

THE AUSTRALIAN LAW OF RESTITUTION: IS ANDREW BURROWS RIGHT THAT THE HIGH COURT HAS LOST ITS WAY?

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1. Introduction

The thesis of Andrew Burrows' paper is that the 21st century restitution cases decided by the High Court of Australia are a profound disappointment because they attack unjust enrichment theory as unwanted top down reasoning. There are three cases which he has analysed: *Roxborough v Rothmans of Pall Mall Australia Ltd*,¹ *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd*² and *Lumbers v W Cook Builders Pty Ltd (in liquidation)*.³

The author's lament is that much of the reasoning in those cases indicates that the High Court has lost its way in relation to the law of restitution. This is juxtaposed against his view that from the late 1980s to the mid-1990s the High Court's decisions on restitution led the way. His conclusion is that 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".

Mr Burrows' challenge to the reasoning in the three cases is made difficult, in my view, by more than one factor:

- First, he doesn't challenge the result in any of the cases: he accepts that they were all rightly decided. The complaint instead is about reasoning which departs from the taxonomy of restitution lawyers who use the four step "benefit", "at the expense of", "unjust factor" and "subject to defences" reasoning ("the restitution conceptual framework").
- Secondly, it should be remembered that in each of those cases the decision below was of an intermediate appellate court which had adopted the restitution conceptual framework in arriving at the wrong result.⁴
- Thirdly, in my view, there is the flavour of a "turf war" in some of the criticisms which are made. In my view, one can accept the undoubted value and organising principles which the rigorous analyses of restitution lawyers have given to the common law, particularly in rationalising a number of the common law counts which were once upon a time labelled quasi contract, without having to accept that it is the rightful place of restitution law to take over established areas of equitable principle, such as the first limb of the rule in *Barnes v Addy*.⁵

2. The English law of restitution

The author holds up five features of today's English law of restitution. For present purposes, I would concentrate on the first two of them. The first is that English law is close to having settled on the restitution conceptual framework. An over-arching legal conceptual framework that does

¹ (2001) 208 CLR 516.

² (2007) 230 CLR 89.

³ (2008) 232 CLR 635.

⁴ *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 95 FCR 185 at [56] – [62]; *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2007] NSWCA 309 at [217] – [237]; *W Cook Builders Pty Ltd (in liq) v Lumbers* [2007] SASC 20 at [63]ff.

⁵ (1874) LR 9 Ch App 244.

not constitute a cause of action as such is marked by the feature that causes of action that operate within the framework must be subsets of it. There is the ever present problem that analysis of a case may be blurred by reference to the framework as opposed to the material facts and the legal reasoning or principle which makes those material facts a cause of action. This is an inherent problem of abstract reasoning, presented by overarching concepts or conceptual frameworks.

From time to time, in various areas of the law, problems of this kind emerge and the High Court is not immune from them. The High Court flirted with the idea of a single overarching framework in the law of estoppels for a number of years,⁶ whereas the House of Lords veered away from an invitation to do the same thing in 1998.⁷ But in the end the High Court has probably given up the idea, at least for the moment.⁸ So we don't know whether or not it would have worked.

But it is not difficult to identify examples within the last 20 years when the application of a fashionable concept in a conceptual framework has got the High Court into trouble. An example which comes to mind is the use of the concept of "proximity" in the law of negligence as a determinant of the existence of a duty of care against the risk of pure economic loss. It was distilled as a critical step in the conceptual framework for approaching the duty of care question by Lord Wilberforce in *Anns v The Merton London Borough Council*.⁹ Initially, the High Court ran with it, in a big way.¹⁰ But after a while,¹¹ it became clear that proximity was nothing more than a label. Its use disguised the essential reasoning that was determining the question of whether a duty of care did exist or didn't exist in novel situations. The High Court rightly abandoned it.¹² The House of Lords had done so too,¹³ but replaced it with a taxonomy that is not all that different.¹⁴ Apart from a long running dissent by Justice Kirby, the High Court has refrained from going down that path again, preferring to accept that in this area the reasoning must be developed on a case by case basis as opposed to reference to an over-arching conceptual framework.¹⁵

As a second example of the kind of problem which can be created by use of a fashionable concept in a priori reasoning, I would choose a more controversial case. All Australian lawyers are familiar with the strong development of equitable doctrine or principle in many areas in the High Court in the last 20 years or so. Many important cases have been decided which invoke as a concept of central importance the identification of unconscionable or unconscientious conduct.¹⁶ Some

⁶ *Legione v Hately* (1983) 152 CLR 406 at 430; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 451; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 411 and 440.

