

CASE NOTE

SPANGARO v CORPORATE INVESTMENT AUSTRALIA FUNDS MANAGEMENT LTD*

FAILURE OF CONSIDERATION (FAILURE OF BASIS) AS A CLAIM IN UNJUST ENRICHMENT

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[*Spangaro v Corporate Investment Australia Funds Management Ltd is an important decision on many levels. Its principal importance is twofold. Firstly, it expressly recognised the existence of a claim in unjust enrichment as part of the common law of Australia. Secondly, it recognised that such a claim exists when the 'consideration' (that is, basis) of a payment fails, and the relevant contract under which the payment was made is terminated or avoided.*]

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I INTRODUCTION

A commentator writing recently in the *Law Quarterly Review* suggested that the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd*¹ had 'rejected the theory that "unjust enrichment" is the determinant of the restitutionary action for failure of consideration'.² Finkelstein J, however, said

* (2003) 47 ACSR 285 ('*Spangaro*').

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¹ (2001) 208 CLR 516 ('*Roxborough*').

² Ben Kremer, 'Restitution and Unconscientiousness: Another View' (2003) 119 *Law Quarterly Review* 188, 188.

the exact opposite in *Spangaro*.³ It is shown below that his Honour was correct, and that the commentator's view is a misstatement of the decision in *Roxborough* and of the law in Australia.

Other central issues concerned with the law of unjust enrichment arose in *Spangaro* and are discussed below. They included Finkelstein J's acknowledgment that, by reason of a number of decisions of the High Court, the law of Australia recognises a claim in unjust enrichment. Another was the question of whether, and in what circumstances, a claimant in unjust enrichment may recover from a person with whom the claimant did not directly deal. Finally, there is a brief discussion below of recent authorities recognising that the basis of the equitable claim for 'knowing receipt' is the law of unjust enrichment.

A *Facts and Decision in Spangaro*

Spangaro involved a managed investment scheme that failed before it had really begun. The intention was for members of the public to purchase both 'interests' in a cotton farming scheme and shares in a company called Australian Cotton Ltd ('ACL').⁴ The *Corporations Act 2001* (Cth) ('*Corporations Act*') requires managed investment schemes to have a responsible entity upon whom trustee-like duties are imposed by the Act.⁵ In this case, the responsible entity was a company called Corporate Investment Australia Funds Management Ltd ('CIAFM'). The Act enabled the appointment by the responsible entity of an agent in connection with the investment scheme.⁶ One purpose was to permit the appointment of an agent as custodian to hold some or all of the property of the scheme.⁷ Here, a custodian, Cardinal Financial Investment Securities Ltd (in liq) ('Cardinal'), was appointed to, inter alia, collect and temporarily hold the bulk of the money which members of the public would pay to participate in the scheme.⁸

The *Corporations Act* also required a prospectus for both the offering of 'interests' in the scheme and shares in ACL.⁹ One prospectus was issued for both offers. The judgment does not say who issued the prospectus, but it was presumably CIAFM (for the offer of the interests in the scheme) and ACL (for the issue of shares in ACL).¹⁰

To participate in the investment scheme, Mr Spangaro paid CIAFM a sum of money for an interest in the project and shares in ACL. The prospectus stated that: 'All Application Moneys will be held in a separate bank account in trust for the applicants until the issue of the Interests'.¹¹ The bank account was to be maintained by Cardinal. Finkelstein J interpreted 'Application Money' to mean

³ (2003) 47 ACSR 285, 301.

⁴ Ibid 288–9 (Finkelstein J).

⁵ *Corporations Act* pt 5C.2.

⁶ *Corporations Act* s 601FB.

⁷ *Corporations Act* s 601FC(4).

⁸ *Spangaro* (2003) 47 ACSR 285, 288–9 (Finkelstein J).

⁹ *Corporations Act* s 709.

¹⁰ See *Spangaro* (2003) 47 ACSR 285, 299 (Finkelstein J), stating that Cardinal was 'not a "party"' to the prospectus.

¹¹ Cited *ibid* 288.

the money paid for interests in the scheme, and not the money paid for shares in ACL.¹² Once the project was established, Cardinal would hold the application monies as agent for CIAFM, then pay the monies over to CIAFM.¹³

The effect of various provisions of the prospectus and related documents was that no interest in the scheme was to actually be issued until a minimum number of subscriptions for interests in the project was reached.¹⁴ Moreover, the project would not be regarded as being established until that minimum was achieved.¹⁵

Mr Spangaro, selected as a test case for many other investors with similar claims, had paid \$13 600 for six interests in the project, and a lesser sum for shares in ACL.¹⁶ However, in breach of the terms of the prospectus, Cardinal paid over Spangaro's money to CIAFM before the minimum number of subscriptions had been achieved. As events turned out, the scheme failed and Cardinal was placed into liquidation.

