

CURRENT LEGAL ISSUES SEMINAR 2019 (Thursday, 13 June 2019):

***WHAT'S IN A NAME? THE TAXONOMICAL AND CONCEPTUAL DIVIDE
BETWEEN UNJUST ENRICHMENT AND EQUITY***

The Hon Justice Julie Ward¹

INTRODUCTION

- 1 I begin by acknowledging the traditional custodians of the land on which we meet, the Jagera and Turrbal people, and pay my respects to their elders, past, present and emerging, as well as to any of our First Peoples here today. I also thank the organisers of this seminar for the invitation to speak today on the topic of unjust enrichment.

- 2 The recognition of unjust enrichment as a concept within the law of restitution is one of the most significant legal developments of the late twentieth and early twenty-first century and early twenty-first century.² It is certainly one of the most controversial. Indeed, the relationship between historic, equitable concepts and modern concepts and taxonomies of unjust enrichment is notoriously vexed.

- 3 At the heart of the debate are questions that go to the nature of legal reasoning and the rule of law itself. This paper will explore the different legal classifications of unjust enrichment and the status of unjust enrichment in Australian law today, particularly in the realm of equity; with some focus on pleadings issues. These include how considerations of certainty of outcome should be balanced against the remedial flexibility necessary to do justice in a particular case.

¹ Chief Judge in Equity, Supreme Court of New South Wales. I am indebted to the valuable research and assistance of my tipstaff, Olivia Back, and equity researcher, Tim Pilkington; and, as always, to the insightful observations of Jessica Hudson, with whom I have discussed issues of the kind here addressed on many occasions.

² *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256-7; [1987] HCA 5 (*Pavey*).

4 Therefore, tonight I propose to discuss the taxonomical and conceptual divide between unjust enrichment and equity. I will begin by providing a brief overview of the ways in which unjust enrichment has been classified, with emphasis placed on the High Court's approach to unjust enrichment. I will then consider the Equity/Law divide. I will finish by outlining some common challenges and possible solutions for the pleading of restitutionary claims and/or defences based on unjust enrichment.

WHAT IS UNJUST ENRICHMENT?

5 What is unjust enrichment?

6 Courts, practitioners and academics alike have grappled with the different ways in which we might understand and define unjust enrichment, including: as a cause of action; a normative principle; an organising principle; or taxonomically as a category of claim.

7 It is useful briefly to address each in turn.

A cause of action

8 Turning, first, to the notion of unjust enrichment as a cause of action.

9 Without wishing to ruin any surprises, I take the opportunity at this point to signpost that this is not going to be a speech that contends for the conceptualisation of unjust enrichment as a cause of action; but it is relevant to acknowledge this aspect of the discourse.

10 At times in Australian case law, and more so in the academic commentary, unjust enrichment has been spoken of in terms of "restitution for an unjust enrichment" or as "an action for unjust enrichment".³ Nevertheless, the High Court's position remains steadfast that unjust enrichment is *not* a cause of action. As Ian Jackman SC has remarked: "[t]o read the High Court's

³ See, for example, *Duckworth v Water Corporation* (2012) 261 FLR 185; [2012] WASC 30.

references to “unjust enrichment” is to appreciate the impressive range over which judicial prose can express disapproval”.⁴

- 11 To make reference to one of many High Court decisions that have rejected unjust enrichment as a cause of action, in *David Securities Pty Limited v Commonwealth Bank of Australia*⁵ (*David Securities*) the High Court stated explicitly that “unjust enrichment does not itself constitute a cause of action” but, rather, it provides a “unifying legal concept” and “serves to mark out the defences to claims in restitution”.⁶ This position has been affirmed in numerous High Court decisions.⁷
- 12 In *Roxborough v Rothmans of Pall Mall Australia Ltd*⁸ (*Roxborough*), Gummow J pointed out that treating unjust enrichment as a “definitive principle” may restrict the “substance and dynamism” of the concept.⁹ His Honour espoused that such dogmatism would “tend to generate new fictions in order to retain support for its thesis” and may “distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things”.¹⁰
- 13 One reason for the confusion as to whether or not unjust enrichment is a cause of action (despite the High Court’s insistence that it is not) arguably stems from the four-step analysis repeatedly cited in the literature on this topic and initially espoused by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd*.¹¹ The four-step analysis poses the following questions:

(1) Was the defendant enriched?

⁴ Ian Jackman, *The Varieties of Restitution* (Federation Press, 2nd ed, 2017) 1.

⁵ (1992) 175 CLR 353; [1992] HCA 48 (*David Securities*).

⁶ *Ibid* 406.

⁷ For example, see, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 [151] (per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (*Farah Constructions v Say-Dee*); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635; [2008] HCA 27, [83]-[85] (per Gummow, Hayne, Crennan and Kiefel JJ) (*Lumbers*); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; [2012] HCA 7, [29]-[30] (per French CJ, Crennan and Kiefel JJ) (*Equuscorp*); *Friend v Brooker* (2009) 239 CLR 129; [2009] HCA 21, [7] (per French CJ, Gummow, Hayne and Bell JJ) (*Friend v Brooker*).

⁸ (2001) 208 CLR 516; [2001] HCA 68 (*Roxborough*).

⁹ *Ibid* [74].

¹⁰ *Ibid*.

¹¹ [1999] 1 AC 221, 227.