⁷ *The Indian Grace* [1998] AC 878 at 914.

⁸ *Giumelli v Giumelli* (1999) 196 CLR 101 at [7].

⁹ [1978] AC 728 at 751.

¹⁰ *Jaensch v Coffey* (1983-1984) 155 CLR 549 at 583-584; *Sutherland Shire Council v Heyman* (1984-1985) 157 CLR 424 at 495; *San Sebastian Pty Ltd v Minister for Environmental Planning* (1986) 162 CLR (1991) 172 CLR 243 at 252; 341 at 355; *Hawkins v Clayton* (1987-1988) 164 CLR 539 at 576; *Gala v Preston* (1991) 172 CLR 243 at 252; *Bryan v Maloney* (1995-1995) 182 CLR 609 at 617.

¹¹ Sir Gerard Brennan was the first doubter.

¹² *Hill v Van Erp* (1995-1997) 188 CLR 159 at 176 and 238; *Perre v Apand* (1999) 198 CLR 180 at 198, 210 and 254.

¹³ *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618.

¹⁴ See *Perre v Apand* (1999) 198 CLR 180 at 193-4.

¹⁵ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 218 CLR 515 at [18], [22] – [24] and [34].

¹⁶ Eg *Commercial Banking Co Ltd v Amadio* (1983) 151 CLR 447; *Legione v Hately* (1983) 152 CLR 406; *Muschinski v Dodds* (1985) 160 CLR 582; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190; *Stern v McArthur* (1988) 165 CLR 489; *Louth v Diprose* (1992) 175 CLR 621; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Bridgewater v Leahy* (1998) 194 CLR 457; *Giumelli v Giumelli* (1999) 196 CLR 101; *Australian Competition and Consumer*

judges in the High Court, notably Sir Anthony Mason and Sir William Deane, can readily be identified as the champions of that concept as an over-arching conceptual determinant. Although some more recent decisions might herald a move away from the growth of the importance of unconscionable conduct in my opinion its present dominance in the conceptual framework of a number of areas of equitable principle and particular equitable causes of action has led even the High Court into error.

The example I proffer for that contention is *Bridgewater v Leahy*.¹⁷ In that case, the wife and daughters of a testator brought proceedings against their nephew and cousin for a declaration that a transaction of sale reflecting an option in favour of the nephew in the will of the testator was of no effect because it was induced by undue influence and/or unconscionable conduct together with consequential relief to undo the transfers of land to the defendant made pursuant to the sale and by exercise of the option. The primary judge in the Supreme Court of Queensland was the Chief Justice. His decision that there was no undue influence or unconscionable conduct on the facts was overturned by the High Court. What was extraordinary about the case was that the defendant, who was found to have engaged in unconscionable conduct, was the passive acceptor of a benefit conferred by his uncle who was of sound mind and strong personality and with whom he had a close working relationship. Ultimately, the case is a decision on its facts, as many cases in the area of undue influence and unconscionable conduct are. But to anyone familiar with cases in that area of the law, it is difficult to argue that it was not a stretch from earlier decisions. In other words, the conceptual determinant of unconscionable conduct can be seen to be growing. In my opinion, *Bridgewater v Leahy* was a bridge too far. The reasoning which was employed to arrive at the result by the majority of the High Court is opaque, beyond characterising the transaction as improvident and the close relationship as unequal. My point is that fashionable labels can be glibly applied and doing so can distort the law. They are no better solution to recurring legal questions just because they are new.

I would come back to Mr Burrows' second feature of today's English law of restitution, namely that it is not sufficient as a matter of pleading to simply plead one's cause of action for restitution as unjust enrichment. That is nothing more or less than a recognition of the fact that unjust enrichment is not a cause of action. It is a concept or part of a conceptual framework. Even in the cases held up by Mr Burrows as those in which Australia led the way in the development of a principled law of restitution, of which *Pavey & Matthews Property v Paul*¹⁸ is the first, that was emphasised in the judgments. The recognition of that fact means that at the end of the day the four step analysis of unjust enrichment reasoning comprising the restitution conceptual framework must be adapted to fit the case law by which causes of action have developed, not the other way round.