Spangaro sought to recover his \$13 600. His claims were as follows:

- 1 against Cardinal, for breach of trust;¹⁷
- 2 against CIAFM, for 'money had and received';¹⁸
- 3 against CIAFM, for 'knowing receipt';¹⁹ and
- 4 against individuals who controlled Cardinal and CIAFM, as 'knowing assistants'.²⁰

Finkelstein J's judgment concerned the first three claims, which all succeeded. The claims in (1) and (4) are not of present relevance, but those in (2) and (3) gave rise to the issues outlined above.

II RECOGNITION AND APPLICATION OF THE PRINCIPLES OF UNJUST ENRICHMENT

The first claim against CIAFM was for 'money had and received'.²¹ Finkelstein J dismissed the old language almost immediately. For his Honour, what was being pursued was a 'claim in restitution against CIAFM. Mr Spangaro alleges that CIAFM has been unjustly enriched at his expense by reason of CIAFM's retention of the amounts paid'.²²

Finkelstein J stated that this claim was 'personal in nature and grounded in the doctrine of unjust enrichment'.²³ Finkelstein J went on to outline the elements of the cause of action:

¹² Ibid 291.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid 298–9.

¹⁷ Ibid 287.

¹⁸ Ibid 300.

¹⁹ Ibid 302.

²⁰ Ibid 305.

²¹ Ibid 300.

²² Ibid.

²³ Ibid.

To obtain restitutionary relief, a plaintiff must demonstrate that:

- (i) the defendant was enriched;
- (ii) the defendant's enrichment was at the plaintiff's expense;
- (iii) the enrichment was unjust (according to defined categories developed in the cases); and
- (iv) no restitutionary or other defences would preclude restitution being made.²⁴

This acceptance of a cause of action in, and the underlying principles of, unjust enrichment is firmly based in English and Australian precedent. A series of High Court cases, cited by Finkelstein J, has confirmed the existence of, and developed, the principles of unjust enrichment.²⁵ The first case in the series is *Pavey*. There, Deane J stated that unjust enrichment

constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff.²⁶

In addition, Deane J referred to the builder's claim for *quantum meruit* in that case as 'an action founded on restitution or unjust enrichment'.²⁷ The judgment of Mason and Wilson JJ supported Deane J on this point.²⁸

Some commentators, and one or two judges, have seized on the word 'concept' in the first passage from Deane J's judgment extracted above to suggest that unjust enrichment is just that — a concept — and nothing more. Another principle, that of 'unconscionable conduct', has been said to govern the claims in question.²⁹ That view is discussed, and rejected, below. For now, it is enough to note that the 'unconscionability' view cannot stand in the face of the second High Court case in the series cited by Finkelstein J as supporting a claim in unjust enrichment for restitutionary relief.

ANZ v Westpac was decided one year after *Pavey*. A unanimous High Court said:

The basis of the common law action of money had and received for recovery of an amount paid under fundamental mistake of fact should now be recognized as lying not in implied contract but in restitution or unjust enrichment. ... In other words, receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.³⁰

²⁴ Ibid. I have added paragraph spacing. As to the onus of establishing (iv), see below Part II(F).

²⁵ Ibid 300–1, citing *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 ('*Pavey*'); *Australia & New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 ('*ANZ v Westpac*'); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ('*David Securities*').

²⁶ Ibid 256–7.

²⁷ Ibid 262–3.

²⁸ Ibid 221, 227.

²⁹ *Roxborough* (2001) 208 CLR 516, 543 (Gummow J).

