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**"AUSTRALIAN CHALLENGES FOR THE LAW OF UNJUST  
ENRICHMENT"**

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## Introduction

One account of the status of unjust enrichment in Australia goes something like this.

About 25 years ago the common law was approaching maturity. The objective theory of contract had largely triumphed.<sup>1</sup> A conceptual model of torts had emerged which, whilst not particularly elegant,<sup>2</sup> had provided structure and some clarity to the law of torts. Then, at this time of maturity, an alien intruder disrupted the careful development of the common law. The belated recognition of the law of unjust enrichment in Australia<sup>3</sup> and England<sup>4</sup> (although earlier in Canada<sup>5</sup>) was one of those embarrassing things of the 1980's and early 90's, like pop music or mullet hairstyles.

In 1997, Peter Birks and Robert Chambers recounted a conversation with a former leading Australian judge which was consistent with this account of the law of unjust

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\* My thanks to Clare McKay and Long Pham for research assistance for this paper.

<sup>1</sup> *Taylor v Johnson* (1983) 151 CLR 422.

<sup>2</sup> See the discussion in J Edelman, J Goudkamp and S Degeling 'Introduction' in *Torts in Commercial Law* (2011).

<sup>3</sup> *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221. See also *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988)164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

<sup>4</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

<sup>5</sup> *Deglman v Guarantee Trust Co of Canada* [1954] SCR 725.

enrichment. This judge was a truly great equity lawyer and legal historian. Birks and Chambers said that this judge:<sup>6</sup>

remarked to one of us, 'We don't need a law of restitution. It is no more than a neo-Marxist conspiracy to upset law that has always been perfectly well understood under the familiar headings of the common counts.

As Birks and Chambers recognised, the judge who said this was one of the few lawyers who truly understood the origins of the common counts. He could have explained the different species of assumpsit. He knew the difference between assumpsit and debt. He could also have expounded the difference between assumpsit and case and when an 18th century plaintiff would be non-suited.

But there are not many lawyers today who carry in their heads the history and precedents of the forms of action. Even if lawyers today generally did think in terms of forms of action, the first part of this paper seeks to expose the fallacy that it was a wrong turning for the law of unjust enrichment to break free from the forms of action. The short historical account shows that the law of unjust enrichment has a heritage at least as distinguished as our modern conception of the law of contract or torts even though the modern law of unjust enrichment took longer to break free from the forms of action.

Today it is well established that liability for unjust enrichment can arise, subject to defences, if the following are satisfied: (1) the defendant is enriched, (2) the defendant's enrichment is at the expense of the plaintiff, and (3) the defendant's enrichment is unjust or, in other words, an 'unjust factor' causes the defendant's enrichment. These three questions have been set out many times in Australian decisions.<sup>7</sup> This reductionist enquiry provides important protection against the law of unjust enrichment degenerating into an exercise of idiosyncratic discretion.<sup>8</sup>

After setting out this historical account of unjust enrichment, I want to consider one very significant question for the law of unjust enrichment in twenty first century Australia. The question is the meaning of the first of these enquiries, 'enrichment', and the manner in which a court will consider a defendant to have been enriched. The answer to this question may have very significant effects for areas of law including trusts, subrogation, rescission and rectification. This paper is a sketch of this challenge for the law of unjust enrichment with a focus upon the law of trusts.

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<sup>6</sup> P Birks and R Chambers *Restitution Research Resource* (1997) at 1.

<sup>7</sup> See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 568 fn 257 (Kirby J) 'generally accepted analysis'. See also *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd* [2002] NSWCA 263 at [34] (Spigelman CJ); *Hollis v Atherton Shire Council* [2003] QSC 147 at [10] (Jones J); *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [222] (Tobias JA); *Ideas Plus Investments Ltd v National Australia Bank Ltd* [2006] WASCA 215 at [65] (Steytler P), [96] (McLure JA); *Ethnic Earth Pty Ltd v Quoin Technology Pty Ltd* [2006] SASC 7; (2006) 94 SASR 103, 117 [65] (Bleby J); *Natuna Pty Ltd v Cook* [2007] NSWSC 121, [155] (Biscoe AJ); *ABL Custodian Services v Smith* [2010] VSC 548 at [54] (Croft J); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Limited & Ors* [2011] NSWSC 267 at [21] (Einstein J). See also K Mason, J Carter and G Tolhurst *Restitution Law in Australia* (2nd edn, 2008) 43 [141].

<sup>8</sup> *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257 (Deane J).

## An historical account of unjust enrichment

The origins of unjust enrichment are Roman. In the formulary period of Roman law, unjust enrichment was concealed within the praetor's formula for relief. It emerged generally during the classical period, described as an obligation *quasi ex-contractu*: 'obligations which cannot strictly be seen as arising from contract but which, because they do not owe their existence to wrongdoing are said to arise as though from a contract.'<sup>9</sup> There was some limited recognition that 'quasi contract' was not the best name for this category of law. In one text in the Digest, attributed to Pomponius, it was said that *iure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiolem* (it is natural justice that no-one should unjustly enrich himself to the detriment of another).<sup>10</sup>

The English pre-history of unjust enrichment followed a similar pattern of development to that of Roman law. During the period of the forms of action, common law claims for unjust enrichment were brought as writs of debt or account. The nature of the action was concealed behind a bare plea that the defendant owed the money as a debt or must account for it. For instance, an action for debt was brought against the abbot of a monastery where a monk purchased goods which were used by the monastery.<sup>11</sup> When the nature of these actions was discussed, they often were referred to by the use of the Roman *quasi-contract*.

After a misinterpretation of a decision of the Court of Exchequer Chamber in 1648,<sup>12</sup> the common law courts began to allow plaintiffs to plead unjust enrichment cases in forms of action known as *indebitatus assumpsit* (a species of 'assumpsit' or promise) rather than in debt.<sup>13</sup>

These pleadings involved an allegation by the plaintiff that the defendant, being indebted (*indebitatus*), had promised to pay the debt (*assumpsit*) but failed to pay.<sup>14</sup> This form of action was preferable to debt because, unlike debt, a defendant could not wage his law. He could not defend the case by finding witnesses or compurgators (often paid for the service) to swear to his innocence. *Indebitatus assumpsit* cases lay

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<sup>9</sup> P Birks and G McLeod (trans) *Justinian's Institutes* (1986 Duckworth London) at 117. The Latin text of 'said to arise as though from a contract' is *quasi ex contractu nasci videntur*. In another Digest extract from Pomponius, the reference to the obligation not to unjustly enrich oneself at the expense of another appears without the words *et injuria* (unjust): Digest 12.6.14.

<sup>10</sup> Digest 50.17.06. Discussed in D Ibbetson 'Unjust Enrichment in English law' in E Schrage (ed) *Unjust Enrichment and the Law of Contract* (2001 Kluwer Law International Netherlands) 33 at 35.

<sup>11</sup> D Ibbetson *A Historical Introduction to the Law of Obligations* (1999 Oxford University Press Oxford) 266 citing YB T.22 Edw III f8 pl16.

<sup>12</sup> *Slade's case* (1648) Style 138.

<sup>13</sup> Although only initially including money counts, from the mid-19<sup>th</sup> century counts of *quantum meruit* and *quantum valebant*, for the value of services and goods, were also pleaded as *indebitatus assumpsit*: J H Baker 'The History of Quasi-Contract in English Law' in W R Cornish, R Nolan, J O'Sullivan and G Virgo *Restitution, Past, Present and Future* (1998 Hart Publishing Oxford) 37 at 41.

<sup>14</sup> E Lawes *Practical Treatise on Pleading in Assumpsit* (1810 W Reed London) at 418-503.

for anything that could give rise to a debt. A number of common counts arose which alleged the circumstances in which the debt arose.<sup>15</sup>

One of the common counts of *indebitatus assumpsit* was the common count of money had and received. The pleading of an action for money had and received was borrowed from the old writ of account against a receiver and alleged that the defendant ‘had’ money that in law had been ‘received to the use of the plaintiff’. Like the other counts in *indebitatus assumpsit*, money had and received was originally brought for a genuine promise. The defendant ‘had and received’ money to the use of the plaintiff and had to pay it over because that was what he had promised to do. The count for money had and received moved ‘very slowly outwards from a genuinely contractual core’<sup>16</sup> to fictional promises. The fictional promise cases covered claims for restitution of value wrongfully received as well as claims for unjust enrichment. For instance, where a plaintiff overpaid money to a defendant by mistake, the plaintiff could recover the amount of the overpayment on a count of money had and received in *indebitatus assumpsit*.<sup>17</sup>

The implied promise fiction was obvious because the defendant had never promised to return the money; indeed, the defendant might not even have realised that the money was paid by mistake.<sup>18</sup> But the fiction persisted and these actions in *indebitatus assumpsit* were generally known as *quasi-contract*. This language, borrowed from the Romans, meant ‘as though from’ (quasi) contract because of the ‘implied’ or fictitious promise.