3. The three decisions of the High Court

(1) *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd*¹⁹

Although it is the second of the cases analysed by Andrew Burrows, I would challenge most strongly his criticism of the High Court's decision in *Farah*. The essential criticism is that in Mr Burrows' view it is anomalous for the common law to recognise strict liability of a third party

Commission v CG Berbatis Holdings Ltd (2003) 214 CLR 51; *Tanwar Investments Pty Ltd v Cauchi* (2003) 217 CLR 315; *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367; *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656.

¹⁷ (1998) 194 CLR 457.

¹⁸ (1987) 162 CLR 221 at 256-257.

¹⁹ (2007) 230 CLR 89.

recipient of property subject to defences, based on *Lipkin Gorman v Karpnale Ltd*,²⁰ but for equity to require “knowing” receipt as an element of liability of a third party recipient of property transferred in breach of fiduciary duty. The equitable cause of action referred to is conveniently described as liability under the first limb of *Barnes v Addy*.²¹

There are several important points bound up in the comparison. To be fair, the author doesn’t shrink from the proposition that his goal is to simplify the law and enhance coherence, by reducing the doctrines of the common law and equity to one, meaning to abandon the separate principle of equity that requires notice to the recipient of property in breach of trust or fiduciary duty. An important assumption is that the common law action will answer the categories of case to which the equitable cause of action extended. Historically, this was not so.²² The common law did not recognize trusts or give cognizance to the rights of beneficiaries. I would not add to the length of this comment by discussion of the fusion fallacy of common law and equity.

Secondly, reclassifying the equitable cause of action as a common law restitutionary cause of action would render inapplicable the existing equitable defences and replace them with an undeveloped or unstated set of defences for this particular restitutionary cause of action at common law. The High Court did not mention this in *Farah*, although it considered and rejected the theses that (1) a restitution based strict liability had supplanted the equitable cause of action and (2) that there was a common law cause of action which lay alongside the equitable cause of action.²³

Mr Burrows invokes a contention that the requirement of “knowing” receipt is unnecessary even for the equitable cause of action, on proper analysis of the authorities. That is a remarkable contention, given that *Barnes v Addy* was decided no less than 135 years ago and the High Court’s reasons in *Farah* expressly refer to cases decided both before²⁴ and after²⁵ *Barnes v Addy* which support the requirement of notice for liability under the first limb. Too many later cases have accepted the need for “knowing” receipt to even be mentioned. But Mr Burrows relies on three cases to support the contrary contention. Chronologically, the first of them is *Bridgeman v Green*.²⁶ That was decided in 1757, 114 years before *Barnes v Addy* stated the principles as they were accepted in 1874 and have been accepted since. A point that needs to be recognised is that the claim against the knowing recipient of “trust” property here considered is not proprietary - it is personal.²⁷ That is why the formulation of the principle in *Barnes v Addy* requires notice.

The second case is *Ministry of Health v Simpson*.²⁸ It concerned the administration of a testator’s assets and was expressly decided on the footing that it did not concern the execution of trusts, where it was accepted that no similar right of recovery existed.²⁹ It is not much of a basis to suggest infirmity in the rules applying to the law of trusts and fiduciary obligations.

The third case relied upon by Mr Burrows is *Re Griffiths*.³⁰ That case also did not involve a breach of trust or fiduciary obligation. So it was not a case concerned with the liability of a recipient to the cestui que trust or the fiduciary object. *Farah*, on the other hand, was just such a case. Like

²⁰ (1991) 2 AC 548.

²¹ (1874) LR 9 Ch App 244. Extension of the cause of action from cases of breach of trust to cases of breach of fiduciary duty was recognised in *DPC Estates Pty Ltd v Consul Developments Pty Ltd* (1973) 132 CLR 373.

²² *Farah* at [154].

²³ *Farah* at [153].

²⁴ *Farah* at fn 190.

²⁵ *Farah* at fn 191.

²⁶ (1757) Wilm 58.