³⁰ (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

There could be no clearer recognition of unjust enrichment: ‘The basis of the common law action ... for recovery of an amount paid under fundamental mistake of fact ... [lies] in restitution or unjust enrichment’.³¹

In *David Securities*, a case concerning a payment made under a mistake of law, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ characterised the claim as seeking the recovery of the payment ‘on the ground of unjust enrichment’.³² Similarly, Brennan J said:

Leaving aside defences that arise from supervening circumstances, the essential condition for an order for restitution of money paid by mistake is that the receipt of the payment by the defendant has unjustly enriched the defendant at the expense of the plaintiff.³³

In *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*, another claim to recover a mistaken payment, Mason CJ stated:

Restitutory relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched. As in the action for money had and received, the defendant comes under an obligation to account to the plaintiff for money which the defendant has received for the use of the plaintiff. The subtraction from the plaintiff’s wealth enables one to say that the defendant’s unjust enrichment has been ‘at the expense of the plaintiff’, notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties.³⁴

Brennan J, with whom Toohey and McHugh JJ agreed,³⁵ stated:

The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter. ... [N]o defence of ‘passing on’ is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A’s moneys.³⁶

More recently, in *Roxborough*, Gleeson CJ, Gaudron and Hayne JJ stated:

If there is here a right to enforce repayment upon the basis of a failure of consideration, it is because, in the circumstances, the law imposes upon the respondent an obligation to make just restitution for a benefit derived at the expense of the appellants.³⁷

Their Honours go on to quote with approval those parts of Mason CJ and Brennan J’s judgments in *Royal Insurance* extracted above, each of which explicitly stated that the basis of recovery was that the defendant ‘ha[d] been

³¹ Ibid.

³² (1992) 175 CLR 353, 379.

³³ Ibid 392.

³⁴ (1994) 182 CLR 51, 75 (citations omitted) (*‘Royal Insurance’*).

³⁵ Ibid 103.

³⁶ Ibid 90–1 (citations omitted).

³⁷ *Roxborough* (2001) 208 CLR 516, 527. Other passages from their Honours’ judgment, which might be thought to undermine the acceptance of a general principle of unjust enrichment, are extracted below. See below nn 87, 91–2 and accompanying text.

unjustly enriched'.³⁸ According to Gleeson CJ, Gaudron and Hayne JJ, *Royal Insurance* was decided 'on general restitutionary principles'.³⁹ The three passages quoted above from *Royal Insurance* and *Roxborough* unequivocally contain the language of unjust enrichment. And as stated, the High Court in *ANZ v Westpac* could not have been clearer.

Similarly unequivocal acceptance of the existence of the law of unjust enrichment exists in England. In *Lipkin Gorman (a firm) v Karpnale Ltd*, Lord Goff said:

I accept that the solicitors' claim in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club was indeed unjustly enriched at the expense of the solicitors. ... [T]he underlying principle of recovery is the principle of unjust enrichment.⁴⁰

Every other member of the House of Lords in that case expressly agreed with this statement.⁴¹ Again, in *Kleinwort Benson Ltd v Glasgow City Council*, a case involving a claim to recover money paid under a void contract, Lord Goff said that 'the claim in the present case is simply a claim to restitution, which in English law is based upon the principle of unjust enrichment.'⁴² Lord Clyde said exactly the same thing,⁴³ as did Lord Hutton.⁴⁴ Lord Mustill and Lord Nicholls dissented on another point.

In *Banque Financière de la Cité v Parc (Battersea) Ltd*, an equitable claim of subrogation, Lord Hoffman stated that:

Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution.⁴⁵

All other members of the House of Lords agreed that non-contractual subrogation was a claim in unjust enrichment.⁴⁶

In *Kleinwort Benson Ltd v Lincoln City Council*, another void contract case, Lord Goff referred to the fundamental change in the law that took place when

³⁸ Ibid 529.

³⁹ *Roxborough* (2001) 208 CLR 516, 529–30. The passages from *Royal Insurance* quoted by Gleeson CJ, Gaudron and Hayne JJ were those extracted above: see above nn 34, 36 and accompanying text.

⁴⁰ [1991] 2 AC 548, 578 ('*Lipkin Gorman*').

⁴¹ Ibid 558 (Lord Bridge), 559 (Lord Templeman), 568 (Lord Ackner). *Lipkin Gorman* is discussed in *Spangaro* (2003) 47 ACSR 285, 301 (Finkelstein J).

⁴² [1999] 1 AC 153, 167.

⁴³ Ibid 184.

⁴⁴ Ibid 186.

⁴⁵ [1999] 1 AC 221, 231–2 ('*Banque Financière*'). Lord Griffiths agreed with Lord Hoffman: at 228.

