

CASE NOTE

LUMBERS v W COOK BUILDERS PTY LTD (IN LIQ)*
RESTITUTION FOR SERVICES AND THE ALLOCATION
OF CONTRACTUAL RISK

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[In *Lumbers*, the High Court held that a subcontractor could not obtain remuneration from the defendant (on whose land the subcontractor had performed building work) for services rendered pursuant to an arrangement between the subcontractor and head contractor. The Court adopted a retrograde approach to claims for a quantum meruit by focusing solely on whether there was a request by the defendant for the services. More soundly, the Court relied upon the principle that claims in restitution should not defeat a contractual allocation of risk. This case note argues that the Court's reasoning is insensitive to the complexities that arise in determining quantum meruit claims in the context of services. The High Court's reinterpretation of the law of unjust enrichment in service-based claims as requiring a request has directed Australian law down the path of legal fiction and — consistently with other recent decisions deploring 'top-down' unjust enrichment reasoning — ignores the analysis of substance.]

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I INTRODUCTION

The decision of the High Court in *Lumbers v W Cook Builders Pty Ltd (in liq)* (*'Lumbers'*)¹ resembles the previous year's decision of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd ('Farah')*² in terms of its progression through the judicial hierarchy. In both cases, the trial judge rejected the plaintiff's claim by reference to orthodox equitable (*Farah*) or common law (*Lumbers*) principles, only for the

* (2008) 232 CLR 635.

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¹ (2008) 232 CLR 635.

² (2007) 230 CLR 89.

intermediate appellate court to overturn the decision on the ground that the plaintiff's claim met the requirements of an unjust enrichment claim. In both cases the High Court then allowed the appeal, taking the opportunity to deplore 'top-down' unjust enrichment reasoning, which was said to be neither soundly based in precedent nor sensitive to particular features of the cases to which it was applied.

Attitudes in Australia to unjust enrichment scholarship, polarised before *Farah* and *Lumbers* were handed down, have been hardened by these High Court decisions. Restitution sceptics consider themselves vindicated by the decisions. Restitution theorists, on the other hand, will not have been convinced by the reasoning to alter their methods. The decisions provide ammunition for both camps. Just as *Farah* was never a suitable vehicle for unjust enrichment analysis because the defendants had not been enriched,³ so in *Lumbers* a successful unjust enrichment claim would have undermined a valid allocation of contractual risk. In each case, however, the High Court has performed its negative role of extirpating error more successfully than its positive role of expounding and developing the law. In *Lumbers*, disappointingly little guidance is provided on the criteria for the award of a *quantum meruit* where there is no valid contract between the provider of services and the recipient. This case note contends that the arguments of unjust enrichment writers, for example about the role of free acceptance in the law, cannot be lightly disregarded. They identify genuine problems about the basis for awarding restitution for services. The decision in *Lumbers* contributes little to the solution of these problems.

II THE FACTS

The defendants, a father and son ('the Lumbers'), engaged W Cook & Sons Pty Ltd ('Sons') to build what the trial judge described as a 'quite distinctive' house.⁴ Most of the work was in fact performed by another company in the group, W Cook Builders Pty Ltd ('Builders').⁵ The change of identity of the company performing the work was made without the knowledge or approval of the Lumbers. Indeed, the Lumbers would have objected to the change had they known of it, since Builders, unlike Sons, was not a licensed builder.⁶ The contract between the Lumbers and Sons was oral and the Lumbers paid amounts from time to time in response to telephoned requests from Mr McAdam, the secretary of Sons.⁷ Three years after completion of the house, Builders went into liquidation.⁸ The Lumbers subsequently received a letter from a director of Sons stating that no further amounts were owing to Sons.⁹ The liquidator claimed

³ Ibid 143 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also Rob Chambers, 'Knowing Receipt: Frozen in Australia' (2007) 2 *Journal of Equity* 40, 45–7.

⁴ *W Cook Builders Pty Ltd v Lumbers* [2005] SADC 153 (Unreported, Judge Beazley, 15 November 2005) [1]; see also at [4], [43].

⁵ See *ibid* [53], [56], [67]–[68]. See also *Lumbers* (2008) 232 CLR 635, 641 (Gleeson CJ).

⁶ *W Cook Builders Pty Ltd v Lumbers* [2005] SADC 153 (Unreported, Judge Beazley, 15 November 2005) [5], [40].

⁷ *Ibid* [41]; see also at [58].

⁸ *Ibid* [23].

⁹ *Lumbers* (2008) 232 CLR 635, 646–7 (Gleeson CJ). See also *ibid* [16], [60].

