which the rule was derived by Pilcher J, Atkinson J had thought that the company had a clear *prima facie* case. However, the defendant sought to resist the company’s claim by invoking what amounted to a form of simple aggregation rule:

“no payment can be recovered which is made with full knowledge of the facts [...] [T]he payment is the company’s payment, the knowledge of all its agents is the company’s knowledge and therefore the company has made these payments with full knowledge of all the relevant facts.”

This argument proceeded as a form of *a fortiori* argument from cases concerned with a rather different question—ie a principal’s liability for the tort of deceit committed via its agents. Dicta in a then-recent Court of Appeal decision were said to indicate that a principal/company could incur liability for deceit via a strong—“transformative”—form of aggregation: ie, if A1-agent made a false statement, unaware of its falsity, and A2-agent knew of the truth but was unaware of the statement’s being made, the attribution to the principal of both agents’ knowledge and conduct might nevertheless enable a finding of fraud by aggregation, even though neither of the agents nor the principal individually had any guilty knowledge. Atkinson J denied that this was possible—a position which has since become accepted orthodoxy in England and elsewhere. The “dishonesty” required lay in the knowing/reckless making or permitting of a false statement to another. Agent or principal needed actually to have that dishonest mind-state: one could not add together the innocent minds of two agents, or of agent and principal, to produce—by aggregation—a dishonest state of mind. It followed that, if the agent making the false statement was innocent, then either the principal or some other agent needed to have had some “guilty knowledge with reference to the representation complained of”—ie, in effect, to have knowingly allowed the false statement to be made by another. It

89 [1937] 2 KB 607.
90 Ibid, 615.
91 Ibid, 617, 618.
92 London County Freehold & Leasehold Properties Ltd v Berkeley Property and Investment Co Ltd (1936) 155 LT 190, esp per Romer LJ.
93 *Anglo-Scottish Beet Sugar* [1937] 2 KB 607, 617–618.
94 Ibid, 618–627.
95 See *Armstrong v Strain* [1952] 1 KB 232, a decision widely followed in subsequent decades.
96 *Anglo-Scottish Beet Sugar* [1937] 2 KB 607, 627.
further followed that, *even if* the principles of the fraud/deceit-liability cases were applicable to the mistake-claim cases, they could not prevent relief on the facts: 97

“I am not satisfied that a company can be saddled with fraud unless some agent has guilty knowledge with reference to the representation complained of; and therefore even if the principles applicable to fraud apply to mistake (and I am far from laying it down as a matter of law that they do) there is nothing to prevent me giving relief in this case and holding that the mistake of the agent was the mistake of the principal.”

Viewed in context, Atkinson J’s decision in *Anglo-Scottish Beet Sugar* is innocuous. He did not in fact decide that the law of unjust enrichment embodied a known salience rule. He was concerned merely to show that the fraud cases did not support an indiscriminate form of simple aggregation of knowledge of different agents of a company. In relation to liability for deceit, a known salience rule makes good sense—it may be a necessary (even if not sufficient) step in establishing the “guilty knowledge” required to justify holding a company or other principal liable in deceit for an innocent agent’s false statements. However, this is a rather different context, raising rather different questions from the question whether a company or other principal might be *disqualified* from bringing a claim in unjust enrichment for mistake. Atkinson J apparently saw this. In the passage just quoted, he expressly did not decide that the principles found in the fraud cases were necessarily governing—he decided only that, *if* they were, they would not prevent the restitutionary claim. Pilcher J, deciding *Turvey v Dentons*, seems to have missed this. *Anglo-Scottish Beet Sugar* was wrongly taken to be “clear” authority for a disqualifying known salience rule.

It follows that what was said to be “clear” authority for Pilcher J’s known salience rule was anything but. The rule was ill-conceived in its foundations, and it gains no greater force from its unreasoned and uncritical adoption in later cases and legal texts. In no case since has the rule been used to prevent a claim—in each case, the restitutionary claim succeeded on the basis that, even if some other agent knew the true facts, that agent did not know that another agent was acting on an incorrect belief or assumption. These cases did not address or decide whether, if they had been cases of “known salience”, that would be enough *without more* to bar the organisation’s claim, or whether *something more* might be needed.