⁴⁶ Ibid 228 (Lord Steyn), 237 (Lord Clyde), 243 (Lord Hutton).

there was judicial ‘recognition that there exists a coherent law of restitution founded upon the principle of unjust enrichment’.⁴⁷ Yet again, all other members of the House of Lords agreed that this was so.⁴⁸

In *Dubai Aluminium Co Ltd v Salaam*, a case concerning, inter alia, vicarious liability under the *Partnership Act 1890*, 53 & 54 Vict, c 39, Lord Millett (with whom Lord Hutton and Lord Hobhouse agreed) said:

The firm ... and its innocent partners ... are vicariously liable for a partner’s conduct provided that three conditions are satisfied: (i) his conduct must be wrongful, that is to say it must give rise to fault-based liability and not, for example, merely *receipt-based liability in unjust enrichment*; (ii) it must cause damage to the claimant; and (iii) it must be carried out in the ordinary course of the firm’s business.⁴⁹

Finally, in *Criterion Properties plc v Stratford UK Properties LLC*, Lord Nicholls (with whom Lord Walker agreed) said (in obiter dicta):

If a company (A) enters into an agreement with B under which B acquires benefits from A, A’s ability to recover these benefits from B depends essentially on whether the agreement is binding on A. ... If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the assets in question, *A will have a personal claim against B for unjust enrichment, subject always to a defence of change of position. B’s personal accountability will not be dependent upon proof of fault or ‘unconscionable’ conduct on his part. B’s accountability, in this regard, will be ‘strict’.*⁵⁰

All of these cases support the proposition that the common law (using that term to mean judge-made law including equity) recognises a doctrine of unjust enrichment that forms the principled basis of a number of causes of action. Liability in unjust enrichment is strict, subject to defences including change of position. Liability is not dependent on fault or ‘unconscionable conduct’.

Adopting the approach of Finkelstein J in *Spangaro*,⁵¹ and the approach of Lord Steyn in *Banque Financière*,⁵² four questions must be asked:

- 1 Was the defendant enriched?
- 2 Was the enrichment at the expense of the claimant?

⁴⁷ [1999] 2 AC 349, 373.

⁴⁸ *Ibid* 357 (Lord Browne-Wilkinson), 389 (Lord Lloyd), 398 (Lord Hoffmann), 402–3 (Lord Hope).

⁴⁹ [2003] 2 AC 366, 397 (emphasis added) (*‘Dubai Aluminium’*). See also at 391 (emphasis added): Dishonest receipt gives rise to concurrent liability, since the claim can be based on the defendant’s dishonesty, treating the receipt itself as incidental, being merely the particular form taken by the defendant’s participation in the breach of fiduciary duty; but it can also be based simply on the receipt, treating it as a *restitutionary claim independent of any wrongdoing*: see *John v Dodwell & Co Ltd* [1918] AC 563.

⁵⁰ [2004] 1 WLR 1846, 1848 (second emphasis added) (*‘Criterion Properties’*).

⁵¹ See above n 24 and accompanying text.

⁵² [1999] 1 AC 221, 227.

- 3 Was the enrichment unjust (according to defined categories developed in the cases)?⁵³
- 4 Are there any restitutionary or other defences?

Leaving aside three minor issues to be considered below, Finkelstein J's recognition and application of the law of unjust enrichment is welcome support for those modern jurists who strive for a rational, principled understanding of Australian law.⁵⁴ This continuing search for, and explanation of, principle ensures that the most basic doctrine of the Australian legal system — that like cases must be treated alike — is upheld.

A 'Just a Concept'

Faced with the clear authority referred to above and relied upon by Finkelstein J in *Spangaro*, it might seem difficult to argue that there is no such thing as a claim in unjust enrichment. Yet such a view persists, and is championed by no less than Gummow J of the High Court. In his Honour's view, expressed in *Roxborough*, the true basis of a claim for restitution (in that case, a claim to recover a payment made for consideration that failed) is not unjust enrichment, but unconscionable conduct.⁵⁵

Gummow J's judgment in *Roxborough* does not refer to any of the passages extracted above from those High Court decisions that expressly accept the principles of unjust enrichment. Instead, his Honour relies on a different passage from *David Securities*. That passage, contained in the judgment of Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, was in these terms:

According to the respondent's submissions, moneys paid under a mistake of law could only be recoverable in so far as the recipient has been unjustly enriched at the expense of the payer, such that it would be unconscionable for the recipient not to give restitution to the payer. In support of this approach, the respondent relies, inter alia, on the recent decisions of this Court in *Westpac Banking Corporation* and *Pavey & Matthews*.

Although this alternative approach is not greatly different from that stated above, it does have important consequences in relation to the elements of the action which the plaintiff must plead and prove. It also appears to proceed from the view that in Australian law unjust enrichment is a definitive legal principle according to its own terms and not just a concept.