\$261 715 from Sons and the Lumbers for work done on the Lumbers house.¹⁰ Proceedings against Sons were stayed when Builders was unable to provide security for Sons' costs.¹¹ The claims against the Lumbers were based on Sons' alleged assignment of the benefit of the contract or, alternatively, on 'restitution/unjust enrichment'.¹²

The trial judge rejected the claim based on assignment because the Lumbers' contract with Sons was too personal to be assigned. This was due to the close business relationship between the Lumbers and Mr McAdam and because there was no evidence of an intention to assign on the part of Sons.¹³ An appeal on this point was dismissed by the Full Court of the Supreme Court of South Australia¹⁴ and was not further pursued.¹⁵ The trial judge rejected the claim in unjust enrichment on the ground that:

At all times there was extant an agreement between the Lumbers and Sons which covered the work said to have been undertaken by Builders. Insofar as a claim ought to have been made by Builders it ought to have been against Sons.¹⁶

An appeal to the Full Court was allowed by majority (Sulan and Layton JJ, Vanstone J dissenting). The majority held that the Lumbers had been incontrovertibly benefited by the work Builders had done since it had saved them expense that they would otherwise necessarily have incurred and, alternatively, since it constituted an improvement to their land.¹⁷ In addition, relying on *Pavey & Matthews Pty Ltd v Paul*,¹⁸ the majority held that the Lumbers had freely accepted the benefit of the work done by Builders since they knew that the work was being done and that it was not being done gratuitously.¹⁹ Vanstone J dissented on the ground that any remedies available to Builders were to be found in its contract with Sons and not in an unjust enrichment claim against the Lumbers.²⁰

III THE HIGH COURT DECISION

The High Court unanimously allowed the Lumbers' appeal. Gleeson CJ delivered a separate judgment from the joint judgment of Gummow, Hayne, Crennan and Kiefel JJ. The judgments were in agreement on the crucial point that the

¹⁰ *W Cook Builders Pty Ltd v Lumbers* [2005] SADC 153 (Unreported, Judge Beazley, 15 November 2005) [65].

¹¹ *Ibid* [12]–[13].

¹² *Lumbers* (2008) 232 CLR 635, 642 (Gleeson CJ). See also *ibid* [18]–[19].

¹³ *W Cook Builders Pty Ltd v Lumbers* [2005] SADC 153 (Unreported, Judge Beazley, 15 November 2005) [89]–[92].

¹⁴ *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406, 413–14 (Sulan and Layton JJ), 428–9 (Vanstone J).

¹⁵ *Lumbers* (2008) 232 CLR 635, 642 (Gleeson CJ).

¹⁶ *W Cook Builders Pty Ltd v Lumbers* [2005] SADC 153 (Unreported, Judge Beazley, 15 November 2005) [103] (citations omitted).

¹⁷ *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406, 422 (Sulan and Layton JJ).

¹⁸ (1987) 162 CLR 221.

¹⁹ *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406, 423 (Sulan and Layton JJ).

²⁰ *Ibid* 430–1.

legal relationships between the Lumbers, Sons and Builders were governed exclusively by contract law and not by the law of unjust enrichment.²¹ They differed, however, in their approaches to specific issues.

Gleeson CJ was prepared to assume that services can enrich the recipient where they constitute an incontrovertible benefit or where the recipient has freely accepted the benefit of their performance.²² He held, however, that these grounds for identifying services as an enrichment provided no basis for imposing liability on the facts of *Lumbers*. Although he accepted the assumption that the completed house constituted an incontrovertible benefit,²³ it was nonetheless a benefit for which the Lumbers had contracted to pay Sons and which Sons had contracted to confer on the Lumbers.²⁴ Similarly, the concept of free acceptance was inapplicable because the Lumbers had never had an opportunity to reject the building work undertaken by Builders.²⁵

The joint judgment, on the other hand, avoided the language of incontrovertible benefit and free acceptance. Instead, it reasserted the requirement, traceable to the pre-*Common Law Procedure Act*²⁶ formulations of pleading claims in assumpsit for a *quantum meruit*, that a successful claim for restitution for services must be based on an express or implied request for the performance of services. The judgment disapproved the earlier South Australian decision of *Angelopoulos v Sabatino*²⁷ — which had applied the concept of free acceptance — to the extent that it held that restitution could be ordered even if the services had not been expressly or impliedly requested.²⁸ The joint judgment's insistence on a request as a precondition to an award of restitution in most²⁹ cases of extra-contractual service performance will be discussed below in Part IV. Here it is sufficient to note that this aspect of the joint judgment's reasoning throws into doubt the reasoning, if not the result, of other decisions based on the defendant's free acceptance of the performance of services.³⁰

The second difference between the approaches taken by Gleeson CJ and the joint judgment related to the impact of the contractual matrix which governed the

²¹ See *Lumbers* (2008) 232 CLR 635, 654, 656–7 (Gleeson CJ), 671–2 (Gummow, Hayne, Crennan and Kiefel JJ).