- (2) If so, was the defendant enriched at the plaintiff's expense?
- (3) If so, is there any factor calling for restitution (i.e., a vitiating or unjust element)?
- (4) If so, is there any reason why restitution should nonetheless be withheld?
- 14 The Honourable Keith Mason AC QC proffers a fifth question as being whether a proprietary remedy, such as a lien or constructive trust, is available and necessary in the circumstances?¹²
- 15 Although it might be tempting to treat these questions as a statement of the elements of a cause of action, they should not be (and have not been) understood as such. In *Investment Trust Companies v Revenue and Customs Commissioners*, Lord Reed JSC explained that the phases of the four-step analysis are not legal tests but “signposts towards areas of inquiry”.¹³
- 16 Since the literature on unjust enrichment in Australia largely accepts the four-step analysis, irrespective of the way unjust enrichment is defined (or “named”), I will refer to the four-step analysis as such in this paper. However, while providing a useful (and simple, though dangerously simplistic perhaps) way of approaching the concept of unjust enrichment, I emphasise that it has neither been endorsed nor applied by the High Court; and I do not here suggest that it should be. I will return to this point when I come to discuss pleading restitutionary claims and/or defences based on unjust enrichment later in this paper.

¹² Keith Mason, ‘Strong coherence, strong fusion, continuing categorical confusion: The High Court’s latest contribution on the Law of Restitution’ (2015) 39 *Australian Bar Review* 284, 287.

¹³ [2018] AC 275; [2017] UKSC 29, [41]-[43].

A normative principle

- 17 The second way that unjust enrichment may be classified is as a normative principle; namely, that “no-one ought to be unjustly enriched at the expense of another” or that “the law does not permit one person to be unjustly enriched at the expense of another”.¹⁴ Professor Birks, in his *Introduction to the Law of Restitution*, suggested that there was a Roman root for a normative conception of unjust enrichment (though he shifted slightly away from this statement in the second edition of his seminal text on *Unjust Enrichment*).¹⁵
- 18 In his *Introduction to the Law of Restitution*, Professor Birks observed that the *Digest* preserves two versions in fragments excerpted from Pomponius.¹⁶ In one it is said that “[t]his is indeed by nature fair, that nobody should be made richer through loss to another (*cum alterius detriment*)”.¹⁷ In another, that “[i]t is fair by the law of nature that nobody should be made richer through loss and wrong to another (*cum alterius detriment et iniuria*)”.¹⁸
- 19 Professor Barker has said that, while not a principle of law *per se*, unjust enrichment when understood as a normative principle can act as a “legislative or judicial reason for changing existing legal rules, or making new ones”.¹⁹
- 20 Historically, the classification of unjust enrichment as a normative principle has received little encouragement.²⁰ In *Holt v Markham*, Scrutton LJ suggested that such a classification would be overly vague and result in unfettered judicial discretion and a “well-meaning sloppiness of thought”.²¹ Professor Birks himself rejected the construction of unjust enrichment as a

¹⁴ Peter Birks, *An Introduction to the Law of Restitution* (Oxford Clarendon, 1989) 22.

¹⁵ Birks, above n 14, 22-23; In his text *Unjust Enrichment* (Clarendon Law Series, 2nd ed, 2005), Professor Birks describes the principle as ‘only weakly’ normative (at p 274) (arguably to avoid future accusations that the principle did not look to existing legal rules and, therefore, amounted to a vague, abstract moral principle).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Kit Barker, ‘Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons’ in J Neyers, M McInnes, S Pitel (eds), *Understanding Unjust Enrichment* (Oxford, 2004) 84-90.

²⁰ Kit Baker and Ross Grantham, *Unjust Enrichment* (Lexis Nexis, 2nd ed) 19.

²¹ [1923] 1 KB 504 at 513-514.

normative principle, citing reasons such as that the function of unjust enrichment was “downward” (not outward) looking (that is, its purpose was to collect together cases where the law provided a particular response) and that the proposition, defined in prescriptive terms, was ambiguous (particularly because of the phrase, “at the expense of”).²²

- 21 Indeed, to suggest that it is a normative principle might be said to overstate its role. Obiter dictum of Deane J in *Pavey & Matthews Pty Ltd v Paul (Pavey)*, *David Securities*²³ and *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited*²⁴ (*AFSL v Hills*) indicates that unjust enrichment, at least in the modern context, is a legal, and not a normative, principle.

An organising principle

- 22 The third potential classification of unjust enrichment is as an organising principle. On this understanding, the function of unjust enrichment is to group together cases on the basis that they share a set of common features. Whilst a governing principle suggests a principle that is informative of the development of certain doctrines insofar as it is descriptive of their basis (and I note that this is another way that the concept has been explained), an organising principle postulates both a process of inquiry and a criterion for collating certain cases within a particular category.
- 23 This approach views the concept as a classificatory unit which itself attracts no normative force or prescriptive power and makes reference to no external, abstract moral principle(s).²⁵
- 24 Professor Burrows believes that the “essential role” of the unjust enrichment principle is “as an organising tool for existing legal decisions”.²⁶ The authors of the most recent edition of *Goff and Jones* similarly explain the function of

²² Birks, above n 14, 23-24.

²³ (1987) 162 CLR 221; [1987] HCA 5

²⁴ (2014) 253 CLR 560; [2014] HCA 1.