English law almost broke free from the fiction of implied contract in the mid-18<sup>th</sup> century when Lord Mansfield explained that the basis of restitutionary recovery was specific reasons for injustice (referred to in the modern law as ‘unjust factors’).<sup>19</sup> In a celebrated passage from *Moses v Macferlan*,<sup>20</sup> Lord Mansfield said that<sup>21</sup>

If the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff’s case, as it were upon a contract (‘quasi ex contractu’ as the Roman law expresses it.) This species of assumpsit (‘for money had and received to the plaintiff’s use’) lies in numberless instances....

English law could have immediately followed Lord Mansfield’s lead and recognised (as it now does) a law of unjust enrichment which insisted upon a particular reason why restitution should be awarded, or as we now say, an ‘unjust factor’. This was the

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<sup>15</sup> D Ibbetson *A Historical Introduction to the Law of Obligations* (1999 Oxford University Press Oxford) at 148.

<sup>16</sup> D Ibbetson *A Historical Introduction to the Law of Obligations* (1999 Oxford University Press Oxford) at 272.

<sup>17</sup> Eg *Kelly v Solari* (1841) 9 M & W 54.

<sup>18</sup> F W Maitland *The Forms of Action at Common Law* (ed A H Chaytor and W J Whittaker) (1965 Cambridge University Press Cambridge) at 70.

<sup>19</sup> See *Lindon v Hooper* (1776) 1 Cowp 414 at 416; 98 ER 1160 at 1162; *Moses v Macferlan* (1760) 2 Burr 1005 at 1012; 97 ER 676 at 681 (Lord Mansfield comparing the action to a bill in equity).

<sup>20</sup> *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676.

<sup>21</sup> (1760) 2 Burr 1005 at 1008-1009; 97 ER 676 at 678.

course proposed by Sir William Evans.<sup>22</sup> However, Lord Mansfield's valiant attempt at classification was overshadowed by the publication of Sir William Blackstone's comprehensive *Commentaries on the Laws of England*,<sup>23</sup> which entrenched the dominant language of implied contract and the Roman quasi-contract.

When, in the mid-19<sup>th</sup> century, a series of procedural reforms<sup>24</sup> abolished the need to specify a form of action and therefore abolished the requirement to plead the (often) fictitious promise in *indebitatus assumpsit*,<sup>25</sup> unjust enrichment actions remained widely known as quasi-contract or implied contract. The high-water mark of the quasi-contract approach was *Sinclair v Brougham*,<sup>26</sup> a decision not explicitly overruled until 1996.<sup>27</sup> In that case, Viscount Haldane LC said that when the common law 'speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law.'<sup>28</sup>

One of the most significant influences for the development of the modern Anglo-Australian unjust enrichment law was the writing of Professor James Barr Ames.<sup>29</sup> Ames was writing at the time of the great formative development of the common law of obligations.

In an article in 1888, Ames referred to three categories of quasi-contract: judgment debts, statutory (and customary) dues, and 'the fundamental principle that no one ought unjustly to enrich himself at the expense of another'.<sup>30</sup> The latter was the largest of all. Although Ames did not cite a source for the third category, it may have been borrowed from Pomponius.<sup>31</sup>

A colleague of Ames', Professor Keener, drew from Ames' work,<sup>32</sup> and in an extremely influential monograph explained that the instances of quasi-contractual liability rested 'upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another.'<sup>33</sup> In a text on quasi-contract which followed Keener's in 1913, the first two categories of Ames' were quietly abandoned and quasi-contract was treated as synonymous with unjust enrichment.<sup>34</sup> Fifty years later,

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<sup>22</sup> W Evans 'An Essay on the Action for Money Had and Received' in W Evans *Essays: On the Action for Money Had and Received, on the Law of Insurances and on the Law of Bills of Exchange and Promissory Notes* (1802 Merrit & Wright Liverpool); reprinted in [1998] RLR 1.

<sup>23</sup> W Blackstone *Commentaries on the Laws of England* (1765-1769), Books I- IV.

<sup>24</sup> The *Common Law Procedure Act* 1852 (UK) which followed the 1832 Hilary Rules.

<sup>25</sup> *Common Law Procedure Act* 1852 (UK) Section 49.

<sup>26</sup> *Sinclair v Brougham* [1914] AC 398.

<sup>27</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

<sup>28</sup> *Sinclair v Brougham* [1914] AC 398 at 415.

<sup>29</sup> See esp J B Ames 'The History of Assumpsit: Implied Assumpsit' (1888) 2 Harv Law Rev 53.

<sup>30</sup> J B Ames 'The History of Assumpsit: Implied Assumpsit' (1888) 2 Harv Law Rev 53 at 64.

<sup>31</sup> Ames was a civilian scholar who lectured that 'the equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person should not unjustly enrich himself at the expense of another, has established itself very gradually in the common law': J B Ames *Lectures on Legal History* (1913 Harv Uni Press Cambridge) at 162.

<sup>32</sup> That it was Keener drawing from Ames and not vice-versa is explained in A Kull 'James Barr Ames and the Early Modern History of Unjust Enrichment' (2005) 25 OJLS 297.

<sup>33</sup> W A Keener *A Treatise on the Law of Quasi-Contracts* (1893 Baker and Voorhis & Co, Mass) at 19.

<sup>34</sup> F C Woodward *The Law of Quasi Contracts* (1913, Little Brown & Co, Boston).

this view was confirmed with the authority of the United States *Restatement of the Law of Restitution*.<sup>35</sup>

Following academic and judicial dissatisfaction with the notion of quasi-contract,<sup>36</sup> a turning point for unjust enrichment in England came in Lord Wright's speech in the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*.<sup>37</sup> Lord Wright knew the *Restatement of the Law of Restitution* very well; he had published a lengthy review of it in 1938.<sup>38</sup> The *Fibrosa* case was the first explicit English judicial recognition of the law of 'unjust enrichment'. The plaintiffs were a Polish company that had made an advance payment for a contract for the delivery of machinery from Britain in 1941. War broke out. The House of Lords held that the contract had been frustrated, and that the Polish company was entitled to repayment of the advance as 'money had and received' in *indebitatus assumpsit*.<sup>39</sup> The action for money had and received could not, without a fiction, be based upon a contractual agreement to repay nor upon any wrongdoing by the defendant. Lord Wright saw this and, echoing Lord Mansfield, explained that the reason for restitution in the context of a claim based upon failure of consideration was an obligation to pay arising from the circumstances.<sup>40</sup> Later he explained that<sup>41</sup>

[t]he obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort.

As for the category that this 'creation of law' fell into, Lord Wright said that 'any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment... Payment under a mistake of fact is only one head of this category of the law.'<sup>42</sup>

Apart from Lord Wright's opinion, there was another powerful force operating against the implied contract theory. This was an extraordinary English treatise by Goff (later Lord Goff) and Jones (later Professor Jones, the Downing Professor of the laws of England) in 1966.<sup>43</sup> At the same time there had begun a series of rejections of the theory of implied contract by Australian judges.<sup>44</sup>

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<sup>35</sup> WA Seavey and AW Scott *Restatement of the Law of Restitution* (1937, American Law Institute, St Paul Minn) at 14-15.

<sup>36</sup> See eg *United Australia v Barclays Bank* [1941] AC 1 at 29 '[t]hese fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared...' (Lord Atkin).

<sup>37</sup> [1943] AC 32.

<sup>38</sup> (1937) 51 Harv Law Rev 369.

<sup>39</sup> Overruling *Chandler v Webster* [1904] 1 KB 493.

<sup>40</sup> [1943] AC 32 at 62. See also at 47 (Viscount Simon LC), 55 (Lord Atkin).

<sup>41</sup> [1943] AC 32 at 62.

<sup>42</sup> [1943] AC 32 at 61.

<sup>43</sup> R Goff and G Jones *The Law of Restitution* (1966 Sweet & Maxwell London).

<sup>44</sup> *Watney v Mass* (1954) 54 SR (NSW) 203 at 206 (Street CJ), 222 (Herron J); *Mason v NSW* (1959) 102 CLR 108 at 146 (Windeyer J); *Deposit & Investment Co Ltd v Kaye* (1962) 63 SR (NSW) 453 at 457 (Walsh JA).

