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The Australian Law of Restitution: Has the High Court Lost Its Way?

Andrew Burrows*

1. INTRODUCTION

When I first taught the BCL restitution course in Oxford in the late 1980s and early 1990s, and when I first came to Australia in 1994, we looked across with admiration, and not a little envy, at the wonderful judgments on the law of restitution of the High Court of Australia. We were enthralled by the decisions and reasoning in cases such as: *Pavey & Matthews Property v Paul*,¹ rejecting the implied contract theory and awarding a quantum meruit for work done under an unenforceable contract; *David Securities Property Ltd v Commonwealth Bank of Australia*² allowing restitution for mistake of law and recognising the change of position defence; and *Commissioner of State Revenue v Royal Insurance Australia Ltd*³ rejecting a passing on defence to a claim for restitution of mistakenly overpaid stamp duty. At that time Australia led the way in its development and application of a principled law of restitution and England lagged woefully behind.

How times have changed. The English law of restitution over the last 15 years has seen the most remarkable transformation. The reasoning of the courts at all levels has been characterized by rigorous and enlightened analysis. The growth has been accelerated by two dramatic bursts of litigation, factually so fortunate for the law of restitution. The swaps litigation in the mid 1990s; and more recently, and ongoing, the so-called *Hoecsht* litigation on the consequences of the striking down of UK advanced corporation tax legislation by the European Court of Justice.⁴ Both spates of litigation have spawned a series of path-breaking decisions on the law of restitution. It has been a thrilling time to be a restitution lawyer in England.

Not so here in Australia: for while excellent books on the Australian law of restitution have been written, the post-Mason High Court has produced little to inspire us. On the contrary, the leading recent cases – of which I will be focusing on three in this lecture – have been a profound disappointment in attacking unjust enrichment theory as unwanted top-down reasoning. This looks both odd and backward when one compares the approach of the English courts to this area.

In exploring these issues, I first want to outline very briefly five features of where we are with the English law of restitution before moving on to examine in

* QC (Hon), FBA, Norton Rose Professor of Commercial Law, University of Oxford; Fellow of St Hugh's College. I am grateful to Professor James Edelman for his helpful comments on an earlier draft of this lecture.

¹ (1987) 162 CLR 221.

² (1992) 175 CLR 353.

³ (1994) 182 CLR 51.

⁴ In *Metallgesellschaft Ltd v IRC* and *Hoechst AG v IRC* C-397/98 and C-410/98, [2001] Ch 620.

detail the three leading High Court of Australia decisions since 2000 which, taken together, present a perplexing picture.

2. THE ENGLISH LAW OF RESTITUTION

The five features of today's English law of restitution that I would like to draw to your attention are as follows.

First, English law is close to having a settled conceptual framework for approaching restitutionary questions. Lord Nicholls and Lord Mance in *Sempre Metals Ltd v IRC*⁵ have recently accepted the importance of the distinction drawn by many commentators between, on the one hand, restitution of an unjust enrichment where the cause of action is the unjust enrichment; and, on the other hand, restitution for wrongs, where a tort or breach of contract or an equitable wrong is the cause of action and restitution, if available at all, is an alternative remedy to compensation. The former - restitution of an unjust enrichment where there is no wrong- is what most of the subject is concerned with. It includes, eg, the restitution of payments made by mistake, restitution of payments made for a consideration that has failed, restitution for the compulsory discharge of another's debt, restitution of taxes demanded ultra vires by the Revenue, and restitution for the value of services rendered, or other non-money benefits supplied, under anticipated or invalid contracts. And in relation to restitution of an unjust enrichment, it is a crucial development, enhancing efficient, rational and transparent decision-making, that courts at all levels in England have found it helpful to rely on the four-step analysis advocated by commentators of benefit, at the expense of the claimant, an unjust factor and defences.⁶

Secondly, this does not mean that, as a matter of pleading, it is sufficient in England simply to plead one's cause of action for restitution as unjust enrichment. That is as inadequate as pleading compensation for tort without specifying the precise tort in question and its ingredients; or pleading damages for breach of contract without clarifying what constitutes the agreement, the consideration and the alleged breach. Therefore for unjust enrichment, as made clear in *Uren v First National Home Finance Ltd*,⁷ one has to plead one of the established categories, such as money paid by mistake or for a failure of consideration, or an incremental development from them.

Thirdly, as the scope of some of the unjust factors has been widened, so the courts have had to focus more carefully on the defences to restitution in order to protect security of receipt. Most importantly, since its recognition by the House of Lords in 1991 in *Lipkin Gorman v Karpnale Ltd*,⁸ there have been many cases working out the precise elements of the change of position defence. We now know, for example, that a change of position in anticipation of an enrichment, as well as subsequent to an

⁵ [2007] UKHL 34, [2007] 3 WLR 354 at [116] and [230]-[231].