²⁵ Barker, above n 19.

unjust enrichment, writing that:

[Unjust enrichment] groups together decided cases on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit gained at the claimant's expense in circumstances that the law deems to be unjust.²⁷

25 Criticisms of this approach find fault with the way that it assumes a certain degree of commonality between cases. According to Professor Stevens, it is wrong to proceed on the basis that unjust enrichment is a unified legal concept with a single subject matter and a steadfast “commitment to material similarity”.²⁸ He blames the four-step analysis (to which I have referred above) for mistakenly implying a commonality in relation to the type of cases that fall within this principle.²⁹ Professor Stevens flags as an error the assumption that, because some claims do not have feature X, the maxim that like cases being treated alike, “requires that it is never a necessary condition of any claim for restitution that feature X is satisfied”.³⁰ According to Professor Stevens:

This leads to the conditions for liability for the different kinds of claim being watered down, so that we are left with the law of the lowest common denominator.³¹

A category of claims

26 Fourth, unjust enrichment may be understood as having a “taxonomical function” referring to a category of claims where a claimant is able to recover value that he or she has transferred to a defendant.³²

27 In *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3) (Lampson)*, when sitting in the Supreme Court of Western Australia as his

²⁶ Andrew Burrows, *The Law of Restitution* (Oxford University Press, 2011) 4.

²⁷ Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) 7-8.

²⁸ Robert Stevens, ‘The unjust enrichment disaster’ (2018) 134 *Law Quarterly Review* 511, 576.

²⁹ *Ibid* 577.

³⁰ *Ibid*.

³¹ *Ibid*.

³² *Equuscorp*, [30].

Honour then was, Edelman J stated that “unjust enrichment is not the direct basis of restitutionary relief in Australian law”.³³ His Honour compared unjust enrichment with the category of torts – just as it cannot be pleaded by a plaintiff that a defendant is liable for having committed a “tort”, it similarly cannot be pleaded by a plaintiff that a defendant is liable for having committed “unjust enrichment”.³⁴ Like a tort, unjust enrichment is an event from which certain legal consequences flow, namely, a *prima facie* right to restitution.³⁵

28 Arguably, this approach to unjust enrichment in *Lampson* directs all attention to outcomes and the character to be attributed to them. Therefore, a potential difficulty with such a taxonomic categorisation of unjust enrichment based upon events is that it is doubtful such an approach correctly identifies what makes cases materially alike or meaningfully informs how cases should be decided.

29 An inability appropriately to treat like cases alike may have significant ramifications for the rule of law both at a conceptual and practical level.³⁶ At the practical level, for example, how will we tell whether a factual difference supports a different legal response? Professor Webb argues that it is only by inquiring into the law’s reasons for attaching legal consequences to particular factual occurrences that we can answer this question.³⁷ In so doing, he relies on earlier work by Professor Raz defending the view that what makes cases materially alike is that there are sufficiently similar normative reasons applying to them such that they ought to be determined in the same way.³⁸ A factual

³³ [2014] WASC 162, [50].

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 16.

³⁷ Charlie Webb, *Reason and Restitution* (Oxford University Press, 2015) 40-48; Charlie Webb, ‘What is Unjust Enrichment?’ (2009) 29(2) *Oxford Journal of Legal Studies* 215, 236-238.

³⁸ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009) 201-206; Cf Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978) 152-194; Melvin Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988) 83-96.

difference will be immaterial when it does not provide or invoke a reason for the law to treat cases differently. As Professor Webb writes:³⁹

If we want to identify which restitutionary claims are indeed materially identical ... we need to identify not just what reasons don't apply to such cases but, more importantly what reasons do.

- 30 The same point can be made by adopting the language, much more familiar to lawyers, of “principles”. To say that there is a reason for deciding case A in a particular way is to say that there is a principle that supports that decision. Cases are alike where they raise the same questions of principle; that is, where the principles that we believe are or should be reflected in the law apply to them in the same way. When we disagree as to whether case A and case B are alike we are disagreeing about what are good reasons for legal decisions and/or how these apply to the facts at hand (or, in other words, the principles which do or should shape the law and/or what the application of those principles to the facts requires).
- 31 Implicit within such an argument is, of course, some version of a natural theory of law whereby the way cases should be decided and, law understood, is inherently dependent upon normative considerations. It suggests that when lawyers apply analogies as between cases or categories of law, the judge must determine the applicability or force of that analogy by determining whether the normative reasons informing the one body of law are applicable to the other. A different taxonomical function for unjust enrichment to that stated in *Lampson* was arguably recognised in *Pavey* and in *Muschinski v Dodds*⁴⁰ (as I will discuss shortly when I move on to a discussion of the approach(es) to unjust enrichment adopted by the High Court). This suggests that perhaps there is more than one usage of the label of “taxonomic” – just to add another wrinkle to this already exceedingly complicated concept (but that is a topic worthy of an entirely separate speech).

³⁹ Charlie Webb, *Reason and Restitution* (Oxford University Press, 2015) 48.

⁴⁰ (1985) 160 CLR 583, 617.

- 32 However, that is all I wish here to say here in order to flag the different legal classifications of unjust enrichment. Hopefully, this highlights the plethora of different names and classifications that have been given to the concept of unjust enrichment.
- 33 “What’s in a name”, in the context of unjust enrichment, seems to be a particularly vexed and difficult question to answer. Indeed, an academic mindset and preoccupation with “jurisprudential tidiness” and strict classification may not be helpful. As Jessica Hudson cautions in her article, *Estoppel by Representation as a Defence to Unjust Enrichment – the Vine has Not Withered Yet*, attempts as to coherence should not curtail the operation of a doctrine designed to be of general application.⁴¹ Justice Leeming similarly asserts that the law “cannot be treated purely as an intellectual system, a game to be played by scholars whose aim is to produce a perfectly harmonious structure of rules”.⁴² Justice Leeming acknowledges that “[t]he status afforded to ‘unjust enrichment’ directly impacts the way a legal argument proceeds and is adjudicated, and the precedential force of earlier authorities which may or may not fit well with the conceptual paradigm”.⁴³ Nevertheless, the status and classification of a concept can be understood as mutually exclusive things and upholding the status of unjust enrichment does not necessarily demand classifying it.