In 1987 in Australia<sup>45</sup> and 1991 in England,<sup>46</sup> it was conclusively recognised by the highest courts that unjust enrichment at the expense of another was a legal concept. The first comprehensive Australian text on the subject (covering restitution for unjust enrichment as well as restitution for wrongdoing) was published in 1995.<sup>47</sup> The recognition of unjust enrichment as a category of law then required an understanding of its operation and meaning. There were two broad possibilities.

The first possible approach to the concept of unjust enrichment might have been to see it merely as a vague principle of justice.<sup>48</sup> Much of the writing and decisions on unjust enrichment in the United States is characterised by this idea that ‘unjust enrichment is an indefinable idea in the same way that justice is an indefinable idea’.<sup>49</sup> Unjust enrichment in the United States is commonly treated as a ‘loose framework as well as an invitation for normative inquiry’.<sup>50</sup> This United States approach cannot be solely attributed to the *Restatement of the Law of Restitution* in 1937. As we saw above, that Herculean work succeeded in breaking unjust enrichment free from the fiction of implied contract. And although the Restatement did not elaborate on the nature or operation of unjust enrichment in detail, the reporters of the Restatement knew that the principle of unjust enrichment would need to be further refined and developed.<sup>51</sup>

The second approach is to explain the legal concept of unjust enrichment as a category of law. Like the legal conception of torts, it provides an organising conception for various different instances of liability. By the time of the *Restatement of the Law (Third) Restitution and Unjust Enrichment*,<sup>52</sup> the reporter, Professor Kull, referred to ‘unjust enrichment as an independent basis of liability in common law legal systems—comparable in this respect to a liability in contract or tort[s]...’

In 1966, the opening pages of the first edition of Goff and Jones' *The Law of Restitution* seemed to suggest that unjust enrichment ought to be seen in the first manner, as a vague principle: ‘unjust enrichment is simply the name which is commonly given to the principle of justice’<sup>53</sup> and, ‘in a search for unifying principle at this level we should not expect to find any precise ‘common formula’, but rather an abstract proposition of justice.’<sup>54</sup> But the authors went on to say that ‘the search for principle should not be confused with the definition of concepts’.<sup>55</sup> The legal concept of unjust enrichment was introduced two pages later:<sup>56</sup>

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<sup>45</sup> *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221. See also *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 at 673.

<sup>46</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

<sup>47</sup> K Mason and J Carter *Restitution Law in Australia* (1995 Butterworths Sydney).

<sup>48</sup> *Baylis v Bishop of London* [1912] 1 Ch 127 at 140 (Hamilton LJ).

<sup>49</sup> G E Palmer *The Law of Restitution* (1978 Little Brown & Co Boston) at 5.

<sup>50</sup> H Dagan *The Law and Ethics of Restitution* (2004 Cambridge University Press Cambridge) 26.

<sup>51</sup> WA Seavey and AW Scott ‘Restitution’ (1938) 54 LQR 29 at 29.

<sup>52</sup> American Law Institute *Restatement of the Law (Third) Restitution and Unjust Enrichment* (2011) 3. The second Restatement was never completed.

<sup>53</sup> R Goff and G Jones *The Law of Restitution* (1966 Sweet & Maxwell London) at 11.

<sup>54</sup> R Goff and G Jones *The Law of Restitution* (1966 Sweet & Maxwell London) at 12.

<sup>55</sup> R Goff and G Jones *The Law of Restitution* (1966 Sweet & Maxwell London) at 12.

<sup>56</sup> R Goff and G Jones *The Law of Restitution* (1966 Sweet & Maxwell London) at 14.

The principle of unjust enrichment is capable of elaboration. It presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.

It is this second approach which has now achieved dominance in England and Australia. In a passage which was later quoted by five justices,<sup>57</sup> Deane J said that unjust enrichment is<sup>58</sup>

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.

The High Court of Australia unanimously confirmed this approach in *Bofinger v Kingsway Group Limited*<sup>59</sup> explaining that 'the concept of unjust enrichment may provide a means for comparing and contrasting various categories of liability.' It may also 'assist in the determination by the ordinary processes of legal reasoning of the recognition of obligations in a new or developing category of case'.<sup>60</sup> As Deane J had said earlier,<sup>61</sup> the use of unjust enrichment is an 'informative generic label for the purposes of classification in Australian law' of a 'notion underlying a variety of distinct categories of case...[in which] a benefit [is] derived at the expense of a plaintiff.'

The same approach is advocated in Australia in the work of Justice Mason, Professor Carter and Professor Tolhurst.<sup>62</sup> And in 2011 when the 8<sup>th</sup> edition of Goff and Jones' classic work, now edited by Professors Charles and Paul Mitchell and Dr Watterson, became known as *Goff and Jones' The Law of Unjust Enrichment* the second approach was explicitly adopted. At the start of the book<sup>63</sup> the passage above from Deane J is quoted. The editors of Goff and Jones explain that unjust enrichment is therefore 'an organising concept that groups together decided authorities 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 that is gained at the claimant's expense in circumstances that the law deems to be unjust.'<sup>64</sup>

Intermediate appellate courts in Australia have adopted an approach to the legal concept of unjust enrichment by which the ordinary processes of analogical legal reasoning permit courts to compare and contrast the various categories of legal liability based on unjust enrichment. That approach was pioneered in a groundbreaking book by Professor Birks first published in 1985.

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<sup>57</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

<sup>58</sup> *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257.

<sup>59</sup> [2009] HCA 44; (2009) 239 CLR 269 at [88].

<sup>60</sup> [2009] HCA 44; (2009) 239 CLR 269 at [89].

<sup>61</sup> *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583, 617.

<sup>62</sup> K Mason, J Carter, G Tolhurst *Mason and Carter's Restitution Law in Australia* (2nd edition, 2008 LexisNexis Sydney) at 12 [110].

<sup>63</sup> C Mitchell, P Mitchell, S Watterson (eds) *Goff and Jones The Law of Unjust Enrichment* (8<sup>th</sup> edn, 2011) 6-7 [1-08].

<sup>64</sup> C Mitchell, P Mitchell, S Watterson (eds) *Goff and Jones The Law of Unjust Enrichment* (8<sup>th</sup> edn, 2011) 6-7 [1-08].



In his book, Birks provided an immensely detailed analysis of how unjust enrichment cases dealt with the four central issues:<sup>65</sup>

- (1) The defendant must be enriched;
- (2) the enrichment must come at the expense of the plaintiff;
- (3) the enrichment must be unjust; and
- (4) a court should consider if any defences apply.

The ‘generally accepted analysis’ in Australia is that liability for unjust enrichment, subject to defences, requires an examination of these first three questions.<sup>66</sup>

Each of these enquiries raise extremely difficult issues. For instance, the boundaries of what will count as an unjust factor is extremely controversial. Examples of unjust factors were given by Lord Mansfield in *Moses v Macferlan*:<sup>67</sup>

money paid by mistake; or on a consideration which happens to fail; or for money got through imposition, (express, or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation.

A quarter of a millennium later, although it is well established in Australia that liability in unjust enrichment requires the existence of an ‘unjust factor’<sup>68</sup> it is difficult to find judicial recognition of unjust factors beyond those in this list. In one of the most recent pronouncements on this subject by the High Court of Australia, a joint judgment recognised only mistake, duress and illegality as unjust factors.<sup>69</sup>

But these are matters of detail with which the subject will evolve in the manner in which the common law has always evolved. Sadly, however, as we are approaching two centuries since the abolition of the forms of action, we still see pleadings, almost

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<sup>65</sup> P Birks *An Introduction to the Law of Restitution* (rev ed 1989 Oxford University Press Oxford) at 21.

<sup>66</sup> See footnote 7 above.

<sup>67</sup> (1760) 2 Burr 1005 at 1012; 97 ER 676 at 681.

<sup>68</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Wasada Pty Limited v State Rail Authority of New South Wales (No.2)*[2003] NSWSC 987 at [16] (Campbell J) (emphasis in original) citing K Mason & J Carter *Restitution Law in Australia* (1995 Butterworths Sydney) at 59-60; *Matland Holdings Pty Ltd v NTZ Pty Ltd* [2004] FCA 710 at [171] (Kenny J); *Ideas Plus Investments Ltd v National Australia Bank Ltd* [2005] WASC 51 at [81] (Commissioner Siopis SC); *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346 at 397 (Sackville J), an appeal to the High Court did not affect this obiter dictum: *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 158-159 [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Haxton v Equus Corp Pty Ltd (formerly Equus Financial Services Ltd)* (ACN 006 012 344) (2010) 265 ALR 336 at 384 [261] (Dodds-Streton JA); *Chidiac v Matouk* [2010] NSWSC 386 at [216] (Ward J); *Lahoud v Lahoud* [2010] NSWSC 1297, [152]-[164] (Ward J); *Crown in the right of New South Wales v Anthony Gevaux* [2011] NSWSC 608 at [96] (Ward J).