(c) Assessing the unvitiated material decision rule

In the light of the preceding discussion, a third solution to the problem of dispersed knowledge should be preferred—an “unvitiated material decision” rule. This rule treats knowledge as legally salient only if it is knowledge held by some responsible agent within the company’s decision-making chain, and only if it renders unvitiated some material decision of that agent. In effect, the presence of material knowledge *somewhere* within the organisation is of no independent significance—it has no disqualifying effect—unless it bears directly on an evaluation of the subjective mind-state of one or more responsible agents who were materially involved in the decision-making chain. Does that agent’s knowledge render that agent not mistaken? Assuming that it does, is *that* agent’s unvitiated mind-state material to the

97 *Ibid*, 627; he later elaborated, “… the mere fact that some agent of the company knew of the second agreement is immaterial so long as he had no idea that it was not being acted upon”.
establishment of the organisation’s unjust enrichment claim, in accordance with the principles elaborated in Part D?

This third approach gains some support from the discussion of Andrew Smith J in BP Oil, which has already been considered at length. Recall that Mr Finlinson, the employee in BP’s Chartering Department who was responsible for the chartering of the vessel from Target, did not believe that BP was liable to pay overage freight under the charterparty. However, the employees in BP’s Demurrage Department, who had authorised payment of Target’s invoice, proceeded on a different assumption. Andrew Smith J held that BP’s claim to recover the sums paid as overage freight could succeed on the basis of their mistake, and that Mr Finlinson’s knowledge etc was not fatal. On the facts, this conclusion was consistent with a known salience rule—Mr Finlinson did not think that any invoice for overage freight would be paid, because he could not imagine that BP’s other responsible employees would interpret the charterparty differently and proceed on the incorrect assumption that the freight was due. Nevertheless, close reading of the case suggests that Andrew Smith J was inclined to adopt a different approach. As previously explained, he envisaged that Mr Finlinson’s mind-state might be fatal to BP’s claim if, as the BP employee with responsibility for deciding how much freight should be paid, Mr Finlinson had decided in good faith that the relevant overage freight should be paid, if demanded, even if it was not contractually due. In substance, BP’s claim would have failed because the allocation of roles/responsibilities within BP meant: (i) that, in relation to the question of how much freight should be paid, Mr Finlinson’s will was the “superior” will, which took precedence over that of the employees in the Demurrage Department; and (ii) that, if Mr Finlinson’s decision was unvitiated, there was no mistake on which BP could rely.

This third approach has several substantial merits. First, it is consistent with the “individuated” approach to the establishment of an organisational claim for mistake. Indeed, it can reasonably be viewed as a principled working through of that approach: knowledge is potentially disqualifying only if it is present to the mind of a responsible decision-maker whose mind-state is relevant. Second, it is consistent with the general law’s approach to the role of fault in the context of unjust enrichment claims—an organisation is not penalised because responsible agents carelessly fail to discover the true facts, or because other agents carelessly fail to transmit material information. Third, it does not require any contestable assumptions about whether any additional disqualifying rule may be appropriate and effective to incentivise the beneficial intra-organisational exchange of information. Fourth, it operates neutrally between different claimants. Whether the claim is brought by a natural person as principal, or by an organisation; and, if an organisation, whatever its size or composition, the question is the same. Was the knowledge the knowledge of a responsible decision-maker, whose mind-state is material for the organisation’s mistake claim? Finally, it respects the reality of the internal structuring of complex organisations. It does not assume, contrary to the facts, that what is known in one part will be known in another. And it does not arbitrarily penalise complex organisations for the dispersal of knowledge that is an endemic and probably unavoidable risk of their operation.

99 See ante, Part D(2)(b)(i)(v)–(v) and D(3)(b).
100 See ante, Part D(3)(b).
F. INQUIRY (III):
THE PROBLEM OF “FORGOTTEN” OR “LOST” KNOWLEDGE

1. The underlying problem

It is only human to forget. Our forgetfulness may mean that we act on the basis of a conscious belief or assumption that is incorrect because of some fact of which—when acting—we were not presently aware. Within the English law of unjust enrichment, it is accepted that a natural person’s incorrect belief or assumption, attributable to his forgetfulness, can be a restitution-grounding mistake. Does this simple starting-point require any modification in the context of organisational claims? On examination, there are two complicating factors—one contextual and one legal.

First, there is the contextual problem of “institutional memory”, which is, in part, a by-product of the transience of an organisation’s component parts. Although a company, as a legal entity, is capable of existing across many life-times, it is staffed by officers and employees whose position in the organisation, or in a specific role within the organisation, is inevitably transient. Employees move between employers, retire, cease work through ill-health, or die in-work; or they may change role within the same organisation. It is only human for these humans to forget, but the “institutional memory” of any organisation also faces a further problem, due to this transience—expertise, and with it, material knowledge, may be “lost” to the organisation, if not appropriately recorded or communicated, as office-holders shift.