THE APPROACH ADOPTED BY THE HIGH COURT

- 34 Moving to a discussion of the High Court’s position in relation to the classification of unjust enrichment, as I have already said, the High Court has told us that unjust enrichment is not a cause of action. It seems unlikely that this position will fundamentally shift (despite assertions by some academics

⁴¹ Jessica Hudson, ‘Estoppel by Representation as a Defence to Unjust Enrichment – the Vine Has Not Withered Yet’ [2014] 22 *Restitution Law Review* 19-34, 21.

⁴² Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36(3) *UNSW Law Journal* 1002.

⁴³ Mark Leeming, ‘Subrogation, Equity and Unjust Enrichment’, in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 27-43, 28.

and jurists that it should be treated as such),⁴⁴ absent a change of heart on the restitutionary front.

35 Which classification then receives the most support from the High Court?

36 Although the language of unjust enrichment used by the High Court has not always been consistent, the preferable interpretation of the case law is that the High Court has in modern times leant towards a taxonomical approach, in the way that it has articulated what unjust enrichment is *not*.

37 A taxonomic approach (albeit on different terms to the taxonomic approach described in *Lampson*) was stated in 1987 by Deane J in *Pavey*:

[Unjust enrichment] constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.⁴⁵

38 Insofar as Deane J spoke of unjust enrichment as a “unifying legal concept”, his Honour suggested that unjust enrichment serves a taxonomical function. His Honour also suggested this previously in *Muschinski v Dodds* when stating that:

in Australian law ... “unjust enrichment” is a term commonly used to identify the notion underlying a variety of distinct categories of case in which the law has recognized an obligation on the part of a defendant to account for a benefit derived at the expense of a plaintiff.⁴⁶

39 A taxonomical understanding of unjust enrichment as explaining why the law recognises, or the basis for, restitution in a “variety of distinct categories”, is a different sort of proposition to one which says that all claims for restitution can be conceptualised or organised according to the four-step analysis. There is an important difference between a concept informing legal reasoning which

⁴⁴ See, for example, Edelman and Bant, above n 36, 29.

⁴⁵ *Pavey*, 256-7.

⁴⁶ (1985) 160 CLR 583, 617.

explains the underlying basis for a particular doctrine and one which, in addition to explaining the underlying basis of a variety of claims, poses a certain process of enquiry.

40 As already mentioned, *Lampson* arguably suggests that unjust enrichment as a taxonomic approach does not identify what makes cases materially alike or meaningfully inform how cases should be decided.

41 Further, in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp*, the majority (comprising Mason CJ, Wilson, Deane, Toohey and Gaudron JJ) held that:

The basis of the common law action of money had and received for recovery of an amount paid under fundamental mistake of fact should now be recognised as lying not in implied contract but in restitution or unjust enrichment.⁴⁷

42 To the extent that that passage might be understood as equating restitution and unjust enrichment as categories, it would seem to me that their Honours implicitly recognised unjust enrichment as having a taxonomic function. This is borne out later in the joint judgment, when their Honours state that:

receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.⁴⁸

43 In *David Securities*, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ rejected an approach that in Australian law unjust enrichment is a definitive

⁴⁷ (1988) 164 CLR 662, 673; [1988] HCA 17.

⁴⁸ *Ibid.*

legal principle according to its own terms, “instead a plaintiff must establish more particular vitiating factors”.⁴⁹

44 Further, despite Gummow J’s well-known criticism of unjust enrichment theory, it would be wrong to read his Honour’s judgment in *Roxborough* as a complete rejection of unjust enrichment as a part of Australian law. Rather, his Honour made clear that he was prepared to view unjust enrichment as a taxonomical concept and to endorse what was said in 1992 in *David Securities*.⁵⁰ Confirmation of this proposition followed in *Farah Construction Pty Ltd v Say-Dee Pty Ltd (Farah Constructions v Say-Dee)*,⁵¹ *Lumbers v W Cook Builders Pty Ltd (in liq) (Lumbers)*⁵² and *Friend v Brooker*.⁵³

45 In 2009, in *Friend v Brooker*, French CJ, Gummow, Hayne and Bell JJ said:

[W]hile the concept of unjust enrichment may provide a link between what otherwise appears to be a variety of distinct categories of liability, and it may assist, by the ordinary processes of legal reasoning, in the development of legal principle, the concept of unjust enrichment itself is not a principle which can be taken as a sufficient premise for direct application in a particular case.⁵⁴

46 In *Equuscorp Pty Ltd v Haxton*⁵⁵ (*Equuscorp*) French CJ, Crennan and Kiefel JJ’s stated that unjust enrichment “has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another”.⁵⁶

47 If French CJ, Crennan and Kiefel JJ’s statement in *Equuscorp* is accepted; then arguably unjust enrichment applies to a greater number of claims than most restitution scholars presently recognise. Most would, for example, now omit proprietary restitution as falling within unjust enrichment. Yet, on its face, the concept of unjust enrichment their Honours advanced would seem to

⁴⁹ 1992) 175 CLR 353, 379; [1992] HCA 48.

⁵⁰ (2001) 208 CLR 516; [2001] HCA, [74].

⁵¹ (2007) 230 CLR 89; [2007] HCA 22.

⁵² (2008) 232 CLR 635; [2008] HCA 27.

⁵³ (2009) 239 CLR 129; [2009] HCA 21.