<sup>69</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). As to failure of consideration, see also *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516.

on a daily basis, which plead 'money had and received,' 'money paid to the defendant's use,' 'quantum meruit,' or 'quantum valebat'.

## Enrichment and the law of trusts: the issue of principle

Let me start with a basic example. Suppose I mistakenly transfer title to a Picasso painting by delivery of the painting to you. My mistake is that I owed you a large debt. No debt was owed. I transfer the title to the painting to you mistakenly thinking that I have discharged this debt by the transfer. My mistake is not one which is of such a serious nature that it invalidates my transfer of title to you.<sup>70</sup> I no longer have the title to the Picasso painting. You have it. But I only transferred it by mistake. You are enriched. And your enrichment is at my expense.

Most legal systems around the world recognise that you are under an obligation to pay me the value of the painting at the time you received it, subject to various possible defences. Australian law is one of these legal systems. You have an obligation to pay me the value of the title to the painting which I mistakenly transferred to you. The common count of *quantum valebat* was the usual form behind which this claim for unjust enrichment was historically hidden. The cause of action is now recognised as falling within the law of unjust enrichment.<sup>71</sup>

But isn't there a much better way to reverse your enrichment? The money value of the Picasso painting is not what I want. What I want is the title to the Picasso itself. Now here is a conundrum: the law has already made the decision that title to the Picasso has passed to you. It would be nonsense if the law of property said that title had passed to you but the law of unjust enrichment said that I was the owner of the Picasso.

One solution might have been for the common law to recognise a broad action akin to an action which Civilian lawyers describe, from the Roman action, as a *vindicatio*. That is an action where a plaintiff says "That is mine, give it back". But that action was imperfect. A defendant to a *vindicatio* could always meet the demand by paying the money value of the property right instead of returning it.

A solution of the common law, through the principles of equity, might be the trust. The trust is an institution which allows us to say that you are the owner of the car but that you hold your rights to the car for me. A fully entitled beneficiary of a trust can demand the re-transfer of title.<sup>72</sup> After demand, the trustee comes under a duty to convey.

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<sup>70</sup> *Cundy v Lindsay* (1878) 3 App Cas 459.

<sup>71</sup> *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221 at 227 (Mason and Wilson JJ) 251-256 (Deane J); *Ideas Plus Investments Ltd v National Australia Bank Ltd* [2006] WASCA 215 at [63] (Steytler P);

<sup>72</sup> *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 482.

## Enrichment and the law of trusts: the issue of authority

It is, in theory, possible for a trust to operate as a remedy to reverse unjust enrichment. But the law is not a blank slate. This issue of principle must be examined in the light of authority. First have courts ever explicitly considered whether a trust could be a response to unjust enrichment? Secondly, since a claim for unjust enrichment arises as a result of unjust factors such as mistake, duress, undue influence or failure of consideration, have courts ever considered whether a trust arises as a result of enrichments conferred upon a defendant by mistake, duress, undue influence or failure of consideration?

### ***Authority recognising a trust as a response to unjust enrichment***

Although there is considerable academic support for a 'restitutionary trust' as a response to unjust enrichment,<sup>73</sup> there is almost no authority in which a court has explicitly recognised a trust as a response to unjust enrichment. A recent decision of the Supreme Court of Canada is a rare exception. In that case Cromwell J, writing for the court, said that 'a successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award"'.<sup>74</sup> He explained that the latter was an award of a constructive trust which arose when a monetary award is inappropriate or insufficient.<sup>75</sup>

Neither Australian nor English law has yet explicitly recognised the trust as an institution which can provide a legal response to unjust enrichment. However, there is a line of authority in England and Australia which recognises that a trust arises in circumstances involving a transfer of title where the recipient was not intended to benefit from the title received.

One example from this line of authority is the imposition of a resulting trust which is imposed by law is where an attempt to create an express trust fails.<sup>76</sup> The transferor does not intend to create a trust in favour of himself or herself, but a trust 'automatically' arises because of the lack of intention, usually by the immediate transferor, to benefit the recipient.<sup>77</sup> Another example is the line of cases where a

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<sup>73</sup> See especially P Birks 'Restitution and Resulting Trusts' in *Equity: Contemporary Legal Developments* (1992) (ed. Goldstein) at 335; R Chambers *Resulting Trusts* (1997); B McFarlane *The Structure of Property Law* (2008) at 314-331; C Mitchell, P Mitchell and S Watterson (eds) *Goff and Jones' The Law of Unjust Enrichment* (2011) 834-835 [38-36].

<sup>74</sup> *Kerr v Baranow* [2011] SCC 10; [2011] 1 SCR 269 [46].

<sup>75</sup> *Kerr v Baranow* [2011] SCC 10; [2011] 1 SCR 269 [50].

<sup>76</sup> See the discussion in *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715 [49] (Austin J); and *Yard v Yardoo Pty Ltd* [2006] VSC 109 [298] (Cummins J), discussion not considered on appeal in either *Yard v Yardoo Pty Ltd* [2007] VSCA 35 or *Kara Kar Holdings Pty Ltd v Knudsen* [2001] NSWCA 276. See also J D Heydon and M J Leeming *Jacobs' Law of Trusts* (7th ed, 2006) 236 [1205].

<sup>77</sup> *Robb Evans of Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82; (2004) 61 NSWLR 75, 99-100 [111]-[113] (Spigelman CJ) citing R Chambers *Resulting*

trust is imposed upon the receipt of legal title by a recipient where the transfer of legal title to an asset or its substitute product occurs in circumstances 'about which the transferor was entirely unaware'.<sup>78</sup>

Although none of these English or Australian cases has explicitly recognised unjust enrichment as the source of the trust, there is a compelling reason why the reasoning in many of the cases concerning 'automatic resulting trusts' needs to be re-considered and re-examined. This is because it is often said in these cases that the trust arises because the transferor held both a legal and equitable interest and divested only the legal interest.<sup>79</sup> But the holder of the legal right held no equitable right at all. When the trust is created a *new* equitable interest arises in favour of the settlor.<sup>80</sup> Unless these decisions, and many others like them, which I consider below, are to be overturned, then the reasoning must be refined.

Since these decisions must be understood without the language or reasoning concerning the transferor's 'retention of an equitable interest', I can see only one other justification for the imposition of a trust. These trusts are imposed as a legal response to prevent the recipient having the use and enjoyment of rights for his or her own benefit where that use and enjoyment was not intended.<sup>81</sup> It is not a significant step from this reasoning to conclude that the imposition of a trust in these cases is concerned with preventing unjust enrichment. As Lord Millett has suggested extra-judicially endorsing the thesis of Professor Chambers:<sup>82</sup> 'the development of a coherent doctrine of proprietary restitution for subtractive unjust enrichment is impossible unless it is based on the resulting trust as traditionally understood'.<sup>83</sup>

## ***Authority recognising a trust in instances where a defendant obtains rights as a result of an unjust factor***

### **(1) Transfer of rights from a plaintiff without the plaintiff's knowledge**

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*Trusts* (1997); *Air Jamaica Ltd v Charlton* [1999] UKPC 20; [1999] 1 WLR 1399, 1412 (Lord Millett).

<sup>78</sup> *Robb Evans of Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82; (2004) 61 NSWLR 75, 99 100 [111] [113] (Spigelman CJ).

<sup>79</sup> W Swadling 'Explaining Resulting Trusts' (2008) 124 LQR 72, 99-100 discussing *Vandervell v Inland Revenue Commission* [1966] UKHL 3; [1967] 2 AC 291, 313 (Lord Upjohn), 329 (Lord Wilberforce). See also *Air Jamaica Ltd v Charlton* [1999] UKPC 20; [1999] 1 WLR 1399, 1412 (Lord Millett).

<sup>80</sup> *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14; (1982) 149 CLR 431, 463 (Aickin J); *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20; (2005) 220 CLR 592, 606 [30] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ); *Peldan v Anderson* [2006] HCA 48; (2006) 227 CLR 471, 485 [37] (Gummow ACJ, Kirby, Hayne, Callinan & Crennan JJ).

<sup>81</sup> *Anderson v McPherson (No 2)* [2012] WASC 19 at [103].

<sup>82</sup> R Chambers *Resulting Trusts* (1997).

<sup>83</sup> P Millett 'Restitution and constructive trusts' (1998) 114 LQR 399, 410.