Second, the legal complication arises from the law’s rules on the imputation of knowledge of agents. A company can only act via its officers, employees and agents, and can only “know” via the attribution of their knowledge. This presents a trap, if the courts are ever tempted to impute knowledge of some fact to the company, as an abstract entity, so as to imbue the company with a “memory” which is distinct from, and more enduring than, the individual memories of its human agents. This might then provide fuel for an argument that the company, having “retained” the relevant knowledge, may have made no “mistake”—notwithstanding that the relevant facts were not presently known to any responsible agent who relevantly acted for it.

2. Legal solutions to the problem of forgotten or lost knowledge—a principled solution

The question of forgotten or lost knowledge is under-examined in discussions of attribution. It occasionally surfaces in the cases, in different settings in which knowledge is material to the application of some legal principle. It is not easy to

101 Kelly v Solari (1841) 9 M & W 54; 152 ER 24 (common law); Lady Hood of Avalon v Mackinnon [1909] 1 Ch 476 (equity); Pitt v Holt [2013] UKSC 26; [2013] 2 AC 108, [105–107]. Consistently with this, a prior state of doubt which was a “mere passing uncertainty” and not “persisting”, because the doubts have been dismissed or have otherwise dissolved, is not inconsistent with finding that a person subsequently proceeded on the basis of a mistake: BP Oil [2012] EWHC 1590 (Comm); [2012] 2 Lloyd’s Rep 245, [233–234]; Goff & Jones, 9th ed, [9.22].


reconcile all judicial dicta on the point, but nor is this necessary. Context is key. The primary question should be: how is knowledge or awareness, or its absence, relevant to the particular claim in issue? In the context of organisational unjust enrichment claims for mistake, the parameters of an acceptable solution seem clear.

(a) The individuated approach to identifying organisational “mistakes”

As Part C has explained, the English courts have implicitly adopted an “individuated” approach to organisational mistakes. As such, the required subjective mind-state—the vitiated intent—must be found in the real mind-state of one or more natural persons who are the responsible agents of the organisation in the chain of events that precipitates the organisation’s unjust enrichment claim. Following the logic of this approach, the required mind-state will be the same, whether: (i) the claim is brought by a natural person, based upon his own mistake, when acting on his own behalf; or (ii) the claim is brought by an organisation, based upon the mistake of one of its responsible agents. This provides some clear pointers for the relevance—or rather, irrelevance—of “historic” knowledge.

Where a natural person confers a benefit on another as the result of an incorrect belief or assumption about some state of affairs, his mind-state can qualify in law as a relevant mistake, whether he never knew of the material fact, or he previously knew of it but by the time that he acted he had forgotten it. Knowledge once acquired can be lost by the lapse of human memory. And as Lord Abinger CJ stated in Kelly v Solari,

“the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment”.

Megarry V-C articulated the realistic premise on which this rests in Re Montagu’s Settlement Trusts.

“If a person once has clear and distinct knowledge of some fact, is he to be treated as knowing that fact for the rest of his life, even after he has genuinely forgotten all about it? To me, such a question almost answers itself. I suppose that there may be some remarkable beings for whom once known is never forgotten; but apart from them, the generality of mankind probably forgets far more than is remembered. … [I]t seems to me that a person should not be said to have knowledge of a fact that he once knew if at the time in question he has genuinely forgotten all about it, so that it could not be said to operate on his mind any longer.”

What is the corresponding position for organisational claims? Adopting the individuated approach, the question is whether some particular responsible agent proceeded on the basis of a mistake. The required inquiry is into (only) that responsible agent’s mind-state—and therefore (only) that responsible agent’s state of knowledge—at the relevant time. Given his state of knowledge, it is clearly possible


104 (1841) 9 M & W 54, 58. This was, in fact, an “organisation”-claim, brought by the directors of an insurance company.

105 [1987] Ch 264, 284 (where Megarry V-C was immediately concerned with the ambit of the equitable liability that would now be understood as liability for knowing receipt).
that he may proceed on the basis of a relevant mistake, owing to his ignorance of some material fact, even though the relevant fact is presently known elsewhere in the organisation or the relevant fact was previously known within the organisation. In the case of “historic” organisational knowledge, it would not seem to matter whether the fact was: (i) previously known to the responsible agent, but forgotten by him; (ii) previously known to and forgotten by another agent in the organisation; or (iii) known to another person who is no longer employed by the organisation. If the only inquiry is into the subjective mind-state of the particular responsible agent, and if that agent’s present ignorance of the material fact means that he proceeds on the basis of a mistake, such historic knowledge is not immediately legally salient. It does not negate the existence of a qualifying mistake on the part of the relevant responsible agent.