⁵⁴ *Ibid* [7].

⁵⁵ (2012) 246 CLR 498; [2012] HCA 7.

⁵⁶ *Ibid* [30].

include such cases. Secondly, despite what might be described as scepticism towards Professors Birks' scholarship in Australian courts, it reflects, in important ways, the conception of unjust enrichment he adopted in the *Introduction*; that is, that unjust enrichment is the "generic conception of all events which give rise to restitution".⁵⁷

48 Recently in *Northern Territory v Griffiths*⁵⁸ the language of unjust enrichment once again reared its head in the High Court in a judgment given by Edelman J. The appeals in that case concerned the amount of compensation payable by the Northern Territory of Australia to the Ngaliwurru and Nungali Peoples under the *Native Title Act 1993* (Cth), in relation to their native title rights and interests over lands in the area of the township of Timber Creek in the north-western area of the Northern Territory. One of the issues which arose concerned whether interest upon the value of extinguished native title rights should be simple or compound.

49 In framing the issues, Edelman J spoke of "restitution of unjust enrichment" and of a "prima facie obligation to restore the value of the opportunity to profit from the use of money received by unjust enrichment".⁵⁹ The use of such language arguably foreshadows unjust enrichment taking on a more substantive role in the High Court's jurisprudence in the near future.

THE EQUITY/COMMON LAW DIVIDE

50 The divide between equity and the common law is significant in the contexts of restitution and unjust enrichment and has been hotly debated. In Australia, debate has ensued as to whether restitution is to be understood in terms of unjust enrichment or in terms of equitable principles, and whether the concept of unjust enrichment, more narrowly, should be informed by both common law and equitable principles.

⁵⁷ Birks, above n 14, 17.

⁵⁸ [2019] HCA 7.

⁵⁹ *Ibid* [339].

51 It is appropriate to discuss this divide initially at the conceptual level before moving on to the practicalities of bringing an “unjust enrichment case”. That is because the divide catalyses much of the uncertainty regarding exactly how, why and when one “pleads” unjust enrichment, as well as what relief is available; and the overall utility of the concept of unjust enrichment in remedial terms.

52 Unjust enrichment has been described as problematic because of the way that it “cuts across” other principles and rules already established with a longer historical pedigree and a clear subscription to the Law/Equity divide.⁶⁰ As the Honourable Keith Mason AC QC states:

The unjust enrichment concept, may have strong scholarly support, be derived from the case law and rooted in history, but it cuts across the history of the forms of action and the history of the Law-Equity divide.

53 Jurists and academics frequently cite Lord Mansfield’s judgment in *Moses v Macferlan* as the origin for the confusion, caused by Lord Mansfield’s attempts to integrate equitable principles into the common law actions that form the basis of the modern concept of unjust enrichment.⁶¹ Despite its previous quasi-contractual doctrinal basis, Lord Mansfield asserted that the common law action for money had and received was based in equity as the “gist” of this kind of action was that the defendant was obliged “by the ties of natural justice and equity to refund the money”.⁶²

54 In *Baylis v Bishop of London* Hamilton LJ urged that Lord Mansfield’s judgment should be treated “with great caution”.⁶³ Professor Jones in 1957 described *Moses v Macferlan* as exemplifying “the excesses of the fertile mind of Lord Mansfield, and delicately forgotten”.⁶⁴ Professor Jones may have spoken too soon, however, as Lord Mansfield’s statement is now described as

⁶⁰ J Beatson, *The Use and Abuse of Unjust Enrichment* (Clarendon Press, 1991) 244; Keith Mason, ‘Strong coherence, strong fusion, continuing categorical confusion: The High Court’s latest contribution on the Law of Restitution’ (2015) 39 *Australian Bar Review* 284, 286.

⁶¹ (1760) 2 Burr 1005.

⁶² *Moses v Macferlan* (1760) 2 Burr 1005, 1012 (per Lord Mansfield).

⁶³ (1913) 1 Ch 127.

⁶⁴ H Jones, ‘Change of Circumstances in Quasi-Contract’ (1957) 73 *Law Quarterly Review* 48, 58.

“the origin of the modern law” of unjust enrichment in the seminal *Carter On Contract*.⁶⁵

- 55 At times, the High Court has asserted the ‘otherness’ of ‘equitable principles’ and of ‘unjust enrichment’. In *Farah Constructions v Say-Dee*,⁶⁶ the Court acknowledged the potential for unjust enrichment to distort equitable doctrine and generate new fictions.⁶⁷ The areas in which the concept of unjust enrichment applies were described as “specific and usually long-established”.⁶⁸ Importantly, the High Court unanimously rejected the notion that the ‘first limb’ of *Barnes v Addy*⁶⁹ “ought to be understood and reshaped through the prism of unjust enrichment”.⁷⁰ Among other reasons, the High Court was of the view that such a development would represent a substantial departure from the established authorities concerning claims for knowing receipt, historically based in equity’s intervention against unconscionable conduct.⁷¹ Similarly, the plurality judgment in *AFSL v Hills* juxtaposed unjust enrichment and equity as competing or mutually exclusive concepts to explaining restitution.⁷²
- 56 In *Roxborough*, the High Court also rejected unjust enrichment as the basis for restitution and said that the enquiry was conducted by reference to equitable principles.⁷³
- 57 The High Court, however, has more often endorsed an approach that reconciles the common law versus equity feud in this context. In view of the fact that the High Court has understood unjust enrichment more as a taxonomical tool and a conceptual idea underlying the law of restitution more broadly, and not as a cause of action (or normative principle), it is unsurprising that the High Court has endorsed an approach that seeks to

⁶⁵ J W Carter, *Contract Law in Australia* (Lexis Nexis, 7th ed, 2018) [2904].