I have mentioned above the recognition in Australia that a trust arises where a defendant obtains rights from a plaintiff without the knowledge of the plaintiff. The origin of this principle is the decision of the High Court in *Black v S Freedman & Company*.<sup>84</sup> In that case, Mr Black stole approximately £1,400 from his employer in cash over a period of time. He paid the money into his bank account. Subsequently he withdrew funds from his bank account and, in several transactions, paid them to his wife's bank account. The question for the High Court of Australia was whether Black's wife held her bank account (rights against her bank) on trust for Black's employer. The court unanimously upheld the trial judge's decision that the money was held by the wife on trust.

In a very often quoted statement, O'Connor J said that '[w]here money has been stolen, it is trust money in the hands of a thief, and he cannot divest it of that character'.<sup>85</sup> This statement need not be taken literally; in the context of the case the only question was whether Black's rights against his bank were held on trust. The notes and coins originally stolen by Mr Black were owned by his employer. Black had a right to possession of those notes, but until those notes and coins were deposited in Black's bank, there was no need for the creation of a trust. The employers' right of ownership was unaffected.<sup>86</sup> However, upon the deposit by Mr Black of the notes and coins with his bank, the employers' right to the money was extinguished. As Griffith CJ explained in *Creak v James Moore & Sons Pty Ltd*,<sup>87</sup> the decision in *Black* concerned the 'fund representing the proceeds'. Without the order that Black held his rights against his bank on trust for his employer then Black would have obtained the use and enjoyment of those rights at the expense of his employer.

As I have explained above, this long line of authority, together with cases of 'automatic resulting trusts', involves the common element that the plaintiff was either unaware of the transfer or did not intend to benefit the recipient from the use and enjoyment of the rights transferred.

However, in Australia the cases where the transfer of rights was entirely without the knowledge of the plaintiff cannot be explained as arising as a result of unjust

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<sup>84</sup> *Black v S Freedman & Company* [1910] HCA 58; (1910) 12 CLR 105.

<sup>85</sup> [1910] HCA 58; (1910) 12 CLR 105, 110 (O'Connor J). Quoted, with approval, in *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426, 432 (Griffith CJ); *Spedding v Spedding* (1913) 30 WN (NSW) 81, 82 (Harvey J); *Australian Postal Corp v Lutak* (1991) 21 NSWLR 584, 589 (Bryson J); *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 565 (Lord Templeman); *Zobory v Federal Commissioner of Taxation* (1995) 64 FCR 86, 90 (Burchett J); *Cashflow Finance Pty Ltd (In Liq) v Westpac Banking Corp* [1999] NSWSC 671 at [464] (Einstein J); *Menzies v Perkins* [2000] NSWSC 40, [9] (Hunter J); *Lurgi (Australia) Pty Ltd v Gratz* [2000] VSC 278, [74] (Byrne J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 316-317 [300] (Callinan J)

<sup>86</sup> There has been considerable debate about the meaning of this sentence of O'Connor J. But since a trust arises over the substitute for the thief's right to possession of the stolen asset and since the owner has a superior right to possession of the stolen tangible property, very little will depend on whether or not a trust arises of the thief's initial right to possession. For the debate see J Tarrant 'Property rights to stolen money' (2005) 32 UWAL Rev 234; J Tarrant 'Theft Principle in Private Law' (2006) 80(8) ALJ 531; S Barkehall Thomas 'Thieves as trustees: The enduring legacy of *Black v S Freedman & Co Ltd*' (2009) 3 J Eq 1; J Tarrant 'Thieves as trustees: In defence of the theft principle' (2009) 3 J Eq 170; R Chambers 'Trust and theft' in E Bant and M Harding (eds) *Exploring Private Law* (2010) ch 10.

<sup>87</sup> *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426, 432 (Griffith CJ).

enrichment. The High Court of Australia has said that a transfer without knowledge is not an unjust factor. Referring to the argument that an 'enrichment was unjust because it was without [the plaintiff's] knowledge or fully informed consent', the High Court said that '[n]o case, even in England, has treated ignorance as a "reason for restitution"'.<sup>88</sup>

But the imposition of a trust in Australian law has not been confined to instances where the plaintiff had no intention to benefit the recipient from the use and enjoyment of an asset transferred without the plaintiff's knowledge. The principle extends also to instances involving established unjust factors such as mistake, failure of consideration or undue influence.<sup>89</sup> In these cases the plaintiff does intend to make the transfer but the plaintiff's intention is impaired, or conditional.

## **(2) Transfer of rights from a plaintiff as a result of a misrepresentation or mistake**

The trust which is imposed where a plaintiff's assets have been stolen has been extended to cases where the plaintiff's asset was obtained by fraud.<sup>90</sup> Where the fraud involves the plaintiff entering into a contract to transfer title to the assets, the trust will arise after rescission of the contract.<sup>91</sup> But it is not only instances of fraudulent transfer of assets where a trust might be imposed.

Where a plaintiff's assets are transferred as a result of an innocent misrepresentation which was intended to, and did, induce entry into a contract to convey title, some cases suggest that the transferor can elect to rescind the contract. If so, a trust of the title would arise ([t]he title would revest in equity'<sup>92</sup>). However, following the contentious decision of Joyce J in *Seddon v North Eastern Salt Co Ltd*,<sup>93</sup> there has been a century of debate on this issue concerning whether, after conveyance of an asset, rescission was still possible of a contract induced by innocent misrepresentation but the better position today is that it is possible to rescind, with the result that the

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<sup>88</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, 158-159 [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>89</sup> Although mistake, duress and failure of consideration have been recognised as unjust factors, undue influence has not yet been explicitly so recognised. But where a contract is rescinded for undue influence, restitution could usually be made for mistake or failure of consideration. And restitution is also possible for undue influence causing a benefit to be transferred by gift.

<sup>90</sup> *Samuel John Malouf v MBF Australia Limited* [2007] NSWSC 1020 [26] (Einstein J) approved in *MBF Australia Limited v Malouf* [2008] NSWCA 214 [32] (Hodgson JA); *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589, [41] (White J); *Menzies v Perkins* [2000] NSWSC 40 at [9] (Hunter J); *Orix Australia Corporation Limited v Moody Kiddell & Partners Pty Limited* [2005] NSWSC 1209 at [156] (White J); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Limited* [2011] NSWSC 267, [92] (Einstein J).

<sup>91</sup> *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 387-390 (Brennan J; Wilson J agreeing); *Hancock Family Memorial Foundation Ltd v Porteous* [2000] WASCA 29; (2000) 22 WAR 198, 220 [206] (the Court); *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1, 11-12 (Millett J). There are separate questions concerning whether the rescission is ever an order of the court or whether the court merely pronounces upon the parties' act of rescission; further whether the trust which arises after rescission has retrospective operation.

<sup>92</sup> *Alati v Kruger* (1955) 94 CLR 216, 225 (Dixon CJ, Webb, Kitto and Taylor JJ).

<sup>93</sup> [1905] 1 Ch 326.

asset is held on trust.<sup>94</sup> It may be that there is 'no reason of principle behind the rule at all'.<sup>95</sup> Certainly none was suggested in the case, or in subsequent authorities.

Aside from cases where the defendant has made misrepresentations which induce entry into a contract there is also a line of authority recognising a trust where, without a contract, a plaintiff conveys an asset to a defendant by mistake.

The leading English decision on this point is *Chase Manhattan NA v Israel-British Bank (London) Ltd*.<sup>96</sup> In that case the Chase Manhattan bank made a mistaken payment of \$US 2 million to the Israel-British Bank. The mistaken payment was made on 3 July 1974. Both banks discovered the mistake by 5 July 1974. But before Chase Manhattan bank could get its money back the Israel-British Bank became insolvent. Chase Manhattan argued, following United States authority,<sup>97</sup> that the mistaken payment, and therefore the rights held by the Israel-British Bank to the \$US 2 million, was held on constructive trust. Justice Goulding agreed and said that although there was no authority directly on the point in England the general principles of equity in English law were the same as those in the United States. The decision was approved and relied upon by Bingham J shortly afterwards.<sup>98</sup>

The reasoning of Goulding J is infected with the same error described above.<sup>99</sup> His Lordship's reasoning assumes the holder of absolute legal rights also holds equitable rights. His Lordship said that the plaintiff had *never lost* equitable ownership, and so a trust should be recognised.<sup>100</sup> Chase Manhattan bank had only legal rights; before the transfer of funds to the credit of the Israel-British bank it had no equitable rights in relation to the funds.<sup>101</sup> This error has also been recognised in England.<sup>102</sup>

In the leading speech in *Westdeutsche Landesbank Girozentrale v Islington LBC*,<sup>103</sup> Lord Browne-Wilkinson reinterpreted the reasoning in *Chase Manhattan*. His Lordship suggested that the result in *Chase Manhattan* depended upon when the 'conscience' of the recipient was bound. In other words, the constructive trust only arose when the mistake was discovered on 5 July 1974. This is the approach now taken in England.<sup>104</sup>

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<sup>94</sup> The history and debate is explored in detail in Meagher, Heydon and Leeming (eds) *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th edn, 2004) 471-473 [13-075]-[13-090]. Rejection of *Seddon's* case can be seen in *Baird v BCE Holdings LPty Ltd* (1996) 40 NSWLR 374, 379-380 (Young J); and muted criticism in *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 369 (Mason P).