⁶ See, eg, Lord Steyn in *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221; Mance LJ in *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775; Lightman J in *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418.

⁷ [2005] EWHC 2529 (Ch).

⁸ [1991] 2 AC 548.

enrichment, can count; that the defence does not involve comparing the fault of the parties; but that change of position cannot be invoked by someone who has been objectively dishonest or has changed its position by conduct that is criminal. I should interject here that the importance of the change of position defence, which is a defence unique to unjust enrichment, cannot be overstated. In its fully developed form, unjust enrichment imposes strict liability in the sense that a person who receives an unjust enrichment is bound to make restitution even though he or she is not at fault. Strict liability, while so difficult to defend in, for example, tort law, is here justified precisely because unjust enrichment does not leave the defendant with any loss to bear. Prima facie one is merely taking away a gain that the defendant should not have had; and it is the change of position defence that precisely ensures that, overall, the defendant is made no worse off than it otherwise would have been by having to make restitution.

Fourthly, the English courts have regarded restitution of an unjust enrichment as integrating areas of equity as well as common law. For example, in *Banque Financiere de la Cite v Parc (Battersea) Ltd*⁹ the House of Lords recognised that non-contractual equitable subrogation exemplifies restitution of an unjust enrichment; and in *Sempra Metals v IRC* their Lordships awarded compound interest, traditionally awarded only for breach of fiduciary duty, as the measure of the defendant's unjust enrichment for invalidly demanded advanced corporation tax.

Fifthly and finally, while the overall picture is one of dramatic progressive development over the last fifteen years, this is not to say that the English position is the finished article. On the contrary, it remains very much a work in progress. Most importantly, and disappointingly, the law on proprietary rights after equitable tracing was said by the House of Lords in *Foskett v McKeown*¹⁰ to be explicable within traditional opaque property reasoning without resort to unjust enrichment; and the House of Lords has still not had the opportunity since *Lipkin Gorman* to decide whether what is often referred to as 'knowing receipt', or the first limb in *Barnes v Addy*,¹¹ should be best viewed as awarding restitution for an unjust enrichment so that the fault element should be seen as relevant only to defences and not to establishing prima facie liability. For the time being, and despite the extra-judicial writings of Lords Nicholls and Walker to the contrary,¹² English law is stuck with requiring the recipient's knowledge or, in the words of the Court of Appeal in *BCCI v Akindele*,¹³ unconscionability, in order to establish liability for receiving an enrichment transferred in breach of fiduciary duty.

3. THE THREE DECISIONS OF THE HIGH COURT OF AUSTRALIA

(1) *Roxborough v Rothmans of Pall Mall Australia Ltd*¹⁴

⁹ [1999] 1 AC 221.

¹⁰ [2001] 1 AC 102.

¹¹ (1873-4) LR 9 Ch App 244.

¹² Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in *Restitution, Past Present and Future* (eds Cornish, Nolan, O'Sullivan and Virgo, 1998) 231; Lord Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life: Some Reflections on Accessory Liability and Knowing Receipt' (2005) 27 Sydney Law Review 187.

¹³ [2001] Ch 437.

¹⁴ (2001) 208 CLR 516

In *Roxborough v Rothmans of Pall Mall Australia Ltd*, a retailer (Roxborough) bought cigarettes from a wholesaler (Rothmans). The purchase price included an itemised amount representing the tax – in the form of a licence fee – that it was thought the wholesaler would have to pay over to the state. That tax was subsequently held to be unconstitutional so that the wholesaler did not have to pay it over. The retailer sought restitution from the wholesaler of the tax element of the payments. A majority of the High Court, Kirby J dissenting, held that the retailer was so entitled. This was because there had been a failure of consideration in the sense that the expected state of affairs – the wholesaler being required to pay over the tax – did not eventuate; and the part of the price representing the tax could be severed from the rest. Moreover, applying *Commissioner of State Revenue v Royal Insurance Australia Ltd*¹⁵, it was irrelevant to the claim for restitution that the retailer had ‘passed on’ that payment to its own customers as part of the price of cigarettes sold.

I should emphasise straightaway that, in my view, this was a correct decision and that most of the reasoning of the majority – comprised in a joint judgment of Gleeson CJ, Gaudron and Hayne JJ and separate judgments of Gummow J and Callinan J – should be supported. In particular, the majority correctly accepted and applied an extended meaning of failure of consideration beyond failure of a promised return and thereby granted restitution even though the contract was valid. Kirby J dissented on the ground that, as the contract was here valid and had not been terminated, one could not award restitution. But while contractual validity does normally exclude restitution, allowing restitution on the facts of this case did not conflict with the contractual allocation of risk which is the policy justification for the normal rule.¹⁶ As it was put in the joint majority judgment:¹⁷ ‘It accords with the basis of dealing, and contractual arrangements, between the appellants and the respondent to regard that part of the net total amount of each invoice referable to the “tobacco licence fees” as a severable part of the consideration which has failed. ...the tax component of the net total wholesale cost was treated as a distinct and separate element by the parties. It was externally imposed. It was not agreed by negotiation. ...To permit recovery of the tax component would not result in confusion between enforcing a contract and claiming a right by reason of events which have occurred in relation to a contract.’