⁶⁶ *Farah Construction Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; Mason, above n 60, 299.

⁶⁷ *Ibid* 151 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁶⁸ *Ibid*.

⁶⁹ (1874) LR 9 Ch App 244.

⁷⁰ H Atkin, ‘Knowing Receipt Following *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*’ (2007) 29 *Sydney Law Review* 713 at 717.

⁷¹ *Farah Construction Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 95-96.

⁷² *AFSL v Hills*, [76]-[86] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁷³ (2001) 208 CLR 516; [2001] HCA 68.

bridge the divide between unjust enrichment and equitable principles by imbuing one with the other.

- 58 In the well-known (and oft-cited) case of *Muschinski v Dodds*⁷⁴ the argument was raised on behalf of Mrs Muschinski that she was entitled to a declaration of constructive trust based on broad notions of fairness and unjust enrichment.⁷⁵ Whilst Deane J stated that no general principle of unjust enrichment yet existed in Australia, his Honour referred to the general equitable notions that find expression in the common law count for money had and received.⁷⁶
- 59 Similarly, in *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation*,⁷⁷ the High Court described the action for money had and received as “a common law action for recovery of the value of unjust enrichment”.⁷⁸ At the same time, the High Court recognised that “the grounds of the action for recovery are framed in the traditional words of trust or use and that contemporary principles of restitution or unjust enrichment can be equated with seminal notions of good conscience”.⁷⁹
- 60 In *AFSL v Hills Industries*, French CJ stated that Ashburner’s metaphor of the common law and equity as two streams of jurisprudence which run side-by-side in the same channel and “do not mingle their waters” was at odds with common sense and the reality of equity’s influence on the common law.⁸⁰
- 61 Justice Leeming has written extensively on the common law/equity divide. In particular, his Honour has observed that the “overlapping doctrines and remedies at common law and in equity continue to form an important part of the modern Australian legal system”.⁸¹ Justice Leeming has also called for

⁷⁴ (1985) 160 CLR 583.

⁷⁵ *Ibid* 612.

⁷⁶ *Ibid* 619.

⁷⁷ (1988) 164 CLR 662; [1988] HCA 17.

⁷⁸ *Ibid* 673.

⁷⁹ Mason, above n 60, 316.

⁸⁰ (2014) 253 CLR 560; [2014] HCA 14, [12].

⁸¹ Mark Leeming. ‘Overlapping claims at Common Law and in Equity – An Embarrassment of Riches?’ (2017) 11(3) *Journal of Equity* 229, 230.

greater attention to be given to the ‘statutory elephant in the room’ that is often ignored in taxonomy generally and the exposition of common law and equitable doctrines in particular but I am not so ambitious as to try and cover the interaction of statute in this paper.⁸²

- 62 The equitable doctrine of subrogation provides an example of the common law and equity divide. Meagher, Gummow and Lehane note that the High Court, in *Bofinger v Kingsway Group Ltd*⁸³ (*Bofinger*), was critical of reliance being placed on unjust enrichment “as a principle supplying a sufficient premise for direct application” in well-developed areas of law such as the equitable right of subrogation”.⁸⁴ Their Honours in *Bofinger* stated that:

[A]ll-embracing theories [such as unjust enrichment] may conflict in a fundamental way with well-settled equitable doctrines and remedies.⁸⁵

- 63 The joint judgment in *Bofinger* stated that there is difficulty in identifying the “unjust” enrichment in subrogation cases, which necessarily involve multilateral, rather than bilateral relationships (i.e., “the debtor, the secured creditor, the surety, and those against whom the subrogated surety wishes to enforce the securities”).⁸⁶

- 64 Justice Leeming, in his article *Subrogation, Equity and Unjust Enrichment*, argues that adopting an unjust enrichment analysis in this context would lead to uncertainty⁸⁷. His Honour states that:

[A]n approach which preserves historical continuity is more apt to provide cogent reasons to the losing litigant, and to give rise to a body of law which is coherent. It is ultimately more apt to enhance certainty and predictability.⁸⁸

- 65 Closer to home for my present audience, Professor Swain argues that unjust enrichment should be understood as “jurisdiction neutral” and the “historical

⁸³ *Bofinger v Kingsway Group Pty Ltd* (2009) 239 CLR 269; [2009] HCA 44.

⁸⁴ J D Heydon, *Meagher, Gummow & Lehane’s equity: doctrines and remedies* (LexisNexis Butterworths, 5th ed, 2015) [9-120]; (2009) 239 CLR 269; [2009] HCA 44, [85].

⁸⁵ (2009) 239 CLR 269; [2009] HCA 44, [91].

⁸⁶ (2009) 239 CLR 269; [2009] HCA 44, [97]; Leeming, above n 43, 40.

⁸⁷ Leeming, above n 43, 40.