In the light of this individuated approach, a different conclusion could only be reached if the courts engaged in a process of deeming “historic” organisational knowledge to be present, actual knowledge of the responsible agent—ie by resort to a fiction, deeming the responsible agent still to know what he had since forgotten, or to know what other agents once knew but had since forgotten, so as fictionally to render him not mistaken as to the material facts. The courts do not do this in relation to individual claims for mistake, nor in relation to organisational claims. It is clearly illegitimate. It would distort the substantive law via obviously fictional devices.

None of this means that “historic” knowledge, individual or organisational, must invariably be irrelevant to the success of a claim in unjust enrichment for mistake. Rather, the point is that the integrity of the substantive law governing such claims means that the significance of such “historic” knowledge must be felt, if at all, via different rules—not by denying that a mistake exists, but by disqualifying conditions additional to the basic requirement for a causative mistake.

A good example of how over-extended rules on the imputation of knowledge to companies risk distorting the substantive law’s application is the New South Wales decision in Fightvision Pty Ltd v Onisforou. It is not an unjust enrichment case—it involves a company held liable in tort—but the point remains valid.

In Fightvision, Sky Channel was found to have committed the tort of procuring a breach of contract when it signed up a boxer in breach of an existing contract between the boxer and the claimant boxing promoter. This conclusion required two leaps of reasoning. First, that if Sky “knew” that what it was inducing was a breach of contract, then this was “one and the same thing” as an “intention” to induce a breach. Second, that Sky had such “knowledge”, even though Mr North, Sky’s managing director who was responsible for the decision to sign up the boxer and for the act that amounted to procuring the breach, did not know that the boxer was under contract, and genuinely believed that he was not.

How was that conclusion reached? The answer is via a process of aggregation and attribution which (formally) enabled a finding of an intentional tort, on the basis of what (substantially) might have been mere negligence. Two former senior officers of Sky, Mr Dodds (managing director) and Mr Lyons (head of sporting

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106 On which see ante, Part E.
107 On which see post, Part F(2)(b).
109 Ibid, [250].
110 Ibid, [243], [245].
111 Unsurprisingly perhaps, the case was relied upon in the controversial decision in Westpac v The Bell Group Ltd (No 3) [2012] WASCA 15; 44 WAR 1, to justify a form of “strong” aggregation which, in the light of other cases, seems to be impermissible: see ante, the text to nn 75–81.
acquisitions) were thought to have known of the relevant contractual relationships. However, they had left their employment two months before the boxer was signed by Mr North. The New South Wales Court of Appeal nevertheless thought that this “knowledge” should be treated as “persisting” as the “actual knowledge” of Sky at that later time, and on the basis that “knowledge” that a breach of contract will be induced is “one and the same thing” as an “intention” to induce a breach, Sky was found liable. This seems a surprising outcome. The court found liability based on the identification of a subjective mind-state which no responsible actor had at the material time, and which was itself derived from a finding of actual knowledge which no responsible actor had at the material time. Indeed, even if the “knowledge” of Mr Dodds and Mr Lyons could be treated as persisting, if it was not knowledge then actually held by any responsible officer of Sky—and specifically, by Mr North—it is hard to see how that “deemed” knowledge could legitimately give rise to a finding of the relevant “intention”. The company as such could have no “intention” distinct from the intentions of its responsible officers or agents at the relevant time. And, in the light of his state of ignorance, Mr North—the only relevant officer acting for Sky—can have had no intention to procure any breach.

(b) Assumptions on which historic “organisational” knowledge might be salient

On what assumptions, if any, might historic “organisational” knowledge ever be relevant to the success of an organisation’s claim for mistake? There are undeniably cases where it has been argued, and sometimes found, that organisational knowledge can be “stickier”—ie knowledge, once “acquired” via an agent, can sometimes appear to be imputed to an organisation in a more persisting way, such that it outlasts the memory and/or agency of the particular individual, and is effectively treated as retained for the purpose of determining a company’s legal rights or liabilities arising from subsequent events. Most often, the argument, which sometimes succeeds, is that knowledge acquired via a company officer—typically a director—might be treated as persisting even after that officer has left office or died, eg for the purposes of finding that the company, through the acts of its successors, might incur liability—eg equitable liability for “knowing receipt”.112 On what assumptions, if any, might this sort of argument ever be legitimate in the context of organisational claims for mistake?