²⁷ Equitable proprietary and tracing claims are separate categories of case.

²⁸ [1951] AC 251.

²⁹ At 266.

³⁰ (2008) 2 All ER 654.

DPC Estates v Consul Developments Pty Ltd,³¹ the claimant alleged a breach of fiduciary obligation which resulted in the defendant obtaining property by purchase which the plaintiff alleged observance of the fiduciary's obligation of undivided loyalty prohibited the fiduciary from facilitating. In both cases, the third party succeeded because it did not know of the fiduciary's breach of obligation and did not receive "trust" property. In both cases, the defendant was a purchaser for value of the property acquired by it. Mr Burrows says *Farah* was correctly decided because knowledge of the opportunity to purchase the property was not itself property within the restitutionary cause of action based on *Lipkin Gorman*. But without any resort to *Lipkin Gorman*, the equitable cause of action for knowing receipt of "trust" property was not made out because there was no "trust" property received.³²

Because there was no property for either cause of action, *Farah* might not have been the occasion to resolve any inconsistency which might be perceived between adherents of the common law restitutionary cause of action based on *Lipkin Gorman* on the one hand and the cause of action based on the first limb of *Barnes v Addy* on the other. *Farah* decided, however, that there would have been no common law restitutionary cause of action arising out of the same facts by reason of breach of fiduciary obligation even if "property" had been received.

Re Griffiths says nothing about this problem at all. It was simply a case about a payment made by way of gift under a mistake. In the language of the restitution conceptual framework, mistake was the "unjust factor". Whether or not the gift was set aside applying a well established equitable jurisdiction,³³ the case had nothing to do with breach of trust or breach of fiduciary obligation and therefore had nothing to do with what was decided in *Farah*. The contention that equity did not require notice in the application of the first limb of *Barnes v Addy* is truly untenable.

Mr Burrows relies on the analysis of Hanson J in *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd*.³⁴ in support of the ascendancy of the common law restitutionary claim based on *Lipkin Gorman*. With respect, that is an unfortunate case. It has caused tremendous debate at intermediate appellate court level within this country. Even before *Farah* had been decided, on the question of indefeasibility, *Koorootang* had kindly been put to one side by the Victorian Court of Appeal,³⁵ doubted by a persuasive dissent in the Queensland Court of Appeal³⁶ which was subsequently accepted by the High Court in *Farah*,³⁷ and not accepted by a specially constituted Western Australian Court of Appeal of five judges.³⁸

On the question of the first limb of *Barnes v Addy*, *Kooratang* has been mentioned many times. However, before the NSW Court of Appeal's judgment in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd*,³⁹ which was overturned in the High Court in *Farah*, only one Judge in this country had accepted Hansen J's view on the application of the restitution conceptual framework to the first limb of *Barnes v Addy*.⁴⁰ As far as I know, no English case has been decided on that basis,

³¹ (1973) 132 CLR 373.

³² See *Consul Developments* at p.412.

³³ The case relied on by Lewison J as authority for the equitable jurisdiction, was a claim for to avoid a disposition made by deed, and referred to "mistake induced by those who derive any benefit" not any operative mistake by the donor – see *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400. Later cases have not supported a general equity based on any kind of operative mistake.

³⁴ (1998) 3 VR 16.

³⁵ *Macquarie Bank Ltd v Sixty Fourth throne Pty Ltd* [1998] 3 VR 133 at 257.

³⁶ *Tara Shire Council v Garner* [2003] 1 Qd R 556 at 568.

³⁷ *Farah* at [194].

³⁸ *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517 at 571-572.

³⁹ [2005] NSWCA 309.

⁴⁰ *NINL Ltd v MAN Financial Ltd* [2004] VSC 449.

either.⁴¹ The High Court in *Farah* specifically considered *Koorootang* and the basis of Hanson J's reasons and was not persuaded.⁴²

The conclusion from *Farah* is that the personal cause of action that a legal owner of property which is stolen has as against a volunteer (*Lipkin Gorman*) is not the same thing as the personal cause of action a cestui que trust or fiduciary object has against a third party who has received "trust" property, whether as volunteer or purchaser, from a defaulting trustee or fiduciary with notice of a breach of trust or fiduciary obligation. Like the High Court, I don't understand why they should be the same.