<sup>95</sup> *Baird v BCE Holdings LPty Ltd* (1996) 40 NSWLR 374, 379 (Young J).  
<sup>96</sup> [1981] 1 Ch 105.

<sup>97</sup> *Re Berry* 147 F 208 (1906).

<sup>98</sup> *Neste Oy v Lloyd's Bank plc* [1983] 2 Lloyd's Rep 658, 665-666.

<sup>99</sup> Above text accompanying footnote 80.

<sup>100</sup> [1981] 1 Ch 105 at 119-20.

<sup>101</sup> A further error is that Goulding J suggested that the two banks were in a fiduciary relationship: see R Meagher, J D Heydon & M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th edn 2002 Butterworths Sydney) at 166.

<sup>102</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 706, 714.

<sup>103</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 715. See also *Eldan Services Ltd v Chandag Motors Ltd* [1990] 3 All ER 459 at 462; *Bank of America v Arnell* [1999] Lloyd's Rep Bank 399.

<sup>104</sup> *Papamichael v National Westminster Bank plc* [2003] EWHC 164 (Comm); [2003] 1 Lloyd's Rep. 341 at [221]-[231]; *Getronics Holdings EMEA BV v Logistic & Transport Consulting*

In Australia there are several decisions in which *Chase Manhattan* has been cited with approval or applied<sup>105</sup> without a suggestion that the trust required knowledge of the recipient. However, the New South Wales Supreme Court, without being referred to any of these decisions, has also held that a trust will arise from the time when the recipient has knowledge that the payment was made by mistake.<sup>106</sup> No argument was made in those cases that the nature of the trust sought might have been akin to an order for rescission or conveyance. It may be that, as Lord Browne-Wilkinson envisaged, a trust embodying positive fiduciary duties would require some circumstances demonstrating knowledge by the trustee of his or her role, but a bare trust for conveyance (which Lord Browne-Wilkinson would not have called a trust)<sup>107</sup> might not.

The law concerning when a trust will arise as a result of a mistake or misrepresentation is unsettled. Nevertheless, it is clear that, at least sometimes and perhaps subject to limitations such as knowledge, a trust will arise as a result of a transfer of assets by misrepresentation or mistake. As explained in the conclusion to this paper, what is needed is further clarification of the principles which will guide when such a trust should be awarded for mistake or misrepresentation.

### **(3) Transfer of rights from a plaintiff as a result of failure of consideration**

A second example of recognition by a court that a trust will be imposed where an established unjust factor exists is where a plaintiff transfers rights to a defendant subject to a condition which fails. In such circumstances, it is well established that the failure of the condition ('consideration') means that the plaintiff has a personal right of restitution for the value of the benefit transferred to the defendant. In *Roxborough v Rothmans of Pall Mall Australia Ltd*<sup>108</sup> Gleeson CJ, Gaudron and Hayne JJ explained that the right for restitution based upon a failure of consideration (ie failure of condition or purpose) 'embraces payment for a purpose which has failed as, for example, where a condition has not been fulfilled, or a contemplated state of

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*Co* Unreported April 30, 2004; *Commerzbank AG v I.M.B. Morgan Plc* [2004] EWHC 2771 (Ch); [2005] 2 All E.R. (Comm.) 56 at [36]; *Re Farepak Food* [2006] EWHC 3272 (Ch); [2008] B.C.C. 22 at [37] and following; *Jones v Churcher* [2009] EWHC 722 (QB); [2009] 2 Lloyd's Rep. 94 at [98]–[99]; *Deutsche Bank v Vik* [2010] EWHC 551 (Comm) at [4]; *Fitzalan-Howard v Hibbert* [2009] EWHC 2855 (QB); [2010] P.N.L.R. 11 at [49]; *Bank of Ireland v Pexxnet Ltd* [2010] EWHC 1872 (Comm) at [55]–[57].

<sup>105</sup> *Ilich v The Queen* (1986) 162 CLR 110 at 129 (Wilson and Dawson JJ); *Commonwealth of Australia v ANZ Banking Group* (Unreported NSWSC 7 October 1993 No 50327 of 1992; BC9302376) at 7 (O'Keefe CJ Comm D); *Re Hartogen Energy Ltd (In Liq) v Australian Gas Light Company* (1992) 36 FCR 557 at 573 (Gummow J); *Woolworths Ltd v Richmond Growth Pty Ltd* (Unreported NSWSC 1 November 1996, no. 50143 of 1996; BC9605194) at 18-19 (Bainton J).

<sup>106</sup> *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589, [42] (White J); *Westpac Banking Corporation v Ollis* [2007] NSWSC 956, [20] (Einstein J); *Credit Union Australia Ltd v Lyons* [2009] NSWSC 1188, [29] (White J).

<sup>107</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 706 focusing upon the need for a trustee to be accountable for his actions before a trust can be recognised.

<sup>108</sup> [2001] HCA 68; 208 CLR 516.



affairs has disappeared'.<sup>109</sup> Justice Gummow also emphasised that the right to restitution arises due to 'the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover.'<sup>110</sup>

In the passages quoted above, explaining the operation of the unjust factor of failure of consideration, the joint judgment of Gleeson CJ, Gaudron and Hayne JJ, as well as the separate judgment of Gummow J, relied upon the decision of Deane J in the High Court of Australia in *Muschinski v Dodds*.<sup>111</sup> In that case, Ms Muschinski and Mr Dodds lived in a de facto relationship. They purchased land as joint tenants. Their purpose was to share the land as part of their home and as an arts and crafts centre. When their relationship ended, that purpose or condition failed. Ms Muschinski had contributed ten times more to the acquisition and improvement of the land than had Mr Dodds. Justices Mason and Deane held that the parties held the property on trust for themselves as tenants in common in proportion to their contributions. Controversially, the trust was imposed only at the time of publication of the reasons of the court.<sup>112</sup> Justices Brennan and Dawson dissented and Gibbs CJ, whilst agreeing in the final order of Mason and Deane JJ, would have preferred to impose a charge or lien.<sup>113</sup> In the course of explaining the test for failure of consideration, which Gleeson CJ, Gaudron and Hayne JJ, and Gummow J relied upon, Deane J said:<sup>114</sup>

Both the common law and equity recognise that, where money or other property is paid or applied on the basis of some consensual joint relationship or endeavour which fails without attributable blame, it will often be inappropriate simply to draw a line leaving assets and liabilities to be owned and borne according to where they may prime facie lie, as a matter of law, at the time of the failure.

Deane J explained that this recognition by equity was in the form of an order for a constructive trust, which his Honour said should be recognised only from the date of judgment.<sup>115</sup>

Like the situation of transfers of rights by mistake, there is considerable uncertainty surrounding the trust which arises as a result of a failure of a condition attached to a transfer of rights. When will a trust such as that in *Muschinski v Dodds* arise after the failure of a condition or purpose of a transfer of rights? The instance where such a trust is likely to be most desired would be when payment has been made for goods or services from an insolvent vendor. In what circumstances does the trust arise, removing the money from the bankrupt estate?<sup>116</sup> Must insolvency have occurred, or

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<sup>109</sup> (2001) 208 CLR 516 at 525 [16].

<sup>110</sup> (2001) 208 CLR 516 at 557 [104].

<sup>111</sup> (1985) 160 CLR 583. See also *John Nelson Developments Pty Limited v Focus National Developments Pty Limited* [2010] NSWSC 150 (Ward J).

<sup>112</sup> (1985) 160 CLR 583 at 623.

<sup>113</sup> (1985) 160 CLR 583 at 598.

<sup>114</sup> [1985] HCA 78; (1985) 160 CLR 583, 618-620.

<sup>115</sup> [1985] HCA 78; (1985) 160 CLR 583, 623.