(i) An alternative “organic” theory—an abstract “organisational mind-state”?

One possibility is that this sort of argument might reveal a commitment to a different metaphysical viewpoint—to a more “organic” organisational theory, which assumes that it is meaningful to conceive of an organisation, like a company, as having an abstract “organisational mind”, to which knowledge, beliefs and intentions can be attributed that may be distinct or different from those of its individual human agents. Adopting this starting-point, might one imbue this “organisational mind” with a state of knowledge that represents an aggregate of the disaggregated knowledge presently possessed by each of its responsible agents and, by extension, an accumulation of the knowledge historically possessed by such agents? Taken to its logical conclusion, a further corollary of this last step might be that the deemed persistence of that historic

knowledge in the “organisational mind” might pave the way, eg, for the contention that the “organisation” could not have proceeded on the basis of a “mistake”.113

Whatever the philosophical arguments may be for an “organic” theory, it is not a viable theory for private law’s application to companies and, more specifically, for the application of the law of unjust enrichment. It is inconsistent with the law’s “individuated” approach to organisational claims for mistake. The law does not assume, or pretend, that there is some abstract “organisational mind-state” which must be uncovered and shown to be vitiated. The minds that form the subject-matter of the inquiry are the real minds of the organisation’s responsible human agents. It further follows from this that the knowledge that is salient is not an artificial aggregated state of knowledge imputed to the organisation “as such”—organisations such as companies are assumed by the courts, at least, to have no mind as such. Rather, what is salient is the state of knowledge of the responsible human actors. The question is whether the responsible human actor(s) proceeded on the basis of a mistake. The only legally salient state of knowledge is their knowledge, at the material time, and it is legally salient only insofar as it bears on that question.

This analysis is also consistent with the metaphysical premises that are evident in numerous judicial dicta from a diverse range of legal contexts. In El Ajou v Dollar Land Holdings Pte,114 Millett J explained that:

“where the knowledge of a director is attributed to a company, but is not actually imparted to it, the company should not be treated as continuing to possess that knowledge after the director in question has died or left its service. In such circumstances, the company can properly be said to have ‘lost its memory’.”

In Dryburgh v Scots Media Tax Ltd,116 the Court of Session said that:

“A company has no mind of its own, nor any memory, other than the mind and memory of the individuals who are involved in the management of the company” [making it “impossible” to conclude that the relevant knowledge was “retained” by the company, once the relevant officer with the knowledge had left the company].117

And again, in Transco Plc v HM Advocate,118 in the context of a company’s prosecution for the Scots crime of “culpable homicide”, the Court of Session was very clear that it was illegitimate to engage in a process of cumulative aggregation of “historic” corporate knowledge possessed by different individuals or groups over many years:119

“The … case can succeed only if it is legitimate to attribute to the … company states of knowledge or awareness of individuals or groups which from time to time constituted the controlling mind of the company and to regard such

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113 This parallels the assumptions that might underlie a simple aggregation approach to the problem of dispersed knowledge: see ante, Part E(3)(a).
114 [1993] 3 All ER 717 (Millett J) (a case concerned with liability for “knowing receipt”).
115 Ibid, 743.
116 [2014] CSIH 45; 2014 SC 651 (a case on the application of statutory rules postponing the accrual of limitation periods where proceedings were not brought by a company due to “error”, arising from ignorance of the existence of a right of action against a director).
117 Ibid, [28].
118 2004 SLT 41.
119 Ibid, [63].
knowledge and awareness as, in effect, ‘banked’ with the company so that, when other individuals or groups subsequently having and exercising the directing mind and will of the company acted (or failed to act), the company is treated as having so acted (or failed to act) with the accumulated states of knowledge and awareness of all those hitherto having and exercising the directing mind and will. … [S]uch attribution is not legitimate. … But it is only by such illegitimate ascription that the … case could succeed, since the company has no mind or memory and accordingly cannot be treated as itself retaining knowledge or awareness.”

(ii) An instrumentalist/policy-based rule

Second, might a rule that treats historic “organisational” knowledge as persisting be supported on the basis of instrumentalist/policy-based arguments—eg as promoting some desirable organisational behaviour, or as discouraging some undesirable organisational behaviour?