Lastly, if the decision in *Farah* is to be criticised on the ground that the law could be simpler, it is assumed by Mr Burrows that the restitution conceptual framework in place of the first limb of *Barnes v Addy* will achieve that goal. Perhaps it would. But I am reminded that the Court of Appeal of New South Wales comprised of Judges who enjoy the reputation of being in the vanguard of appellate Judges in this country got it wrong, even if the restitution conceptual framework were to be applied, as Mr Burrows accepts. I wonder whether the error that they made is some indication that the framework itself may not be a sure guide for deciding individual cases. If not, how is the goal of simplicity achieved?

(2) *Lumbers v W Cook Builders Pty Ltd*⁴³

The decision in *Lumbers* is criticised by Mr Burrows for a number of reasons. It is said that the joint judgment focussed on the contractual relationship between the owner and the head contractor and that the central message was that the contract would be unacceptably undermined if the subcontractor's restitutionary claim against the owner were allowed. That seems to be criticised because an alternative restitutionary analysis might have been that the benefit received by the owner was "at the expense of" the head contractor not "at the expense of the subcontractor". With respect to restitution lawyers, looking at the matter that way is adjusting the restitutionary legal conceptual framework to fit the problem.

As between the owner and the head contractor, it is unnecessary to say that work done which benefits the owner is done "at the expense of" the head contractor because there is a valid contract between them providing for payment of the value or price of the work. What can a restitutionary analysis add to that? As between the owner and the sub-contractor, in my view, it is a pea and thimble trick to say that the work was not done "at the expense of" the subcontractor because it was "at the expense of" the head contractor. The subcontractor has suffered the economic detriment of providing the materials and the labour and fixing them to the owner's land in a way that is plainly at its expense in any commonsense world.⁴⁴ The notion that it is not "at the expense of the subcontractor" is just verbal gymnastics designed to enable the restitution conceptual framework to work. But for what purpose?

The next criticism of *Lumbers* is that it has taken us back into the "blind alley" of the forms of action because of the analysis in the judgment of the forms of pleading of claims for work and labour done for and at the request of the defendant. To look at an old form of action or the cause of action based on it was described as using "the mumbo jumbo language of money had and

⁴¹ To do so would be inconsistent with the decision of the Court of Appeal of England and Wales in *BCCI v Akindele* [2001] Ch 437 at 455, particularly bearing in mind that Nourse LJ doubted that the strict liability restitution based argument would work at p. 456.

⁴² *Farah* at [142].

⁴³ [2008] HCA 27.

⁴⁴ The Full Court of the Supreme Court of South Australia adopted that approach: *W Cook Builders Pty Ltd (in liq) v Lumbers* [2007] SASC 20 at [86].

received”. Mr Burrows passionately urges that we should not pretend that in the modern age that it is preferable to the language of unjust enrichment at the claimant’s expense, which he described as explaining the old forms of action in “modern transparent terminology that enables us to understand exactly what the judges are doing”. This is emotional stuff. But in the end it’s not persuasive, in my view. If this modern terminology is so transparent, how is it that the judges in *Lumbers* in the Full Court of the Supreme Court of South Australia below, who tried faithfully to apply it, got it wrong?⁴⁵

In the end, the clear defect in applying the restitution conceptual framework did not lie in the failure of the court below to recognise the meaning of the words “at the expense of”. It lay in their failure to recognise that the owner and contractor as parties to the head contract had agreed for the work to be done and paid for between themselves and that the contractor and subcontractor had similarly agreed for the work to be done for a price without any promise of payment by the principal or owner. In this way, the parties to the respective contracts allocated and bargained their risks. The obvious problem with any attempt to apply the restitution conceptual framework to the problem is that if the subcontractor has a direct right of recovery against the owner or proprietor in restitution, the owner or proprietor is responsible to pay two people for the same work, who are not joint obligees. Double recovery creates an obvious conceptual error.⁴⁶ The real mumbo jumbo problem in the case was attempting to apply the restitution conceptual framework to a case which always belonged in contract and which was readily able to be analysed and decided by the application of established contractual principle.

(3) *Roxborough v Rothmans of Pall Mall*⁴⁷

Of the three cases analysed by Mr Burrows, it may be fair to say that his strongest challenge or attack is made upon the judgment of Gummow J in *Roxborough*.