One can alternatively look at this, as Professor Robert Stevens has advocated,¹⁸ by asking what the position would have been if it had become known prior to payment that the tax was invalid. Would the retailer have been bound to pay

¹⁵ (1994) 182 CLR 51

¹⁶ Birks, ‘Failure of Consideration and its Place on the Map’ (2002) 2 Oxford University Commonwealth Law Journal 1 argued that, exceptionally, restitution did not on the facts subvert the valid contract because the tax element of the price was fixed and not negotiated (and, analogously, he suggested at p 5 that *Orphanos v Queen Mary College* [1985] AC 761, HL, may have been wrongly decided). Cf Beatson and Virgo, ‘Contract, Unjust Enrichment and Unconscionability’ (2002) 118 LQR 352 who argue that the dissenting judgment of Kirby J in *Roxborough* is to be preferred: the contract between the claimant and the wholesale seller of the tobacco was valid so that restitution of part of the purchase price should not have been awarded.

¹⁷ At [21].

¹⁸ ‘Is there a Law of Unjust Enrichment?’ in S Degeling and J Edelman, *Unjust Enrichment in Commercial Law* (2008) 11.

that portion of the price? Or, as a matter of contractual construction, was payment of that part of the price conditional on the tax being valid? Agreeing with the decision of the majority, Stevens concludes that, as matter of construction, that part of the payment was conditional on the tax being valid and would not have been payable.

So if that is all fine, what is the problem? The problem is that Gummow J, as one of the majority, took the opportunity in his separate judgment to launch a torpedo attack on unjust enrichment. For while he accepted that the implied contract theory of restitution was authoritatively rejected in Australia by *Pavey & Matthews v Paul*, he said that that case had not identified a satisfactory doctrinal basis for the old money counts.¹⁹ His attack on unjust enrichment comprised three central objections.

First, he argued that unjust enrichment was a ‘unifying legal concept’, to use Deane J’s words in *Pavey & Matthews*, but was not a definitive legal principle. The danger otherwise was that unjust enrichment would become an all-embracing theory which would distort well-settled doctrines and remedies by the application of ‘top-down reasoning’ and would undermine traditional common law development.²⁰ I will refer to this as the ‘top-down reasoning’ objection.

Secondly, he argued that there were examples of restitution by an action for money had and received where there had been no enrichment of the defendant so that unjust enrichment could not possibly be the explanation. We can call this the ‘no enrichment’ objection.

Thirdly, adopting a statement of Justice Paul Finn, he considered ‘unconscionable conduct’ to be a better explanation of the trigger for restitution than unjust enrichment.²¹ As regards the common law action for money had and received, his specific reasoning was that, ever since *Moses v Macferlan*,²² this action had been conceived as embodying equitable ideas and central to it, in line with the need for ‘unconscionable conduct’, was that it must be unconscionable for the defendant to retain the money.²³ We can refer to this as the ‘unconscionable retention’ objection. It was also reflected in the joint judgment of Gleeson CJ, Gaudron and Hayne JJ, who talked of whether it was ‘unconscionable of the respondent to withhold repayment’ and of the ‘conscientiousness of the respondent’s retention of the moneys.’

With respect, each of these three objections is flawed.

The first ‘top-down reasoning’ objection is perhaps the most surprising. This is because, as I see it, the whole modern restitution movement has been the very antithesis of top-down reasoning. Commentators like Goff and Jones and Birks have been concerned to work from the bottom up with the raw material of the case law providing the acknowledged starting point for the analysis of principle. The books of those scholars are crammed with the details of cases and they are, or were, scholars renowned for their encyclopaedic knowledge of the common law and their mastery of its intricacies. In a modern law school there are plenty of academics with top-down

¹⁹ At [64].

²⁰ At [82]-[84].

²¹ At [70].

²² (1760) 2 Burr 1005.