There seems little to be said in favour of a general rule that imputes to an organisation all “historic” knowledge of its relevant officers or employees, for the purpose of determining the organisation’s rights and liabilities. A rule that deemed knowledge, once acquired, to persist in this way could certainly be expected to provide some incentives for organisations to gather, record and disseminate material information to responsible persons—thereby eg reducing the risk, and resulting costs, of errors.120 However, any general rule of this sort would be a very blunt instrument, apt to lead to costly over-investment in precautionary behaviour, with the risk of counter-productive consequences—eg too much information retention and circulation can be as obscuring as too little. It would also be difficult to square with the goal of equal and consistent treatment—it would set peculiar traps for organisations, and particularly complex organisations, given the complexity of their activities, and their shifting composition of countless minds and bodies across a potentially indefinite time-frame.

It is sometimes hinted that imputation rules that treat historic knowledge as persisting might be appropriate in a narrower form, as an ad hoc response to particular problems—eg to fears that an organisation might engage in strategic behaviour, contriving a change of personnel, or the destruction of records, in an effort to cleanse itself of “unwanted” knowledge, and thereby avoid a risk of liability that might otherwise arise. A more limited argument of this sort seemed to surface in the reasoning in Fightvision,121 where the court suggested that:122

“there are sound practical reasons for corporate knowledge including the knowledge of former officers and employees. A corporation cannot cause itself to shed knowledge by shedding people, and it cannot be that a head of sporting acquisitions can sign up a sporting identity whom his predecessor could not sign up simply because of the change in personnel.”

On examination, there may well be other means to tackle this problem—eg finding liability on the basis of conduct amounting to “willful blindness”. Whether or not that is the case, what are being identified are specific risks, whose existence needs to be demonstrated in the particular context in question. It would be inappropriate to adopt

120 Cf P Davies, Introduction to Company Law, 2nd ed (OUP, Oxford, 2010), 35.
121 [1999] NSWCA 323; 47 NSWLR 473.
122 Ibid, [244].
artificial general imputation rules merely on a hunch which does not ring true in all contexts.

For reasons already given,\(^\text{123}\) it seems inherently unlikely that organisations will deliberately engage in such strategic behaviour for the purpose of enabling claims in unjust enrichment to be made on the ground of mistake. Indeed, the incentives seem to point in the opposite direction—in favour of ensuring, so far as possible, that material information is appropriately recorded and shared with a view to avoiding the risk that errors are made. If there is a problem, it seems more likely to be the result of innocent/negligent failures of recording or communication.

In the light of this, if there is any instrumentalist/policy-based argument for the law to disqualify organisational claims for mistake in some cases of historic knowledge, it might be better implemented via a different and more sensitive strategy—most likely, via the adoption of an independent disqualifying rule that a claimant’s negligence might bar a claim for mistake. If adopted, such a disqualifying rule would not be specifically addressed to the problem of historic knowledge, but such knowledge might well prove highly relevant to the rule’s operation. The suggested disqualifying rule would potentially be engaged where a responsible agent was mistaken because of a present lack of knowledge or awareness of material facts, which itself was the result of some form disqualifying individual or organisational negligence—eg an unreasonable failure to maintain accurate internal records, an unreasonable failure to make inquiries of other agents or of the agent’s predecessors, or an unreasonable failure in the transmission of material information by other agents. There is much to be said in favour of this sort of approach compared with other strategies. It does not distort the substantive law via the use of expansive rules on “imputation” of knowledge, for the purpose of negating the conclusion that there was a causative mistake—an artificial and distorting strategy, if it deems to be actually known what was not, for the purpose of establishing that a mind-state that was actually vitiated by ignorance of material facts was not. It is also a general disqualifying rule which is capable of nuanced application to natural persons and organisations alike—a desirable goal from the point of view of equal or consistent treatment. Nevertheless, whatever the merits of such a rule may be, it does not presently represent the law—mere negligence will not prevent recovery on the ground of mistake, whether by an individual or by an organisation.\(^\text{124}\)

(iii) Inferences/presumptions of fact that knowledge persists

Third, it seems easy to accept that the fact that knowledge was once held might generate an evidential inference or presumption,\(^\text{125}\) either (i) that the information is