⁸⁸ *Ibid.*

divide between law and equity ought not to matter” in the context of the concept’s further development.⁸⁹ In *Brambles Holdings Ltd v Bathurst City Council (Brambles)*, Mason P, as his Honour then was, similarly suggested a preoccupation with historical analysis in this context was problematic and limiting.⁹⁰ His Honour noted that “attitudes to the unjust enrichment concept are also hallmarks of other academic divisions, some of whose members struggle to preserve the boundaries of their jumbled inheritance rather than strive for conceptual order within”.⁹¹

PLEADING RULES AND UNJUST ENRICHMENT

- 66 One issue that was raised with me at the time I was considering what to speak about today, was the concern that practitioners may have as to how to plead a claim in equity when seeking relief for unjust enrichment. As I have suggested, I suspect that this largely stems from the way that unjust enrichment muddies the waters of the equity/law divide and defies clear classification by the High Court or academics.
- 67 Anecdotally, some practitioners argue that problems stem from the uncertainty regarding how unjust enrichment is classified; and whether liability should be characterised as legal or equitable; others lament that the flexibility of equity more generally results in uncertainty, making it difficult for practitioners to provide reliable legal advice to their clients (particularly in relation to commercial disputes). I am of the school of thought, however, like Justice Leeming and Lord Millett, that “[e]quity’s place in the law of commerce, long resisted by commercial lawyers, can no longer be denied”.⁹²
- 68 Despite assurances by the High Court that unjust enrichment has a taxonomic function and is not a cause of action, it remains common to see cases argued

⁸⁹ Warren Swain, ‘Unjust Enrichment and the Role of Legal History in England and Australia’ (2013) 36(3) *UNSW Law Journal* 1030.

⁹⁰ (2001) 53 NSWLR 153; [2001] NSWCA 61.

⁹¹ *Ibid* [2].

⁹² Peter J Millett, ‘Equity’s Place in the Law of Commerce’ (1998) 114 *Law Quarterly Review* 214, 214 (as cited in Mark Leeming, ‘The role of equity in 21st century commercial disputes — Meeting the needs of any sophisticated and successful legal system’ (2019) 47 *Australian Bar Review* 137, 139).

or pleaded on the basis of unjust enrichment. I point to one recent example in this regard.

69 In *Carbone v Melton City Council*⁹³ certain land vested in a Council by registration of a plan of subdivision by the plaintiffs. The question arose as to whether the Council had “acquired” the land and, thus, was required to pay compensation under the *Land Acquisition and Compensation Act 1986* (Cth). One of the claims pleaded was that, if compensation under the Act was unavailable, the Council had been “unjustly enriched, at the expense of the plaintiffs”.⁹⁴ The basis for the claim was that: the transfer of the land was made at the Council’s request; the Council “freely accepted” the land; and the transfer was made in circumstances where there was clearly no intention to make a gift.

70 The difficulty with pleadings of this kind is that they risk concealing the real basis upon which a claimant seeks restitution. To plead one’s case as being for “restitution” because the defendant has been unjustly enriched is no different from pleading a claim for “damages” for a tort. This is problematic not only as a matter of procedure, but it also appears to have led certain cases to be put in a rather novel fashion. In *Carbone v Melton City Council*, the claimant eventually put its case in oral argument as one for a *quantum valebat*.⁹⁵ This brings out a further problem of terminology in this area of the law. That is, one consistently sees cases pleaded on the basis of the old forms of actions, most commonly, as a *quantum meruit*. (And one consistently sees such cases get struck out.) While it is true that in most of these instances it quickly becomes evident that the true complaint is restitution for total failure of consideration, or what has more recently become known as “failure of basis”, this is not invariably so and should not be presumed.

71 Another pleading rule – equally simple and a matter of common sense (but, I regret to say, commonly overlooked) – is that pleadings should not be made in general or abstract terms. Courts have been averse to pleadings that

⁹³ [2018] VSC 812.

⁹⁴ *Ibid* [38].

⁹⁵ *Ibid* [151].

simply appeal to idiosyncratic notions of equity as what is “fair and just” or which plead generalised claims based on unjust enrichment.⁹⁶ Equally, references to ‘justice’ and ‘equity’ in the abstract should not be used to deny or misrepresent the common law origin of many claims of restitution.⁹⁷ As Gummow, Hayne, Crennan and Kiefel JJ stated in their joint judgment in *Lumbers* unjust enrichment cases should proceed by “the ordinary process of legal reasoning”.⁹⁸ So, for example, more is required than proof of retention of a benefit (see *Lahoud v Lahoud*⁹⁹); there must be some additional factor rendering retention of the benefit ‘unjust’ in the relevant sense and that additional factor must be identifiable and causative.¹⁰⁰ As was recognised in *David Securities Pty Ltd v Commonwealth Bank of Australia* (by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ):

... it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.¹⁰¹

72 The absence of a factor rendering retention of the benefit (or the relevant enrichment) “unjust” for the purposes of a claim in restitution was determinative of the claimant’s inability to establish an entitlement to interest upon moneys paid over in *State Bank of New South Wales v FCT*.¹⁰² Similarly, in *Lahoud v Lahoud* no causative mistake was identified so as to warrant the conclusion that what had occurred on the facts was inequitable or unconscionable. Instead of pleading in general and abstract terms, the facts material to the case should be pleaded clearly and with particularity.

73 The general rule is that pleadings must plead all the material facts on which reliance is placed (see the review of some of the relevant case law in *E Co v*

⁹⁶ *Coshott v Lenin* [2007] NSWCA 153, [8]-[11]; *Chidiac v Maatouk* [2010] NSWSC 386, [216]ff; *Hightime Investments Pty Ltd v Adamus Resources Ltd* [2012] WASC 295; *Pavey*; *Lumbers*, [67].

⁹⁷ Carter, above n 65.

⁹⁸ *Lumbers*, [85].

⁹⁹ [2010] NSWSC 1297.

¹⁰⁰ *Ibid* [151].

¹⁰¹ (1992) 175 CLR 353 at 378-278; [1992] HCA 48; See also Deane J in *Pavey* and in *Lactos Fresh Pty Ltd v Finishing Services Pty Ltd (No 2)* [2006] FCA 748.