²³ At [83]-[89].

theories: eg, those who wish to show that the common law promotes economic efficiency or those who argue that the common law discriminates against women. Restitution scholars stand at the other end of the scale and are sometimes derided precisely because they are black-letter lawyers concerned with the pain-staking analysis of the rules, principles and doctrine laid down by the judges. In the light of Gummow J's comment, it is ironic that, in seeking to allay the fears of those who had traditionally rejected the language of unjust enrichment as too discretionary and open-ended, Peter Birks precisely stressed that the law of unjust enrichment that he was advocating was 'downward-looking to the cases' and did not seek to 'draw on an unknowable justice in the sky'.²⁴ For similar reasons it is, with respect, nonsense to suggest that unjust enrichment reasoning somehow contradicts traditional common law reasoning. The common law is developed precisely by the articulation of principle from a mass of decisions. Recognition of the principle against unjust enrichment represents nothing more, and nothing less, than the application of standard common law techniques and shows the common law working at its brilliant best. Indeed, Gummow J's preference for the language of unconscionable retention shows he himself, inevitably as an appellate judge, seeking to articulate an underlying principle. Finally to say that unjust enrichment is a legal concept but not a definitive legal principle requires further elaboration as to what exactly is meant²⁵ and, on one view, is to draw a distinction without a difference.

The second 'no enrichment' objection can be quickly dismissed. If there have been successful non-contractual actions for money had and received where the defendant has not been benefited, then Gummow J would clearly be correct that at least those cases could not rest on unjust enrichment. But at best that would be a partial objection because it would obviously leave untouched the many cases where there has been enrichment. More fundamentally, however, Gummow J is, in my view, wrong to think that there have been any relevant 'no enrichment' cases. The main example he referred to was the New Zealand case of *Martin v Pont*²⁶ where the claimant had given his accountant \$600,000 to invest and the money had been stolen by one of the accountant's employees for whom the accountant was responsible. It was held that, irrespective of any tort claim for damages, the claimant could recover the money from the accountant in an action for money had and received. This can be straightforwardly interpreted as an award of restitution for a failure of consideration where the defendant received the money, and hence was initially enriched by it, but could not rely on the change of position defence because the theft was committed by one of its own employees. The personal law of unjust enrichment is prima facie concerned with the defendant *receiving* an enrichment:²⁷ if the defendant has subsequently been disenriched in good faith that is a matter for the defence of change of position. In so far as Gummow J was suggesting that, if the defence of change of

²⁴ *An Introduction to the Law of Restitution* (revd edn, 1989) 19.

²⁵ This may be thought reminiscent of the now discredited language of Lord Diplock in *Orakpo v Manson Investments Ltd* [1978] AC 95. For two diametrically opposed interpretations of what this distinction may mean (on the one hand as a rejection of idiosyncratic notions of fairness and, on the other hand, as a rejection of unjust enrichment as a category of law) see the editors' Introduction to *Unjust Enrichment in Commercial Law* (eds Degeling and Edelman, 2008) 1, 9-10.

²⁶ [1993] 3 NZLR 25. He also referred to the old case of *Parry v Roberts* (1835) 3 Ad & El 118 where the defendant entrusted with money had lost it in a brothel but was held liable in an action for money had and received. Although not analysed in this way one can say that the defendant was initially enriched by the money and could not here rely on a change of position defence.

²⁷ This links with the old language of money 'had and received'.

position does not relieve the defendant, one cannot be concerned with the defendant's enrichment, he was missing the important point that it is the defendant's *initial* (unjust) enrichment that prima facie triggers restitution.

The third 'unconscionable retention' objection fails because it will *always* be unconscientious to retain an unjust enrichment received, subject to recognised defences such as change of position. So focussing on unconscionable or unconscientious retention adds precisely nothing to the essential unjust enrichment enquiry. It merely semantically repackages the same analysis under a different label albeit one which superficially allowed Gummow J to rid himself of the language of unjust enrichment. To adapt a metaphor used by Professor Birks, unconscionable retention is no more than a fifth wheel on the unjust enrichment coach.²⁸

This was, in effect, recognised as early as 1841 in *Kelly v Solari*,²⁹ one of the leading cases on restitution of a mistaken payment. An insurance company had paid out on a life insurance policy to a widow even though the policy had lapsed because of her deceased husband's failure to keep up the premiums. In response to the widow's submission that, beyond showing that she had received a mistaken payment, it must have been unconscientious for her to retain it, Rolfe J said the following: 'With respect to the argument that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it.'³⁰ In other words, unconscientious retention added nothing beyond the essential unjust enrichment enquiry of whether the payment received had been made by a relevant mistake. One also wonders when in Gummow J's world, the cause of action for restitution of a mistaken payment would accrue. The case law clearly establishes that the cause of action accrues at the date the payment is received.³¹ It does not accrue at a later date when the defendant knows (or ought to know) of the mistake; and a demand for repayment is irrelevant and unnecessary.³² Yet if Gummow J were correct that unconscionable retention triggers the restitution, that established law on accrual would presumably have to be regarded as wrong.

It is also puzzling that what Gummow J here said on unconscionable retention seems to be inconsistent with what he has said in other judgments as to the vague and conclusory nature of the language of unconscionability. So, for example, in *Garcia v National Australia Bank*³³ he was party to the joint judgment saying that to use that language is 'to characterise the result rather than to identify the reasoning that leads to the application of that description.' And in *ACCC v CG Berbatis Holdings Pty Ltd*³⁴ Gummow and Hayne JJ approved remarks of John McGhee QC that the broad use of terms like unconscionable and unconscientious 'may have masked rather than illuminated the underlying principles at stake.'