<sup>116</sup> *Scott v Surman* (1742) Willes 400, 402; (1742) 125 ER 1235, 1236 (Willes CJ); *Winch v Keeley* (1787) 1 Term Rep 619, 623; [1787] EngR 38; (1787) 99 ER 1284, 1286 (Buller J). And see now *Bankruptcy Act* 1966 (Cth) s 116(2)(a).

be imminent at the time of payment?<sup>117</sup> Must the money paid be segregated and be identifiable trust property at the time when the condition fails? Does the trust arise from the date of the happening of the events; if not, in which cases will it arise from the date of judgment?<sup>118</sup>

#### **(4) Transfers of rights from a plaintiff as a result of undue influence**

A third area where a trust has been imposed as a means to effect restitution of rights transferred from a plaintiff is undue influence. In *McCulloch v Fern*,<sup>119</sup> Palmer J in the Supreme Court of New South Wales considered a gift from the plaintiff and his wife of most of the proceeds from the sale of their matrimonial home. The gift was made for the benefit of the founder of a religious sect of which they were members. The gift discharged most of a loan, secured by mortgage over a property owned by the sect leaders. Palmer J imposed a trust over the property in the proportion representing the amount by which the funds from the plaintiff and his wife had discharged the mortgage. One reason for the imposition of a trust was that the undue influence exerted by the sect leaders over the plaintiff and his wife.

Another example is *Reid v Reid*.<sup>120</sup> In that case the plaintiff was injured in a car accident and suffered permanent brain damage. He was cared for and supported by his mother, upon whose judgment he heavily relied. When he received compensation for the accident, the plaintiff used the money to purchase a house in the joint names of himself and his mother. Justice Bryson held that the plaintiff's intention was impaired by the undue influence of his mother. His mother therefore held her share of the house on trust for him.

Once again, there are matters of uncertainty that arise in relation to this trust. First, the recognition of the trust in *McCulloch v Fern* was not concerned with the rights to the money transferred by the plaintiff and his wife. It was a trust over the property over which the funds discharged part of the mortgage. This appears to recognise tracing from the funds, backwards into the previously purchased property. Such a phenomenon has excited considerable academic debate.<sup>121</sup>

Secondly, in comparison with *McCulloch v Fern* or with *Reid v Reid*, some cases concerning undue influence recognise the plaintiff as having a power to rescind the gift rather than having rights under a trust.<sup>122</sup> It may be that this distinction is semantic in many contexts. As four justices of the High Court said in *Giumelli v*

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<sup>117</sup> *Neste Oy v Lloyd's Bank Plc* [1983] 2 Lloyd's Rep. 658; *Re Farepak* [2006] EWHC 3272 (Ch); [2007] 2 BCLC 1.

<sup>118</sup> In oral argument recently one High Court justice suggested that one day *Muschinski* might need to be revisited one day: *John Alexander's Club Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; (2010) 241 CLR 1, 8 (Gummow J).  
<sup>119</sup> [2001] NSWSC 406.

<sup>120</sup> 1997, NSW Supreme Court, unreported, 30 November 1998.

<sup>121</sup> Compare M Conaglen 'Difficulties with Tracing Backwards' (2011) 127 LQR 432 with L Smith 'Tracing into the Payment of a Debt' [1995] CLJ 290.

<sup>122</sup> *Allcard v Skinner* (1887) LR 36 Ch D 145. More recently, see *Quek v Beggs* (1990) 5 BPR 11 761 where McLelland J recognised a power to rescind a gift for undue influence.

*Giumelli*, a constructive trust 'does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests'.<sup>123</sup> If the trust is a response to unjust enrichment, it should operate only to re-vest rights which arise from defective transfers in the law of unjust enrichment; there is no warrant for the imposition of fiduciary duties. In this respect, when the plaintiff litigates to assert a demand for re-conveyance, recognition of a trust is no different from a 'mere equity' or power to rescind: the bare trust is 'akin to orders for [re]conveyance'.<sup>124</sup> In *Stump v Gaby*<sup>125</sup> Lord St Leonards even equated rescission with the trust saying that a person with the right to rescind a transaction for fraud 'remains the owner' in equity. And as Sir Peter Millett once said, eschewing the awkward label of 'mere equity', '[i]t probably does not matter if we say that the relationship is not a trust relationship, so long as we call it something else. The trouble is that we have no other name for it.'<sup>126</sup> Although it is sometimes suggested that the characterisation of the plaintiff's rights as involving rescission ('a power model') can have different consequences from characterising the plaintiff's rights as involving rights under a trust ('an immediate interest model'),<sup>127</sup> many of the asserted differences may fade away when it is recognised that the imposed trust in the cases discussed above involves little more than a power to assert reconveyance and, as the High Court of Australia has suggested, the trust might be withheld if the circumstances require it.<sup>128</sup>

In summary, there is limited authority on the question of whether and when a trust is generally an available award when rights are transferred from a plaintiff as a result of undue influence. If it is, then in common with the trust which arises following a mistake or a failure of consideration, further guidance from the courts may assist to clarify generally when the trust will be available, and the date from which it will take effect.

### ***The nature of the trust imposed***

There is academic debate about the appropriate label to describe the trust which is imposed in cases concerning restitution of rights to a plaintiff where the rights have been transferred by misrepresentation, mistake, failure of consideration or undue influence. Much of the debate in this area has focussed upon whether the trust should

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<sup>123</sup> *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

<sup>124</sup> *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

<sup>125</sup> (1852) 2 De GM & G 613 at 630; 42 ER 1015 at 1018. See also *Gresley v Mousley* (1859) 4 De G & J 78, 93; 45 ER 31, 36 (Turner LJ) and R Chambers *Resulting Trusts* (1997 Oxford University Press Oxford) 172-174.

<sup>126</sup> P Millett 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 404.

<sup>127</sup> B Hacker *Consequences of Impaired Consent Transfers* (2009) 125-159; C Mitchell, P Mitchell, S Watterson (eds) *Goff and Jones The Law of Unjust Enrichment* (8<sup>th</sup> edn, 2011) 814-815 [37-25]-[37-28].

<sup>128</sup> *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ) giving a priority dispute in insolvency as an example.

be labelled 'constructive' or 'resulting'. In *McCulloch v Fern*<sup>129</sup> the trust arising from undue influence was described as constructive. In *Reid v Reid*<sup>130</sup> the trust arising from undue influence was described as resulting. In some of the fraud cases the trust is described as 'resulting'.<sup>131</sup> In others it is described as constructive.<sup>132</sup> Some cases refer to the trust as being either resulting or constructive,<sup>133</sup> or a 'constructive (resulting) trust'<sup>134</sup> or simply as a trust.<sup>135</sup>

The view of Professor Chambers, following the late Professor Birks, is that the label 'resulting trust', from the Latin *resalire*, invokes a metaphor of rights 'jumping back' to the settlor.<sup>136</sup> The metaphor of jumping back is inapt. As explained above, the transferor of a legal right in these cases holds no equitable rights or powers prior to transfer. The High Court of Australia has recognised this on numerous occasions.<sup>137</sup> Nothing 'jumps back'. Instead, the resulting trust *inter vivos* involves the creation of new equitable powers in favour of the transferor.

An alternative view which does not invoke the metaphor of jumping back suggests that 'resulting' ought merely to be understood as 'resulting' from the circumstances of the case.<sup>138</sup> On this view, there is little difference, as a matter of labelling, between 'resulting' and 'constructive', since constructive trusts have also been described as involving a court 'constru[ing] the circumstances in the sense that it explains or interprets them'.<sup>139</sup> The constructive and the resulting trusts were also closely associated historically. In *Grey v Grey*,<sup>140</sup> Lord Nottingham LC spoke interchangeably of a use by implication (now, resulting trust) and a constructive trust.<sup>141</sup> Historical separation may have occurred with the epexegetical interpretation of the word 'construction' in the expression in the *Statute of Frauds* 1677 'by the implication or construction of law'.<sup>142</sup>

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<sup>129</sup> [2001] NSWSC 406.

<sup>130</sup> 1997, NSW Supreme Court, unreported, 30 November 1998.

<sup>131</sup> *Samuel John Malouf v MBF Australia Limited* [2007] NSWSC 1020 [26] (Einstein J) approved in *MBF Australia Limited v Malouf* [2008] NSWCA 214 [32] (Hodgson JA); *Evans v European Bank Limited* [2004] NSWCA 82; (2004) 61 NSWLR 75 at [111]- [116] (Spigelman CJ); *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1, 11-12 (Millett J).

<sup>132</sup> *Menzies v Perkins* [2000] NSWSC 40 at [9] (Hunter J); *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 387-390 (Brennan J; Wilson J agreeing).

<sup>133</sup> *Orix Australia Corporation Limited v Moody Kiddell & Partners Pty Limited* [2005] NSWSC 1209 at [156] (White J).

<sup>134</sup> *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep Bank 438, 461-462 (CA).