²² See *ibid* 655.

²³ Gleeson CJ assumed that the end product of a service that is realisable in money constitutes a benefit: see *ibid* 657. For analysis of whether the end product must have been realised in money or whether it is sufficient that it is realisable, see Andrew Burrows, *The Law of Restitution* (2nd ed, 2002) 18–19; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (2006) 109–10.

²⁴ *Lumbers* (2008) 232 CLR 635, 656–7.

²⁵ *Ibid*.

²⁶ See *Common Law Procedure Act 1852*, 15 & 16 Vict, c 76, s 3.

²⁷ (1995) 65 SASR 1.

²⁸ *Lumbers* (2008) 232 CLR 635, 665–8, 674 (Gummow, Hayne, Crennan and Kiefel JJ). See *ibid* 12–13 (Doyle CJ).

²⁹ Exceptions for maritime salvage and necessitous intervention were recognised: *Lumbers* (2008) 232 CLR 635, 663–4 (Gummow, Hayne, Crennan and Kiefel JJ). Maritime salvage awards incorporate an element of reward and are not wholly restitutionary: Burrows, *The Law of Restitution*, above n 23, 320–1; Graham Virgo, *The Principles of the Law of Restitution* (2nd ed, 2006) 302–3.

³⁰ See, eg, *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221; *Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd* (2002) 5 VR 577.

legal rights and obligations of the Lumbers, Sons and Builders on Builders' unjust enrichment claim. The matrix consisted of two contracts. The first was the contract between the Lumbers and Sons for the construction of the house. The second was the contract between Sons and Builders, whereby Builders undertook the performance of the greater part of the construction work.³¹ Both judgments held that any claim for payment for building work must be determined by contract law,³² but the emphasis that they placed on the two contracts was different. For Gleeson CJ, the existence of the subcontract between Sons and Builders precluded any claim being brought by Builders against the Lumbers for work covered by the terms of the subcontract: 'If [the Lumbers] have been enriched, it is at the expense of Sons. If any party has been enriched at the expense of Builders, it is Sons.'³³ The joint judgment, on the other hand, highlighted the contract between the Lumbers and Sons:

These reasons will demonstrate that the legal relationship between Sons and the Lumbers cannot be dismissed from consideration, whether on the bases assigned by the majority in the Full Court or otherwise. When proper account is taken of the rights and obligations that existed between Sons and the Lumbers under their contract, the analysis made by the majority in the Full Court is shown to be flawed. The Lumbers are not shown to have received a 'benefit' at Builders' 'expense' which they 'accepted', and which it would be unconscionable for them to retain without payment.³⁴

On the joint judgment's analysis, the existence of the Lumbers–Sons contract was critical because it negated any finding that the Lumbers had requested Builders to undertake the construction work.

IV INJUSTICE, ENRICHMENT AND THE ALLOCATION OF CONTRACTUAL RISK

The arguments in *Lumbers* — both in the Full Court and in the High Court — were principally directed to the question of whether the Lumbers had been enriched at the expense of Builders by the latter's completion of the building work to the Lumbers' specifications.³⁵ The focus on enrichment is understandable since determining whether services constitute an enrichment is rarely easy and often controversial. Whereas a recipient of money cannot be heard to deny that money is enriching,³⁶ the receipt of services cannot be assumed to be beneficial. Generally speaking, services need not be paid for if they have not

³¹ This contract (between Sons and Builders) was held by Gleeson CJ to be a subcontract: *Lumbers* (2008) 232 CLR 635, 650. Builders' application to argue that the arrangement between Sons and Builders was too uncertain to constitute a contract was rejected, the joint judgment noting that even if the contract was uncertain Builders might nonetheless have a claim for work done or money paid at Sons' request: at 671 (Gummow, Hayne, Crennan and Kiefel JJ).

³² *Ibid* 656–7 (Gleeson CJ), 671–2 (Gummow, Hayne, Crennan and Kiefel JJ).

³³ *Ibid* 657.

³⁴ *Ibid* 662 (Gummow, Hayne, Crennan and Kiefel JJ).