²⁸ In discussing 'knowing receipt', Birks in 'Receipt' in *Breach of Trust* (eds Birks and Pretto, 2002) 213, 226 wrote, "'unconscionable" seems no more than a fifth wheel on the coach'.

²⁹ (1841) 11 LJ Ex 10.

³⁰ At 19.

³¹ Hobhouse J in *Kleinwort Benson Ltd v South Tyneside MBC* [1994] 4 All ER 972; Lord Hope in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349.

³² *Baker v Courage & Co* [1910] 1 KB 56; *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681.

³³ (1998) 194 CLR 395, 409.

³⁴ (2003) 214 CLR 51, 73.

One can only conclude that, despite his eminence and influence, Gummow J's torpedo in *Roxborough* was both ill-designed and badly targeted.

(2) *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*³⁵

Farah, which was controlled by a Mr Elias, and Say-Dee were two companies. They entered into a joint venture to develop a property in Sydney, which they purchased as joint tenants. Farah was told by the Council that it would not grant planning permission for the proposed development unless the site could be amalgamated with neighbouring properties. It was in dispute whether that information had been sufficiently disclosed by Mr Elias to Say-Dee. Mr Elias subsequently arranged for two of the neighbouring properties to be bought, one by a company he controlled and the other by himself, his wife and their daughters.

At first instance Palmer J had held that there had been no breach of fiduciary duty by Farah because Mr Elias had made sufficient disclosure of the information to Say-Dee. That was overturned by the New South Wales Court of Appeal (Tobias JA with whom Mason P and Giles JA agreed) which found that the disclosure had been insufficient so that Farah was in breach of fiduciary duty to Say-Dee. In addition to Farah's liability as a defaulting fiduciary, the Court of Appeal held that the land acquired by Mrs Elias and her daughters was held on constructive trust in the relevant shares for Say-Dee. This was because they were recipients of property transferred in breach of fiduciary duty with the guilty knowledge of their agent, Mr Elias, being imputed to them³⁶ or, irrespective of that, because recipient liability under the first limb of *Barnes v Addy*³⁷ is best viewed as imposing strict liability for restitution of an unjust enrichment, subject to defences. And here Mrs Elias and her daughters could not rely on the defence of being bona fide purchasers for value because they were volunteers.³⁸ Nor, for reasons that I do not wish to explore in this lecture, was there a defence that Mrs Elias and her daughters had been registered with an indefeasible title.³⁹

In so interpreting *Barnes v Addy* recipient liability as imposing strict liability, based on unjust enrichment, the New South Wales Court of Appeal said that there was

³⁵ While I disagree with their rejection of the normative force of strict liability unjust enrichment, see generally for an assessment of the *Farah* case, Ridge and Dietrich, 'The Receipt of What? Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31 MULR 47; Ridge and Dietrich, 'Equitable Third Party Liability' (2008) 124 LQR 26.

³⁶ The imputation was said to give them constructive knowledge: see [214]-[215].

³⁷ (1874) LR 9 Ch App 244.

³⁸ At [213] and [234].

³⁹ See Harding, 'Barnes v Addy claims and Indefeasibility of Torrens Title' (2007) 31 MULR 343. Cf Bryan, 'Recipient Liability under the Torrens System: Some Category Errors' in *Structure and Justification in Private Law* (eds Rickett and Grantham, 2008) 339-359. Bryan argues more generally that *Barnes v Addy* recipient liability should have been irrelevant in *Farah*. As the Court of Appeal had been concerned with imposing a constructive trust, rather than personal rights to value received, the relevant principles should have been property law principles for the return of equitable trust property. They impose strict liability subject to the holder being a bona fide purchaser for value without notice. But it is submitted that one might regard the constructive trust as the creation of a new proprietary right over particular property resting on the same principles as those applied to the personal 'receipt' claim (whether the basis of that be unjust enrichment or an equitable wrong).

‘no reason why the proverbial bullet should not be bitten’;⁴⁰ and, in line with obiter dicta in previous Australian cases – most notably Hansen J’s detailed dicta in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*⁴¹ - and the writings of academics and judges, most importantly Professor Birks and Lord Nicholls, the Court of Appeal saw itself as moving the law forward to a preferable principled position.