<sup>135</sup> *Black v S Freedman & Company* [1910] HCA 58; (1910) 12 CLR 105, 110 (O'Connor J).

<sup>136</sup> *Resulting Trusts* (2007) 4. See also J D Heydon and M J Leeming *Jacobs' Law of Trusts* (7th ed, 2006) 234 [1201].

<sup>137</sup> *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14; (1982) 149 CLR 431, 463 (Aickin J); *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20; (2005) 220 CLR 592, 606 [30] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ); *Peldan v Anderson* [2006] HCA 48; (2006) 227 CLR 471, 485 [37] (Gummow ACJ, Kirby, Hayne, Callinan & Crennan JJ).

<sup>138</sup> *Black Uhlands Inc v New South Wales Crime Commission* [2002] NSWSC 1060 [131] (Campbell J, as his Honour was then).

<sup>139</sup> *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 111 [2] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

<sup>140</sup> (1677) 2 Swan 594, 598; [1677] EngR 86; (1677) 36 ER 742, 743.

<sup>141</sup> See also M McNair 'Coke v Fountaine (1676)' in C Mitchell and P Mitchell (eds) *Landmark Cases in Equity* (forthcoming) ch 2.

<sup>142</sup> W Holdsworth, *A History of English Law* (1924) VI, 643.

Ultimately, the debate about whether the trust is resulting or constructive has no meaningful consequence. The point of note is that whichever adjective is used to describe the trust in these cases, the trust is imposed by law and does not depend upon a declaration or expression of trust by the settlor.

## **Conclusions: future development of unjust enrichment and the law of trusts**

Currently the law of unjust enrichment in Australia is only recognised as occupying the realm of personal rights. The example with which the discussion of enrichment in this paper commenced was a mistaken transfer of title to a Picasso painting. The law of unjust enrichment in Australia recognises explicitly only a right, subject to defences, that the defendant make restitution to the plaintiff the *value* of the painting. The same is true where the transfer occurs as a result of some other unjust factor such as failure of consideration or undue influence.

Although restitution of personal rights is the only explicitly acknowledged response to unjust enrichment, a number of cases have also recognised that in some circumstances a trust can arise as a result of a mistaken transfer of rights or a transfer of rights upon a condition which fails or by undue influence. There is considerable uncertainty concerning when a trust should be recognised based upon these unjust factors, as well as the nature and effect of the trust that arises. Most fundamentally, there is no consensus as to *why* the trust arises in these cases. The proffered rationale in many of the core English cases, and some of the Australian ones, must be rejected. The reasoning in those cases proceeds on the flawed basis that the trust arises because the plaintiff did not dispose of his or her equitable interest; it is suggested that only the legal interest was transferred. But a plaintiff with an absolute legal interest has no equitable interest at all. An equitable interest is not retained. It is created. This requires explanation, and justification. But unless all those decisions which reason on the basis of retention of an equitable interest are to be overturned, the justification must be replaced with alternative reasoning.

Alternative reasoning was first proposed by the late Professor Birks. This reasoning was adopted in an elaborate doctoral thesis, published in 2007 as *Resulting Trusts* by his student (now Professor) Robert Chambers. The thesis is also advocated in the new edition of *Goff and Jones' The Law of Unjust Enrichment*.<sup>143</sup> Considerable further refinement of the thesis will also soon be available in the research of my former doctoral student, Dr Andrew Lodder.<sup>144</sup> At the core of the argument, the point being made is that if the law of unjust enrichment is concerned with reversal of enrichments caused by events such as mistake or failure of consideration or undue influence. It is essentially said that it is difficult to justify why a personal award of the value gained by such events is part of the law of unjust enrichment but a power to obtain restitution of the rights transferred (ie a trust) is not.

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<sup>143</sup> C Mitchell, P Mitchell, S Watterson (eds) *Goff and Jones The Law of Unjust Enrichment* (8<sup>th</sup> edn, 2011) 834-835 [38-36].

<sup>144</sup> *Enrichment in the Law of Unjust Enrichment and Restitution* (2012, forthcoming Hart Publishing).

There may be a danger that classification of the foundation of a trust as lying in the law of unjust enrichment may mask, rather than illuminate the process of reasoning and explanation for why the trust arises. That danger lies in all cases where unjust enrichment is the foundation of the action. In Australian law it is no more legitimate to plead that a claim arises as a result of unjust enrichment than to plead that it arises as a result of an unspecified tort.

On the other hand, there may be a benefit to be gained by classification within the law of unjust enrichment of the trust which arises in cases of mistake, failure of consideration or undue influence. The benefit is that the overarching classification of unjust enrichment focuses attention upon the reason for the trust being to ensure that a defendant does not benefit from rights the transfer of which was impaired or qualified in some way. The classification provides focus for the consideration of difficult, and unresolved, questions concerning the operation of the trust in these cases. For instance, one question upon which the law is unclear is immediately invited in cases where an enrichment is conferred as a result of a mistake. This question is why there is an immediate right to restitution of the personal value of the enrichment, yet knowledge of a mistake by a defendant is necessary before a trust could be imposed to prevent the defendant from benefiting from the rights which he or she was given by mistake. There may be answers to such questions. For instance, the absence of knowledge of the plaintiff's mistake might bar a claim for a trust, or at least affect the rights over which the trust attaches because until a defendant has knowledge of a mistake, any good faith change of position is a partial defence to a claim for restitution.<sup>145</sup> However, the short point is that the proper classification of the reason for the trust will assist in the process of resolving questions of this nature.

If the trust were to be recognised as a potential response to an event of unjust enrichment then it would have to be acknowledged that the principles of unjust enrichment governing the response of a trust, compared with those governing the response of a personal duty to make restitution are not identical. If the law were a blank slate then it might be thought that a trust is a more compelling response: after all, making restitution of the very rights which unjustly enrich a defendant is a more perfect way of reversing an enrichment than merely requiring the defendant to make restitution of the money value received. Why should the defendant be able to pay the value and keep the Picasso, the title of which was transferred by mistake?

However, it is only in rare instances that the common law recognises a power for a person to obtain rights which had not been promised, charged, or mortgaged to him or her. For example, the action by an owner of goods for conversion or detinue will generally permit only recovery of the value of the goods, rather than the possession of the goods themselves. And even where rights have been promised to another, apart from land or unique goods, specific performance of a promise to convey title to another will generally be refused.<sup>146</sup> The same reluctance to order the reconveyance of specific rights has historically been a part of the law of trusts. Lord Nottingham

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<sup>145</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385-386 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) 405-406 (Brennan J); *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580 (Lord Goff).

<sup>146</sup> In Canada even the principle that land is always sufficiently unique to require specific performance has been rejected: *Semelhago v Paramadevan* [1996] SCC; [1996] 2 SCR 415.

LC in *Cook v Fountain*,<sup>147</sup> explained the reluctance to impose a trust unless absolutely necessary where none had been declared:

The reason of this rule is sacred; for if the Chancery do once take the liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico*.

This same necessity model was adopted in Australia in *Bathurst City Council v PWC Properties Pty Ltd*.<sup>148</sup>

before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy. An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant.

If this is the future for the imposition of trusts as a consequence of some event of unjust enrichment, such as a mistake, failure of consideration, or undue influence then courts will need to develop principles to guide the circumstances in which a merely personal response is not sufficient to quell the controversy.

I commenced this paper with discussion of the origins of the law of unjust enrichment in Roman law. Like the current Australian law, in Roman Law unjust enrichment was also part of the law of obligations. But the Romans had no real conception of rights. Nor did they recognise a trust, at least as we understand that institution today. And, in any event, Gaius is quoted in the Digest as recognising the different senses of restitution:

*Plus est in restitutione, quam in exhibitione: name 'exhibere' est praesentiam corporis praebere, 'restitutere' est etiam possessorem facere fructusque redere: pleraque praeterea restitutionis verbo continentur.* (More is conveyed by restitution than by presentation; for 'to present' is to require the presence of something, "to restore" is also to make someone the owner and hand over the produce; furthermore several things are embraced in the sense of restitution).<sup>149</sup>

Australian law currently recognises a trust as a response to mistake, failure of consideration and undue influence. But the circumstances in which such a trust should be awarded, and the operation of the trust, are unclear. The insight that restitution can be made in different ways, in particular by restitution of value as well as restitution of rights, is an insight which might, in future, provide an understanding of how the law of trusts and the law of unjust enrichment might both develop.

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<sup>147</sup> (1676) 3 Swans 585 at 592; 36 ER 984 at 987.

<sup>148</sup> *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585.

<sup>149</sup> D 50.16.22 (translation A Watson *The Digest of Justinian*, vol 4, University of Pennsylvania Press 1998) 449.