³⁵ See *ibid* 636–8 (D F Jackson QC), 639–40 (G O'L Reynolds SC).

³⁶ Or only rarely: see, eg, *Perpetual Trustees Victoria Ltd v Ford* (2008) 70 NSWLR 611, 640–2 (Harrison J), *revd* [2009] NSWCA 186 (Unreported, Allsop P, Young JA and Sackville AJA, 8 July 2009). For a discussion of this case, see Elise Bant, 'Incapacity, Non Est Factum and Unjust Enrichment' (2009) 33 *Melbourne University Law Review* (forthcoming).

been freely chosen. As Bowen LJ said in *Falcke v Scottish Imperial Insurance Co* (a dictum repeated in the joint judgment in *Lumbers*):

The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.³⁷

The best evidence of the exercise of choice to receive services is entry into an enforceable contract. But in the absence of a contract, the law of unjust enrichment identifies other circumstances in which the receipt of services will be regarded as beneficial — either because the services have been chosen or because the recipient's freedom of choice is overridden by compelling policy reasons.³⁸ Two such circumstances were considered in *Lumbers*.

The first was that the Lumbers had freely accepted the benefit of Builders' work. Even if, contrary to the opinion of the joint judgment, free acceptance can satisfactorily determine whether services are enriching, *Lumbers* was not a case of free acceptance. As Gleeson CJ pointed out a service can only be freely accepted if the recipient has had an opportunity to reject it. The Lumbers had never had an opportunity to accept or reject the work undertaken by Builders since they were unaware that it was being done.³⁹

The other reason for treating the services as beneficial was that they constituted what unjust enrichment law terms an 'incontrovertible benefit'. A defendant will be incontrovertibly benefited where no reasonable person could be heard to deny that the services constitute an enrichment.⁴⁰ An example of an incontrovertible benefit is that of a builder who mistakenly constructs a house on the defendant's land, honestly believing it to be the land on which a client has requested the work to be done, which the defendant later sells.⁴¹ Another is the plaintiff's discharge of the defendant's debt.⁴² In both examples, the benefit of the services is actually realised in money. Where the end product of services has not been sold, it is less certain that the benefit to the recipient of the services is incontrovertible. Such a characterisation is justifiable provided that the services can readily be converted into money. Indeed, it would be unfair not to recognise the services as enriching if the recipient later sold the end product but was not required to pay the service provider. Gleeson CJ rejected the argument that Builders' work was an incontrovertible benefit on the ground that the benefit 'was that which Sons had undertaken to provide for the Lumbers and for which

³⁷ (1886) 34 Ch D 234, 248, cited in *Lumbers* (2008) 232 CLR 635, 663 (Gummow, Hayne, Crennan and Kiefel JJ).

³⁸ Edelman and Bant, above n 23, 100–1, 107–15.

³⁹ *Lumbers* (2008) 232 CLR 635, 656.

⁴⁰ See *ibid* 653 (Gleeson CJ), quoting *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406, 422 (Sulan and Layton JJ).

⁴¹ Cf *Brand v Chris Building Pty Ltd* [1957] VR 625.

⁴² The discharge must not be officious, in the sense that the plaintiff must not have assumed the defendant's debt without prior request from the latter. Officiousness is relevant to determining whether the enrichment was unjust: *Owen v Tate* [1976] QB 402.

the Lumbers had agreed to pay Sons.⁴³ But this argument goes to the question of the justice of the enrichment, not to whether the Lumbers had been enriched. Assuming that the distinctive features of the house did not make it hard to sell, the services were readily realisable in money.⁴⁴ The house, once completed in accordance with specifications, incontrovertibly benefited the Lumbers.

In fact, the focus throughout the *Lumbers* litigation on whether the Lumbers had been enriched was misplaced. The critical question, barely touched upon in the judgments, was whether the enrichment was unjust. The terminology of ‘free acceptance’ and ‘request’, employed by the Full Court and the High Court respectively, is apt to conflate questions of injustice and enrichment, but the issues need to be kept distinct.⁴⁵ On what ground might Builders have argued that it was unjust for the Lumbers not to pay for the construction work performed under the subcontract? We have seen that free acceptance fails, as an unjust factor as well as a criterion of enrichment, because the Lumbers never had an opportunity to reject Builders’ work. Similarly, if the injustice of not paying for services can be shown by proving that the services were requested (a question discussed in the next Part) there was no injustice in *Lumbers* because the defendants never requested Builders to undertake the work on the house. The only other unjust factor on which Builders might have relied is failure of consideration, meaning that the basis on which the services were performed had failed. Restitution of money for failure of consideration is well-established⁴⁶ and the logical case for allowing restitution for services on the ground of failure of consideration is convincing. If restitution of money paid for services which have not been performed can be ordered, why can restitution not also be ordered where the services have been performed but the agreed remuneration has not been paid (always assuming that the services constitute an enrichment)?⁴⁷