In overturning that decision, the High Court of Australia, in a joint judgment of Gleeson CJ, Gummow J, Callinan J, Heydon J and Crennan J, held that there had been sufficient disclosure of information by Farah to Say-Dee so that Farah had not been in breach of fiduciary duty; but that even if there had been a breach of fiduciary duty, Mrs Elias and her daughters did not receive trust property; and that, even if they did, the knowledge of Mr Elias could not be imputed to them as he was not their agent. Moreover, they were not volunteers but bona fide purchasers for value without notice. The Court of Appeal’s strict liability interpretation of recipient liability was subjected to a scathing attack. That reasoning was said to have been unjust to the parties, to have led to confusion in the courts, and to be contrary to both authority and principle.⁴²

In my view, the High Court was correct to reverse the Court of Appeal. For even if there was a breach of fiduciary duty by Farah, and even if Mrs Elias and her daughters provided no value so that they were not bona fide purchasers, it is hard to see how Mrs Elias and her daughters could be said to have received property transferred in breach of fiduciary duty. It might be that what the Court of Appeal had in mind was that the information acquired by Mr Elias was trust property, that it was traceable into the land, and that Mrs Elias and her daughters were recipients of that land. But there was no clear discussion of this by the Court of Appeal and factually there was no transfer by Farah of information or land to Mrs Elias and her daughters. They never acquired the information and they, not Farah, first acquired the land. It follows that, on an unjust enrichment analysis, it was unclear how it could be said that the benefit to Mrs Elias and her daughters was at the expense of Say-Dee.

But while the decision was correct, I part company with the High Court in its analysis of authority and principle on the question of a recipient’s strict liability. In terms of authority, the New South Wales Court of Appeal had pointed to the conflict between the common law model of restitution, as applied in *Lipkin Gorman v Karpnale Ltd*,⁴³ which imposes strict liability on a third party recipient subject to defences, and the equitable law on ‘knowing receipt’ which imposes fault-based liability on a third party recipient of property transferred in breach of fiduciary duty. Coherence in the law dictates that, unless there is good reason for the difference, one cannot have two different models of restitutionary liability applying to what is essentially the same fact pattern. The High Court of Australia’s answer was not to provide, or even to attempt to provide, a rational explanation for the difference. Instead it thought it sufficient to say that *Lipkin Gorman* was not argued as a breach

⁴⁰ At [232].

⁴¹ [1998] 3 VR 16.

⁴² A second-limb *Barnes v Addy* claim, not discussed in the Court of Appeal, was also rejected by the High Court because there had been no dishonest or fraudulent design and, in any event, Mrs Elias and her daughters did not have sufficient knowledge of it.

⁴³ [1991] 2 AC 548.

of fiduciary duty case;⁴⁴ that coherence in the law was ‘not a satisfactory reason for an intermediate appellate court to effect a radical change in the law’;⁴⁵ and that the unsettling of the traditional equitable approach by the Court of Appeal showed how right Gummow J had been in *Roxborough* to denounce unjust enrichment as a legal principle.⁴⁶ Permeating the High Court’s reasoning was the belief that common law and equity are fundamentally distinct so that they can happily co-exist without amendment even though it had been powerfully argued by the New South Wales Court of Appeal in line with the views of many commentators – the details of which are familiar to many here and will not now be repeated - that, in this context, the judges have been applying clashing approaches at common law and equity to the same basic question of liability.

Perhaps even more disappointing than the High Court’s failure to address the fundamental question of principle, was its failure to recognise that, even within equity, the insistence on fault has not been uniform. When Peter Birks first exposed the inconsistencies, as between common law and equitable approaches to the receipt of misdirected funds, a major plank of his argument was that even within equity there are pockets of law where strict liability has been imposed on recipients. The major example he gave was the House of Lords’ decision in *Ministry of Defence v Simpson*⁴⁷ where, on the in personam claim, the charities were held strictly liable to repay the monies mistakenly transferred to them by the executors in breach of fiduciary duty. Yet the High Court of Australia, despite its fondness for equitable precedent, thought it unnecessary even to mention that leading equitable case relied on by Professor Birks and Lord Nicholls.

But there is even more that can be said about precedents in equity. Even if we put to one side equitable proprietary rights after tracing, which do not depend on fault but might be regarded as raising different issues, two examples will suffice to show that it is a myth to pretend that equitable restitutionary liability is always fault-based. In the recent case of *Re Griffiths*⁴⁸ the deceased had made three transfers, two in April 2003 and the third in February 2004, in an attempt to avoid paying inheritance tax. The success of the scheme depended on his survival for seven years but he died in April 2005. His executors sought to set aside the gifts for mistake in equity. It was held that, at the time of the third gift but not at the time of the first two, the deceased was relevantly mistaken in that, while he thought he was healthy, he had already contracted cancer. Applying a well-established equitable jurisdiction, the third gift was therefore set aside for mistake. The importance for my theme tonight is that the sole question at issue was whether the deceased had been acting under a serious, which was taken to mean a ‘but for’, mistake. It was completely irrelevant that the recipients of the gifts had no knowledge of his mistake. In other words, it was taken as read that the liability here was strict just as it would have been had the claim been at common law for a mistaken payment.