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123 See ante, Part E(3)(b).
124 See ante, the text at n 87.
125 Cf Bowstead & Reynolds, 20th ed, [8.208] (suggesting that the problem of “forgetfulness” “could perhaps be approached by the use of the burden of proof”), a position softened slightly in Bowstead & Reynolds, 21st ed, [8.209]; DeMott (2003) 13 Duke J Comp & Intl L 291, 307–308 (a principal will not be deemed to know a fact that an agent once knew but has forgotten by the time the agent acts on the principal’s behalf, but since it may be difficult for a third party to show that the agent has remembered the information, just as it may be difficult for a third party to show that the agent has communicated the information, it may be preferable to adopt a presumption that information that an agent has “recently acquired” is known by the agent when the agent acts on behalf of the principal—it may be “attractive to forget ‘bad facts’, or to claim to have forgotten them, once the consequences after-the-fact of knowledge become evident”).
still remembered\textsuperscript{126} or (ii) that it has been imparted to another.\textsuperscript{127} This is compatible with an individuated approach to the identification of organisational mistakes. Thus, the fact that a responsible agent within a company at one time knew of some material fact may plausibly lead to an inference that that knowledge persisted at some later time or, depending on the context, that he had communicated it to his successor. Such inferences might properly be more readily made, eg, if the information was recent, or was acquired in the context of the same transaction, or was particularly important.

This seems unexceptional, and innocuous, as long it is remembered that it is only an inference of fact that is susceptible to being displaced/disproven by appropriate evidence. If a legal rule requires a subjective state of actual knowledge, awareness, or suspicion at some material time, it cannot be legitimate to infer that that knowledge etc existed or persisted in the face of satisfactory evidence that it did not—eg evidence that the responsible agent had forgotten the material fact, or that the responsible agent never knew the material fact, because, whilst it was known to his predecessor, it was never communicated to him before his predecessor moved roles, left the organisation or died. If such historic knowledge is nevertheless treated as persisting for some legal purpose, the law is operating a “deeming” rule that requires some different and cogent justification.

The risk of slippage from an inference of fact that knowledge persists, to a policy-based “deemed (to be persisting) knowledge, regardless” rule, is manifest in the brief discussion of von Doussa J in \textit{Beach Petroleum NL v Johnson}.\textsuperscript{128} Had knowledge of certain security arrangements entered into by a company been lost on the death of directors? The judge’s actual conclusion was that this “lost” knowledge was immaterial, as the surviving director and other agents were fully cognisant. However, the judge did go on to say that, in any event:\textsuperscript{129}

\begin{quote}
“the application of the principle in the authorities relied on [by counsel, to suggest that knowledge once received by a company can be forgotten] must depend on the nature and importance of the information said to be once known and later forgotten. The subject matter of the information in the present case was very important to the financial well-being of … the companies and was not information of the kind that would be forgotten. In my view, if the companies ever had imputed to them knowledge [of the transactions], that knowledge should not be treated as being capable of being forgotten or lost at the death of the director whose knowledge was imputed.”
\end{quote}

Arguably, one finds in this passage a strong inference or presumption of fact—that important matters are at least very unlikely to be forgotten—being treated as something akin to a rule of “deemed (to be persisting) knowledge, regardless”.

\textsuperscript{126} Cf \textit{Re Montagu’s} [1987] Ch 264, 284–285 (a court might be “slow to conclude” that “what was once known has been forgotten”).
\textsuperscript{127} Cf \textit{Crossco No 4} [2011] EWHC 803 (Ch); [2011] NPC 38, [172] (finding no evidence of the knowledge having been imparted to another relevant agent).
\textsuperscript{128} [1993] FCA 283; 43 FCR 1; recently cited in \textit{Crossco No 4} [2011] EWHC 803 (Ch); [2011] NPC 38, [172].
\textsuperscript{129} \textit{Ibid}, [23.36].
Fourth, in matters of attribution, context is key. Consistently with this, the relevance of historic “organisational” knowledge, which is “forgotten” or “lost”, will necessarily depend on the precise quality of the “knowledge” that is legally relevant. And, crucially, this may in turn depend on the particular legal question to which an answer is being sought.

A legal rule whose application assumes a particular subjective mind-state—say, a subjective state of actual knowledge, awareness or suspicion in the mind of some relevant actor—is inevitably distorted if an organisation is treated as “knowing” what no relevant person acting for it actually knows or suspects at the relevant time. However, matters look different if the relevant legal rule explicitly treats as salient a form of “constructive” knowledge, or otherwise incorporates a standard of care or negligence. Such a rule can legitimately attach significance to “knowledge” which is not actually present to the mind of relevant agents within the organisation, but which should have been present—eg if proper records had been kept and consulted, or if reasonable inquiries had been made of present or past employees, or if material information had been duly communicated. This insight is particularly significant in the context of organisational claims for “mistake”. The identification of a “mistake” assumes a particular subjective state of mind on the part of a responsible agent. The fact that something could or should have been known, but was not, does not disprove the existence of that mind-state. Nevertheless, it might become legally salient—albeit via an independent disqualifying condition—if the law were to say that a claimant’s negligence might bar recovery for mistake.