The unanswerable objection to applying failure of consideration to the facts of *Lumbers* is not that the unjust factor is confined to money claims, but that the basis on which Builders did its work was that it would be paid by Sons, not by the Lumbers. There was no failure of consideration caused by the Lumbers’ failure to pay Builders since that consideration (or basis) for payment did not exist. Rather, the basis for undertaking the work was Sons’ promise to pay Builders. As the joint judgment pointed out, even if Builders had no contractual claim against Sons it would have been entitled to a *quantum meruit* from Sons

⁴³ *Lumbers* (2008) 232 CLR 635, 656.

⁴⁴ For a discussion of this issue, see Burrows, *The Law of Restitution*, above n 23, 18–19; Edelman and Bant, above n 23, 109–10.

⁴⁵ Birks originally argued that free acceptance operated both as an unjust factor and as a test of whether services constitute an enrichment: Peter Birks, *An Introduction to the Law of Restitution* (1st revised ed, 1989) 114–16. His later view was that free acceptance was not an unjust factor (except possibly in some cases in which the recipient of services had never intended to pay for them), but that it was a test of enrichment: Peter Birks, ‘In Defence of Free Acceptance’ in Andrew Burrows (ed), *Essays on the Law of Restitution* (1991) 105.

⁴⁶ See, eg, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 (‘*Roxborough*’).

⁴⁷ For recent recognition of the availability of failure of consideration as a ground of restitution for services, see *Yeoman’s Row Management Ltd v Cobbe* [2008] 4 All ER 713, 736–7 (Lord Scott); see also at 718 (Lord Hoffmann), 751 (Lord Brown), 751 (Lord Mance).

based on the fact that it was Sons that had commissioned the work from Builders and from which Builders expected payment.⁴⁸

In the High Court, both judgments cite the well-known passage of Lord Goff's judgment in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* stating that 'serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract.'⁴⁹ In the final analysis, Builders' restitutionary claim failed because it ignored the commercial risk allocated both by the principal construction contract and by the subcontract. But arguments based on risk allocation belong to the determination of whether an enrichment is unjust and not, as the Full Court and High Court supposed,⁵⁰ to the inquiry into whether the defendant was enriched.

V RESTITUTION FOR BENEFITS CONFERRED ON THIRD PARTIES TO A TERMINATED CONTRACT?

One of the fringe benefits of *Lumbers* is that the decision answers a question canvassed by restitution writers about whether restitution can be obtained from a third party to a contract on whom a benefit is conferred in performance of the contract. Can an unpaid subcontractor under a construction contract sue the owner for reasonable remuneration for work done as an alternative to suing the (possibly insolvent) head contractor?⁵¹ The answer given by the High Court, concurring on this point with academic opinion,⁵² is 'no'.⁵³ The identification of the basis on which the subcontractor did the work will depend on the construction of the contract that the subcontractor entered into with the head contractor. This contract will almost certainly have provided that it is to the head contractor, not the owner, that the subcontractor must look for payment. As Gleeson CJ observed, techniques of construction are reinforced on this point by policy considerations. If Builders could obtain payment from the Lumbers, so also could the numerous subcontractors employed by both Sons and Builders on the construction of the house.⁵⁴ Owners should not be put at risk of having to pay remuneration to a potentially large number of subcontractors whose involvement in the construction of a house was not agreed to and in many cases not known.

An argument that has been tentatively advanced is that the subcontractor might be entitled to reasonable remuneration from the owner where either the head contract⁵⁵ or both contracts⁵⁶ have been terminated.⁵⁷ But termination of either

⁴⁸ *Lumbers* (2008) 232 CLR 635, 671 (Gummow, Hayne, Crennan and Kiefel JJ).

⁴⁹ [1994] 1 All ER 470, 475, cited in *ibid* 655 (Gleeson CJ), 663 (Gummow, Hayne, Crennan and Kiefel JJ).

⁵⁰ See *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406, 420–4 (Sulan and Layton JJ), 429–31 (Vanstone J); *Lumbers* (2008) 232 CLR 635, 654–7 (Gleeson CJ), 663–8 (Gummow, Hayne, Crennan and Kiefel JJ).