⁴⁴ At [141].

⁴⁵ At [148].

⁴⁶ At [151].

⁴⁷ [1951] AC 251

⁴⁸ [2008] EWHC 118, [2008] 2 All ER 654.

Even closer to the sort of *third party* recipient liability in *Barnes v Addy* is the old case of *Bridgeman v Green*.⁴⁹ There the claimant, who was wealthy but vulnerable, had made significant gifts under the undue influence of his servant not only to the servant but also to some of the servant's relatives and friends. Those third parties were held strictly liable to make restitution to the claimant. As they were not bona fide purchasers for value without notice, there was no justification for their being enriched at the expense of the claimant who did not truly mean them to have the money. In the words of Lord Commissioner Wilmot, 'There is no pretence that Green's brother or his wife was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift... Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it...'

The truth, as I see it, is that strict liability subject to defences is a principled way to reconcile the inconsistency on the standard of liability which exists not only as between common law and equity⁵⁰ but also internally within equity.

Admittedly it would have been prudent for the New South Wales Court of Appeal to have heard arguments by counsel on the strict liability approach, instead of proceeding entirely on its own initiative. But no court is *bound* to stick to the confines of what has been argued before it. The job of a judge and most obviously of an appellate court is to decide the case on the facts as found and according to the law as it determines it to be in line with precedent. And strictly speaking there was no binding Australian precedent against the Court of Appeal's approach. If the Court of Appeal for articulated rational reasons regarded the traditional understanding of the first limb of *Barnes v Addy* to be flawed, it was duty bound to say so and to seek to put the law, by interpretative development, on a sounder footing. In so far as the High Court was suggesting that principled development of the common law is a matter for the High Court only and not for the Court of Appeal in any of the Australian states – a theme that has since been advocated extra-judicially by Heydon J - this seems to me to be a surprising and ultra-conservative view of the role of Australian appellate courts.

(3) *Lumbers v W Cook Builders Pty Ltd*⁵¹

⁴⁹ (1757) Wilm 58.

⁵⁰ Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity' in *Equity in Commercial Law* (eds Degeling and Edelman, 2005) 327-347 has helpfully pointed out that in some Australian cases (eg *State Bank of New South Wales v Swiss Bank* (1995) 39 NSWLR 350,; *Port of Brisbane Corp v ANZ Securities (No 2)* [2003] 2 Qd R 661; *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025) it has been accepted that a common law money had and received claim (applying *Lipkin Gorman*, strict liability and change of position) can be brought against the recipient of property transferred in breach of fiduciary duty.

⁵¹ [2008] HCA 27. See on this case, Edelman, 'Unjust Enrichment and Contract' [2008] LMCLQ 444; Getzler, 'Quantum Meruit, Estoppel and Primacy of Contract' (2009) 125 LQR 196, 204-209. I am also grateful for having had the opportunity to read the excellent unpublished paper by Rush, 'The Intersection between Contract and Unjust Enrichment'.

Finally we come to *Lumbers v W Cook Builders Pty Ltd*. In essence the question at issue here was whether a sub-contracting builder (Cook Builders), working under a contract with the head-contractor (Cook & Sons), was entitled to restitution from the building owner (the Lumbers). The background to the claim, which was for \$261,715, was that four years after the work in constructing a large house had been completed by the sub-contractor, its liquidator realised that it had not been paid all it should have been for building the house. The sub-contractor decided before trial not to proceed against the head-contractor and instead sued the owner on the ground either that it had been assigned the benefit of the head-contractor's contract with the owner or that it had a direct claim for restitution against the owner. The assignment argument was dismissed at trial and, from then on, the focus in the case was on the alternative restitutionary claim. That claim was accepted by a majority of the Full Court of the Supreme Court of South Australia but was rejected on appeal to the High Court of Australia.

The decision of the High Court again seems correct. Although, in my view far from straightforward, the best explanation for denying restitution is that the benefit received by the owner⁵² was *at the expense of* the head-contractor and not at the expense of the sub-contractor. In the words of Gleeson CJ in his excellent judgment, 'If [the Lumbers] have been enriched, it is at the expense of Sons.'⁵³ This is because the work by the sub-contractor was contractually procured by the head-contractor so that, although the sub-contractor directly did the work, it was doing it under a valid contract for the head-contractor who in turn was responsible for it to the owner. For the sub-contractor to claim directly against the owner would have required, in Professor Birks' graphic phrase, 'leap-frogging' which, at least in general, has not been allowed in the law of unjust enrichment not least because this would undermine the contractual risk taken by the sub-contractor. Equivalent situations have arisen in a number of English cases and have been subjected to careful analysis by commentators in discussing what is meant by 'at the expense of the claimant.'⁵⁴

The principal reasoning of the majority of the High Court of Australia was in the joint judgment of Gummow, Hayne, Cressman and Kiefel JJ. They focussed on the contractual relationship between the owner and the head-contractor. The central message was that that contract would be unacceptably undermined if the sub-contractor's restitutionary claim against the owner were allowed; and contrary to the view of the lower courts, the fact that the head-contractor had acknowledged that it would make no claim for payment against the owner was judged to be an inadequate reason for putting that contractual relationship to one side.