¹⁰² (1995) 62 FCR 371; (1995) 132 ALR 653.

Q (No 4)¹⁰³.¹⁰⁴ Any matter that, if not pleaded specifically, may take the opposite party by surprise must be specifically pleaded.¹⁰⁵ A failure to plead material facts may raise concerns in relation to procedural fairness.¹⁰⁶ Thus, material facts going to the discretion whether or not relief should be granted should be pleaded (such as those giving rise to alleged disproportion in the grant of relief to make good an expectation in an estoppel case) even though it is not necessary for the plaintiff as part of its pleaded cause of action to plead that the grant of the relief claimed would be proportionate to the alleged detriment. In relation to cases involving mistaken payments, being a core area of unjust enrichment, the defence of change of position is often raised.¹⁰⁷ Liability in unjust enrichment is strict and “determined primarily upon claimant-focused enquiries”.¹⁰⁸ Strictly speaking, the defence of change of position will not be available if the recipient of the benefit has not specifically pleaded change of position.¹⁰⁹

- 74 A further pleading issue arises when there is a disconnect between the claim pleaded and the relief sought. In *Brambles*, the ground of unjust enrichment was raised on appeal. It was argued by the appellant that the trial judge had erred in finding that the appellants would be unjustly enriched in certain circumstances. Whilst it was not necessary for this to be determined on appeal, Heydon JA (as his Honour then was) noted that a reason for not examining the unjust enrichment claim, had it come to that point, would have been because the way in which the claim was pleaded was different from the position as found by the trial judge.¹¹⁰ The disconformity between the way the claim was pleaded and the way the facts were found made it inappropriate to examine the unjust enrichment claim.

¹⁰³ *E Co [a pseudonym] v Q [a pseudonym] (No 4)* [2019] NSWSC 429, [403].

¹⁰⁴ J Jacob and I Goldrein, *Pleadings Principles and Practice* (Sweet & Maxwell, 1990) 48.

¹⁰⁵ Uniform Civil Procedure Rules 2005 (NSW), r 14.14(2)(a); *Tyson v Brisbane Market Freight Brokers Pty Ltd* (1994) 120 ALR 1; [1994] HCA 67; *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279; [1990] HCA 11.

¹⁰⁶ *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279; 286; [1990] HCA 11; *Mercanti v Mercanti* [2015] WASC 297.

¹⁰⁷ Hudson, above n 41, 21.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* 31.

¹¹⁰ (2001) 53 NSWLR 153; [2001] NSWCA 61, [93].

75 As an example, see *Anderson v McPherson (No 2)*, where Edelman J, sitting as his Honour then was in the Supreme Court of Western Australia, considered in some detail what can only be described as a pleading debacle. In that case, at the start of the trial the defendant (the daughter-in-law of the plaintiff) defending a claim of resulting trust by her former parents-in-law, amend her pleading to allege a raft of counterclaims based on mistake (later abandoned, failure of consideration, undue influence and unconscionable conduct). It is fair to say that his Honour was critical of the pleadings in a number of respects and found that the evidence did not support any of those claims. His Honour found that certain new pleas, including mistake, had no evidentiary or factual foundation.¹¹¹ His Honour was understandably critical of the submission apparently made by Counsel for the defendant that the Court could fill evidentiary gaps arising due to deficiencies in evidence which could have been led by the defendant (due to an asserted lack of clarity in the plaintiff's case) and held that evidentiary gaps prevented the relief counterclaimed and that Counsel had not led "sufficient evidence in support of the quantum of any claim for restitution".¹¹² Among the contentions there advanced was the proposition (not surprisingly, unsuccessful) that a claim for equitable compensation could be supported by reference to the "minimum equity principle" alone.¹¹³

76 Where there is a known cause of action with prescriptive elements that can be applied, it seems to me to be preferable (and safer) to opt for that over utilising a formulaic recitation of the four-step analysis of unjust enrichment, not least because of the uncertainty still surrounding the concept of unjust enrichment. At the very least, a novel unjust enrichment claim would best be used in the alternative to a traditional pleaded claim.

¹¹¹ [2012] WASC 19, [7]; [26]-[27].

¹¹² Ibid [8]-[9]; [207]ff.

¹¹³ Ibid [6]; [39]-[42]; in that regard see Dixon CJ in *Mayfair Trading Co Pty Limited v Dreyer* (1958) 101 CLR 428; [1958] HCA 55 as to the need for a plaintiff to show an equity to relief and that what constituted an equity to relief was determined by the doctrines of equity (especially at [19]).

CONCLUDING REMARKS

- 77 Does nomenclature matter? Years ago, a commentator at the then Professor Finn's seminar on restitution put forward an elaborate, conceptual framework re-casting, in unjust enrichment terms (as a claim in restitution for mistake of fact as to the consensual basis of the parties' relationship), what was readily explicable by the principles of conventional estoppel. When questioned as to how that construct differed from conventional estoppel, the somewhat startled response was to the effect that it was "just another way of looking at it". The hapless commentator (I hasten to add, not me) was roundly to chastise the making of a suggestion which unduly complicated the already problematic understanding of unjust enrichment.
- 78 I do not suggest that there is not merit in re-evaluating the conceptual framework in which equitable principles operate from time to time (and Professor Birks' academic writing is an example of the benefit to be gained from such an analysis) but – particularly for practitioners confronted with the need properly to formulate their clients' claim(s) for relief in particular cases – one must firmly keep in mind the views expressed by our ultimate appellate Court in this regard' and the practical and conceptual repercussions of what's in a name.