⁵¹ See Burrows, *The Law of Restitution*, above n 23, 347–9; Virgo, above n 29, 327–8.

⁵² Cf Philip Davenport and Christina Harris, *Unjust Enrichment* (1997) 111–13; Philip Davenport, *Construction Claims* (2nd ed, 2006) 161–5. See also Amy Goymour, 'Too Many Cooks: Three Parties, Contracts and Unjust Enrichment' (2008) 67 *Cambridge Law Journal* 469, 470–1.

⁵³ See *Lumbers* (2008) 232 CLR 635, 656–7 (Gleeson CJ), 671 (Gummow, Hayne, Crennan and Kiefel JJ).

⁵⁴ *Ibid* 656–7 (Gleeson CJ).

⁵⁵ Burrows, *The Law of Restitution*, above n 23, 348.

contract, or both, would not overcome the force of Gleeson CJ's objection to allowing restitution. It is trite law that termination of a contract entitles the parties to restitution of benefits conferred under a contract, where the basis for conferring the benefits has failed, but termination does not — without more — remove the allocation of risk between the parties. There is no good reason why the *termination* of a contract between A and B should entitle C, a third party to the contract, to claim restitution from A.

VI REQUEST AS THE BASIS OF RESTITUTION

The most significant — if retrograde — contribution that *Lumbers* makes to unjust enrichment doctrine is to reassert the proposition that, outside contract law, an award of a *quantum meruit* usually⁵⁸ depends upon proof that the recipient of a service requested its performance. Indeed, the leading 'services' case of *Pavey & Matthews Pty Ltd v Paul*⁵⁹ — for twenty years the foundation case of the Australian law of unjust enrichment — was reinterpreted by the joint judgment as a decision on the application of statutory writing requirements to a request-based claim to a *quantum meruit*.⁶⁰ According to the joint judgment, the builders' claim in that case succeeded, not because the respondent, Mrs Paul, had freely accepted the benefit of their work, or because the consideration (or basis) for undertaking the work had failed, but because she had requested the work to be done and *Builders Licensing Act 1971* (NSW) s 45 barred the contractual, but not the request-based, claim.⁶¹ It followed that Builders' claim to a *quantum meruit* failed because the work done had not been undertaken at the request of the Lumbers.⁶²

Cases of necessitous intervention apart, the requirement that a *quantum meruit* is only awarded where the defendant requests the performance of the services has a long pedigree, extending back to the pleading of the *quantum meruit* count in the contractual and quasi-contractual action of *assumpsit*. But the history also shows the difficulties that courts experienced in matching pleading form to

⁵⁶ Virgo, above n 29, 328.

⁵⁷ Alternatively, the head contract might be unenforceable for want of writing. The High Court declined to consider whether the defence that the Lumbers-Sons oral contract was unenforceable under *Builders Licensing Act 1986* (SA) s 39 was available to the Lumbers, because no restitutionary claim against the Lumbers was established: *Lumbers* (2008) 232 CLR 635, 657 (Gleeson CJ), 674 (Gummow, Hayne, Crennan and Kiefel JJ). On the question of statutory interpretation, compare *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 228–30 (Mason CJ and Wilson J), 260–4 (Deane J), 269–70 (Dawson J), where the lack of writing did not bar a claim under *Builders Licensing Act 1971* (NSW) s 45 (which provided that a contract for building work was 'not enforceable' unless it was, inter alia, in writing), with *Sevastopoulos v Spanos* [1991] 2 VR 194, 204–5 (Beach J), where the lack of writing barred a claim on the construction of *House Contracts Guarantee Act 1987* (Vic) s 19(1) (which was substantially identical to *Builders Licensing Act 1986* (SA) s 39, the latter specifying that the builder 'shall not be entitled to recover any fee or other consideration in respect of the building work' where the builder was not licensed).

⁵⁸ Some exceptions were noted in *Lumbers* (2008) 232 CLR 635, 663–4 (Gummow, Hayne, Crennan and Kiefel JJ).

⁵⁹ (1987) 162 CLR 221.

⁶⁰ *Lumbers* (2008) 232 CLR 635, 664–5 (Gummow, Hayne, Crennan and Kiefel JJ).

⁶¹ *Ibid* 665.