Although one might have a rational debate about this, it would seem that that principal reasoning focused on the wrong relationship. Say there had been no valid contract between the head-contractor and the owner, for example because a purported contract between them was void. Although there would then be no question of a restitutionary claim by the sub-contractor undermining a valid contract between the head-contractor and the owner, one would surely still not wish to allow that claim. And that is precisely because the benefit to the owner was at the expense of the head-

⁵² It is submitted that the owner's request for the building work carried out, albeit made to the head-contractor, was sufficient to establish that the owner was *benefited* by that building work.

⁵³ At [54].

⁵⁴ See, eg, Birks, *Unjust Enrichment* (2nd edn, 2005) 89-93.

contractor and not at the expense of the sub-contractor given that the head-contractor had contractually procured the sub-contractor to carry out that work.

But whether focusing on the wrong relationship or not, the disappointment here about the joint judgment is its apparent desire to take the Australian law of restitution back into the old world of the forms of action. So it was thought to be of central importance that the sub-contractor could not bring itself within the traditional pleading that the claim was for work and labour done for and at the request of the defendant, ie the owner. That old form of pleading was thought superior to the three-stage analysis into benefit, at the expense of, and unconscionable retention without payment. That analysis was *itself* now described as dangerous ‘top-down reasoning’ which created a risk of incoherence with other branches of the law, namely here the contract governing the relationship between the head-contractor and the owner.⁵⁵ And it was again said that in Australia, unjust enrichment is a legal concept and not a principle for direct application in particular cases.⁵⁶

If *Roxborough* took us down the unhelpful road of unconscionable retention, and if *Farah v Say Dee* irrationally rejected the need for consistency between common law and equity, *Lumbers* has taken us back into the blind alley of the forms of action. The whole point of the restitution movement was to unpack the wording of the old forms of action and their related pleading so that they can be explained in modern transparent terminology that enables us to understand exactly what the judges are doing. If you so wish, use the mumbo-jumbo language of money had and received to the claimant’s use or money paid to the defendant’s use or quantum meruit. But do not pretend that in the modern age that is preferable to the language of unjust enrichment at the claimant’s expense.

On the particular issue being dealt with in *Lumbers*, we know that the reliance on a request in the traditional pleading was often a fiction. And this led us to analyse the role of request and to conclude that it was largely concerned to establish that the particular defendant had been enriched by services but that that enrichment might be established in other ways (eg, where the benefit is a necessity and hence incontrovertibly beneficial). Of course, one must be careful not to allow the law of restitution to undermine contract and hence the risks undertaken by the parties. That is the basic theme of much of the discussion by commentators of what is meant by ‘at the expense of’. As Lord Goff himself said in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty*⁵⁷, ‘it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract.’ But going back into the forms of action in preference to adopting an unjust enrichment analysis will do nothing to help understand or promote that policy and will merely serve to obfuscate the reasoning of the courts. As Professor Edelman has powerfully expressed it in his case note on *Lumbers*, ‘No-one today would suggest abolishing our framework of torts and replacing them with forms such as “trespass” and “case”. It would be a pity if the [reasoning] in this case were taken as an attempt to resuscitate them for the law of unjust enrichment.’⁵⁸

⁵⁵ At [77]-[78].

⁵⁶ At [185].

⁵⁷ [1994] 1 WLR 161.

⁵⁸ [2008] LMCLQ 444, 448-449.

(4) CONCLUSION

My depressing conclusion is that, while all three of these leading cases were correctly decided, much of the reasoning indicates that, with respect, the High Court has lost its way in relation to the Australian law of restitution. One escape route might be to downplay the importance of that reasoning and to argue that the High Court has merely been warning against the dangers of an over-rigid, or, at the other extreme, an excessively open-ended, application of unjust enrichment reasoning. But whatever strategy is adopted it is essential to the rationality and coherence demanded by the rule of law that unjust enrichment reasoning is restored to its rightful central place. Indeed as one looks across Australia the schizophrenia is striking because in many lower courts, although admittedly prior to *Lumbers*, judges (including Gummow J himself in 1991 in the Federal Court)⁵⁹ have been using the benefit, at the expense of and unjust factor reasoning. That is the way forward and it is incumbent on all of us interested in the Australian law of restitution – whether academic, judge or practitioner and whether from these shores or not – to try to ensure that the High Court is put back on track.

⁵⁹ *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363.