The larger point—that whether “forgotten” or “lost” knowledge is legally salient requires close attention to legal context and, in particular, to the particular legal question that needs to be answered—is also demonstrated by the Court of Appeal’s decision in Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd. The claimant investment trust brought proceedings against the defendants, who had acted as its advisers for certain financial transactions. The defendants resisted an order for inspection/disclosure of documents and other information held by them, arguing that the material had previously been obtained from the then Financial Services Authority (“FSA”) in connection with an FSA investigation, and was caught by confidentiality obligations imposed by the Financial Services and Markets Act (“FMSA”) 2000. Those statutory obligations were triggered only in relation to information “obtained” from the FSA. Treating the issue as one of statutory construction, the Court of Appeal held that the defendant company would not relevantly “obtain” information if the company already “knew” the information, in accordance with the rules of attribution articulated in the Meridian case. Furthermore, in the light of the statute’s purpose, the Court of Appeal thought that there was no reason not to apply the “normal” rules on attribution of knowledge. These would include the “normal” rules regarding inter alia whether a company would continue to be fixed with “knowledge” of something which its employees or agents had forgotten.

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131 See ante, text following n 87, and text following n 123.
133 Ibid, [47–57].
134 Ibid, [50].
At first sight, this might seem to be an unexceptional conclusion. However, the difficulty is that the case did not raise a question of “knowledge”, or at least not necessarily in the sense that was assumed. FSMA 2000, s 348 raised a question as to the ambit of statutory confidentiality obligations, which in turn depended on whether the “information” had only been “obtained” via the FSA’s disclosure, and had not been previously obtained. It is not obvious that that question had to be answered by reference to the “actual knowledge” of the company’s officers, employees or agents, at the time(s) when the same information was provided via FSA disclosure. Information may be, and very likely will be, held by a company in forms other than in the minds of agents/employees—eg in electronic or paper records. If the concept of “obtaining information”, within that particular statutory context, was different from and wider than “the present or past actual knowledge of natural persons”, and if it could capture merely the fact of the information’s being present in an organisation’s records, then essentially humanistic ideas—such as “forgetfulness”—would not be centrally relevant.

(v) The time when knowledge is salient to the identification of a mistake

Finally, the significance of knowledge being “forgotten” or “lost” will obviously depend on the time at which the presence or absence of a subjective state of knowledge or awareness is legally salient. If a question arises whether a benefit was conferred under a restitution-grounding mistake, it is clearly vital to determine at what point in time the existence of a mistake—and thus the presence of a potentially disqualifying state of knowledge—is tested. Past actual knowledge or awareness, which is not a present state of knowledge or awareness at the time when the presence of a mistake must be tested, cannot be regarded as persisting actual knowledge or awareness, which negates the presence of a mistake, except via a fiction. However, the same objection does not arise if the presence of a mistake fell to be tested once and for all at the earlier time when the knowledge was still present. In that case, it will not then matter if, thereafter, what was known was forgotten or lost, for whatever reason. 135

G. CONCLUSION

Comprehensive exploration of attribution rules within the law of unjust enrichment requires a book-length treatment. Inevitably, therefore, this article has done no more than scratch the surface of the topic. Indeed, even its selective exploration of the problems presented by organisational claims in unjust enrichment on the ground of mistake remains incomplete, in two key respects—it has not been possible to unpick the knotty problems posed by “agent misconduct” or “complex decision-making processes”, each of which merits further extended exploration. Nevertheless, enough has hopefully been said within these pages to demonstrate that there are important issues that demand further judicial attention and scholarly inquiry, and that the identification of acceptable legal solutions will not be straightforward. Above all, the law’s solutions must be contextually appropriate. This is obviously true insofar as it is always necessary to ask whose mind-state and/or conduct should count for the

purpose of the particular legal rule in issue. But it is also true in a second and equally fundamental sense. In short, the chosen solutions are likely to be mistargeted and unacceptable unless they are formulated in the light of an understanding of organisational setting—and, in particular, of the peculiar problems that can arise as a consequence of the structure and operations of more complex organisations.