⁶² *Ibid* 664.

substance in cases where the defendant did not expressly request the performance of the services⁶³ and explains why writers have proposed alternative tests for the award of reasonable remuneration for work done.⁶⁴ As Professor David Ibbetson observes, the history demonstrates ‘[t]he capacity for assumpsit to slide almost imperceptibly beyond its contractual edges’.⁶⁵

Under the old forms of action a claim to a *quantum meruit* required the plaintiff to plead that ‘the defendant, in consideration of some service rendered [by] the plaintiff at [the defendant’s] request, promised to pay to the plaintiff the reasonable value of that service.’⁶⁶ In some cases, the services had been performed at the express request of the defendant.⁶⁷ In others, the request could reasonably be inferred from the surrounding circumstances, as in Coke CJ’s example of the man who took cloth to a tailor to be made into a robe. Even if nothing had been said and no price had been fixed, it could reasonably be inferred that the man had requested the robe to be made and had agreed to pay for the work.⁶⁸ But in other cases the plea of a request was a fiction. The plaintiff’s claim succeeded — although the pleading of a request was the only basis for awarding a *quantum meruit* — even though on the facts no request had been made and the making of a request could not be inferred. In *Keck’s Case*,⁶⁹ for example, the plaintiff had undertaken, for an agreed sum, to build a house of specific dimensions for the defendant. The building was completed but the plaintiff was unable to claim the contractual price because the house did not fully conform to the contractual specifications.⁷⁰ The Court nonetheless awarded the plaintiff a *quantum meruit*, leaving it to the jury to take into account the failure to comply with the specifications in assessing the amount of a reasonable payment.⁷¹

The concept of free acceptance was developed by Robert Goff and Gareth Jones as an alternative to the requirement of ‘request’ in order to explain cases where the defendant chose to accept a benefit but where the implication of a request would have been a fiction.⁷² Like the concept of request, free acceptance

⁶³ See J H Baker, ‘The Use of Assumpsit for Restitutionary Money Claims: 1600–1800’ in Eltjo J H Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (1995) 31, 35–41.

⁶⁴ See, eg, *ibid* 39–41; D J Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 269–72.

⁶⁵ Ibbetson, above n 64, 269.

⁶⁶ *Ibid*.

⁶⁷ See generally Samuel Stoljar, ‘Consideration of Request’ (1967) 5 *Melbourne University Law Review* 314, 316–19.

⁶⁸ *The Six Carpenters’ Case* (1610) 8 Co Rep 146, 147; 77 ER 695, 697–8, cited in Ibbetson, above n 64, 269 fn 30.

⁶⁹ (1744) in Sir Francis Buller, *Introduction to the Law Relative to Trials at Nisi Prius* (1768) 196, 196.

⁷⁰ *Ibid*, cited in Ibbetson, above n 64, 269 fn 31.

⁷¹ *Keck’s Case* (1744) in Sir Francis Buller, *Introduction to the Law Relative to Trials at Nisi Prius* (1768) 196, 196.

⁷² Robert Goff and Gareth Jones, *The Law of Restitution* (1st ed, 1966) 30. The impetus for attacks on the role of free acceptance in the law of unjust enrichment was Birks’s adoption of free acceptance, both as an unjust factor and as a criterion of enrichment, in Birks, *An Introduction to the Law of Restitution*, above n 45, 114–16, 265–93. For Birks’s later views, see Birks, ‘In Defence of Free Acceptance’, above n 45.

has been employed to explain why services are enriching and why the defendant's failure to pay for the services is unjust. Examples of free acceptance include builders being induced by property owners to do preparatory work before a contract is signed where the property owner later changes their mind and decides not to sign the contract,⁷³ and a contracting party taking advantage of some of the work done by the defendant under a contract that can otherwise be terminated for breach.⁷⁴ These examples, like free acceptance itself, are controversial, either because the work done may not really be enriching or because it would not necessarily be unjust for the recipient of the services to refuse payment. Some of the cases on free acceptance might be more convincingly decided on other grounds, while others should perhaps not attract liability at all.⁷⁵ Moreover, free acceptance, applied as a test of enrichment, assumes that services can be passively accepted and that in some circumstances a recipient of services comes under a duty to reject their performance if he is not to be held liable to pay for them.⁷⁶ Both assumptions are, without more,⁷⁷ doubtful.

In any case, in arguing about the role of free acceptance in the law of unjust enrichment it is important not to lose sight of the primary reason why this concept was put forward as a test of liability to make restitution for services in the first place, whether as an unjust factor or as a criterion for determining if services are beneficial. The reason was that the concept of request could not, without distortion, explain those cases in which the defendant had exercised a choice to take the benefit of services but had not asked for them to be performed. Even writers who reject the concept of free acceptance recognise that restitutionary awards are not limited to cases of requested benefits and have proposed other tests — including 'reprehensible seeking-out',⁷⁸ '[r]etention of readily returnable benefit after demand',⁷⁹ and '[w]rongful conduct'⁸⁰ — to identify the circumstances in which, in the absence of an incontrovertible benefit, services will be held to be enriching. The concept of a request can no more explain all the cases in which defendants have chosen to take the benefit of services than the notion of the implied contract could explain the cases in which restitution was awarded before the law of unjust enrichment was recognised as a discrete category of legal obligation.