The challenge is made by drawing out three objections to the restitution conceptual framework raised in the judgment of Gummow J which Mr Burrows then proceeds to knock down. The three points are:

- Gummow J’s criticism of top down reasoning;
- how to explain cases where there is no enrichment; and
- Gummow J’s preference for analysis based on unconscionable retention as opposed to unjust enrichment.

For the purposes of my comments, I would mention only two of those points. As to top down reasoning, Mr Burrows argues that Goff and Jones and Birks and other commentators (which should fairly include him) have been concerned to work from the bottom up with the raw material of the case law providing the acknowledged starting point with the analysis of principle. That can plainly be accepted. But it does not mean that once the conceptual determinant has been distilled from the cases it is not potentially subject to the criticism of top down reasoning, particularly when a number of conceptual determinants are distilled and are combined in a framework which is said

⁴⁵ *W Cook Builders Pty Ltd (in liq) v Lumbers* [2007] SASC 20 at [63]ff.

⁴⁶ It is difficult not to have some sympathy for the hapless members of the Full Court, given the fast footwork displayed by the High Court when presented with an analogous problem of potential double recovery in *Gould v Vaggelas* (1985) 157 CLR 215 which was avoided by erecting a right of subrogation.

⁴⁷ (2001) 208 CLR 516.

to explain causes of action which are in some ways disparate or separate, although they have features in common.

The surest guide that there is a potential problem is when the new found framework appears to run headlong and into collision with an established principle. That's exactly what happened in *Farah*. Again this problem is not confined to the law of restitution.

Secondly, as to the debate between "unconscionable retention" on the one hand and "unjust enrichment" on the other, this is the turf war I had in mind in opening my comments. I find it impossible not to agree with Mr Burrows that the two concepts are doing much the same work. Mr Burrows says the answer to the duplication is to treat "unconscionable retention" as the fifth wheel on the unjust enrichment coach. That assumes that the "unjust enrichment" concept is the coach and the "unconscionable retention" concept is an additional wheel. It might just be the other way round, as Gummow J's historical analysis of *Moses v Macferlen* in *Roxborough* tends to show. As one who sees the strength of restitution law placed in common law causes of action, I would prefer to stick to "unjust enrichment" in restitution and keep unconscionable conduct in its equitable place, irrespective as to who has bragging rights to its ancestry. After all, the cause of action being debated has been described as "perfectly legal" (meaning a common law cause of action) for more than one and a half centuries.

Mr Burrows also takes a sideswipe at Gummow J because in another context his Honour has said that terms like "unconscionable" or "unconscientious" may have masked rather than illuminated the underlying principles at stake. From my earlier reference to *Bridgewater v Leahy*, it might be guessed that I'm sympathetic to that view. But I have also attempted to show the same objection applies to the concept of "at the expense of". And it extends, in my view, to the label "unjust enrichment" too.

Conclusion

At the end of the day, I am far from persuaded that the reasoning of the High Court in the three cases which Mr Burrows has analysed indicates that it has lost its way on restitution. On the contrary, in my view, they indicate that the High Court is conscious that there are pitfalls in the analysis of cases by reference to broad concepts employing modern language of the restitution conceptual framework, if it is to be applied as if the separate causes of action which underlie the framework have been abolished or subsumed into some higher status principle. In particular, I challenge the assertion that analysis by reference to the restitution conceptual framework is either transparent terminology or a superior means to enable us to understand exactly what judges are doing. Nor do I accept that it is essential to rationality or coherence demanded by the rule of law that unjust enrichment reasoning, meaning that conceptual framework, has a rightful central place. On the contrary, the fact that in the three cases referred to, the High Court has had to correct wrong decisions below by intermediate Courts of Appeal which have attempted to apply that framework shows that, except in the most skilful of hands, it is apt on occasions to lead to error.

That is not to deny the value of the rigorous reasoning and analysis applied by restitution lawyers to many common law causes of action which call up the same or similar elements and concepts. But to take the next step, and reduce the variety of common law and equitable causes of action which are brought up on that basis to a single taxonomy which will explain all the cases and can be simply applied just might be to parade in the emperor's new clothes.