⁷³ See, eg, *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712.

⁷⁴ See, eg, *Keck's Case* (1744) in Sir Francis Buller, *Introduction to the Law Relative to Trials at Nisi Prius* (1768) 196. Cf *Sumpter v Hedges* [1898] 1 QB 673, where the property owner was liable to pay for materials brought by the builder to the site to complete a building that the builder had left unfinished. Acceptance was proposed by counsel as the test of liability to pay for uncompleted work under a building contract in *Munro v Butt* (1858) 8 El & Bl 738, 750–1; 120 ER 275, 279–80 (Raymond).

⁷⁵ Kenneth Hayne, 'Anticipated Contracts That Fail to Materialise' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (2008) 237.

⁷⁶ Peter Birks, *Unjust Enrichment* (2nd ed, 2005) 56–8. Cf Burrows, *The Law of Restitution*, above n 23, 20–3.

⁷⁷ Such as the specific requirements of estoppel by acquiescence, as to which see *Willmot v Barber* (1880) 15 Ch D 96, 105–6 (Fry J).

⁷⁸ Burrows, *The Law of Restitution*, above n 23, 24–5.

⁷⁹ Edelman and Bant, above n 23, 115–16.

⁸⁰ *Ibid* 117.

VII CONCLUSION

In *Roxborough v Rothmans of Pall Mall (Australia) Ltd*,⁸¹ *Farah* and *Lumbers*, the High Court has acted out its own version of Hamlet without the Prince of Denmark. The play has been performed in three acts with the entire cast of supporting characters — action for money had and received, *quantum meruit* for work done, *quantum valebat*, request assumpsit, and liability as a constructive trustee for having knowingly received property in breach of fiduciary obligation — but without the central character of restitution for unjust enrichment to give shape to the production.⁸² The decisions reached in all three cases were ultimately sensible and right, just as perfectly intelligible, if dramatically different, versions of Hamlet can be staged without the Prince.⁸³ That the law of unjust enrichment can be explained without reference to the concept of unjust enrichment should not occasion surprise. The traditional concepts have, after all, been tried, tested, modified and reinforced over centuries of common law and equity litigation. But the history of the common law also shows how easily its ideas yield to fiction under the pressure of litigation. A genuine implied contract can all too easily lapse into an invented and unreal implied contract in circumstances in which an agreement could never have been freely made. Similarly, it does not require much judicial ingenuity to discover the existence of a request where services were not actively invited (or not invited in the precise way in which they were performed), but where the recipient nonetheless later chose to take the benefit of their performance.

Unjust enrichment theorists have been accused of applying ‘top-down reasoning’,⁸⁴ building empires⁸⁵ and other sins against legal method. But the aim of the scholars who, beginning with the *Restatement of the Law of Restitution*,⁸⁶ introduced the law of unjust enrichment to common lawyers in the twentieth century was actually quite modest: it was to reveal the substance of the law of benefit-based liabilities that lay behind the language of implied contracts and constructive trusts. By insisting that service-based claims must, in general, be requested, the High Court in *Lumbers* has shown that it is prepared to tolerate fiction and to shun the analysis of substance.

⁸¹ (2001) 208 CLR 516.

⁸² Most recently, see *Friend v Brooker* [2009] HCA 21 (Unreported, French CJ, Gummow, Hayne, Heydon and Bell JJ, 28 May 2009) [7] (French CJ, Gummow, Hayne and Bell JJ): ‘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’. Another example waiting in the wings is equitable subrogation. Contrast the methodologies adopted in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 and *Bofinger v Kingsway Group Pty Ltd* (2008) 14 BPR 26 167, special leave to appeal granted [2009] HCA Trans 144 (19 June 2009).

⁸³ Cf Tom Stoppard, *Rosencrantz and Guildenstern Are Dead* (1968).

⁸⁴ *Roxborough* (2001) 208 CLR 516, 544–5 (Gummow J), citing *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J); *Lumbers* (2008) 232 CLR 635, 662 (Gummow, Hayne, Crennan and Kiefel JJ).

⁸⁵ *Roxborough* (2001) 208 CLR 516, 579 (Kirby J).

⁸⁶ *Restatement of the Law of Restitution* (1937).