The two decisions of this Court just mentioned reject that approach.⁵⁶

Three points undermine Gummow J's reliance on that passage. First, it is clear that their Honours in *David Securities* were in fact *rejecting* the very thesis that Gummow J advances — namely, that the plaintiff's right to recovery depends upon the existence of 'unconscionable' conduct on the part of the recipient of the

⁵³ The view that all of the defined categories of unjust enrichment developed in the cases can be assimilated as 'absence of basis' is discussed below: see below n 100 and accompanying text.

⁵⁴ Robert Goff, 'The Search for Principle' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 313.

⁵⁵ (2001) 208 CLR 516, 543.

⁵⁶ *David Securities* (1992) 175 CLR 353, 378.

payment in question. Money paid under a mistake of law was held to be recoverable *without* the need to show ‘that it would be unconscionable for the recipient not to give restitution to the payer’.⁵⁷

Second, the point that their Honours were making in *David Securities* in stating that unjust enrichment is not ‘a definitive legal principle according to its own terms’ is that it is never sufficient simply to prove facts that the plaintiff contends constitute an unjust enrichment of the defendant, and to recite the conclusion in the pleading that a claim in unjust enrichment lies on those facts. That is because an enrichment is only unjust ‘according to defined categories developed in the cases’.⁵⁸ The ‘unjust’ in unjust enrichment at the expense of the plaintiff looks down to the cases. Unless the plaintiff can show that the category of unjust enrichment relied upon has been previously recognised by common law or equity, or exceptionally that a new category ought to be recognised, the plaintiff will fail. It is clear from the passages which immediately follow that this is the point being made by their Honours in *David Securities*. After quoting from Deane J’s judgment in *Pavey*, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ continued:

Accordingly, it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality. As this Court stated in *Westpac Banking Corporation*:

In other words, receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.⁵⁹

Third, the judgment in *David Securities* relied upon by Gummow J in *Roxborough* to undermine the relevance of unjust enrichment in fact accepts the contrary. The passage just quoted expressly approved of the unanimous High Court decision in *ANZ v Westpac*, and in that case the whole Court said that ‘[t]he basis of the common law action ... for recovery of an amount paid under fundamental mistake of fact should now be recognized as lying not in implied contract but in restitution or unjust enrichment’.⁶⁰

B *Unjust Enrichment Is Not a Wrong, and Is Not Based on Unconscionable Conduct*

The above analysis contends that Gummow J’s thesis — namely, that claims for restitution of mistaken payments and payments made for a consideration that fails are based on unconscionable conduct and not unjust enrichment — is

⁵⁷ *Ibid.*

⁵⁸ *Spangaro* (2003) 47 ACSR 285, 300 (Finkelstein J).

⁵⁹ *David Securities* (1992) 175 CLR 353, 379, citing *ANZ v Westpac* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

⁶⁰ *ANZ v Westpac* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

contrary to High Court and House of Lords authority. However, it should also be rejected for another reason — that is, that the principle of unjust enrichment is the only rational explanation of the law as to mistaken payments. ‘Unconscionability’, on the other hand, simply cannot explain that law.

A payment made by mistake is recoverable as of right from the payee, without proof of fault on the payee’s part,⁶¹ subject only to general defences, such as when the defendant has in good faith changed his or her position on the basis of the payment.⁶² We used to understand this right as based upon a ‘quasi-contract’ between the payer and the payee: the law would infer from the fact of a mistaken payment an implied promise by the payee to repay the money.⁶³ That was always a fiction. It did not reflect reality. The payee had promised no such thing. Worse still, this fiction, even though recognised to be a fiction, led to serious error.

*Sinclair v Brougham*⁶⁴ is a perfect example of the importance of properly understanding the true principles of law in operation. In that case an institution did not have power to operate as a bank. Ultra vires, a bank was run nonetheless. The question was whether people who had deposited their money with the institution could get their money back. The House of Lords held that they could not.⁶⁵ The reason for this was that there could be no implied contract to return the money when an express contract to the same effect was void as ultra vires: ‘The fiction can only be set up with effect if such a contract would be valid if it really existed’.⁶⁶ The fiction has now gone, and with it the reasoning and result in *Sinclair v Brougham*. Roughly eight decades later, the House of Lords held that payments made under a void contract are recoverable in unjust enrichment,⁶⁷ and that *Sinclair v Brougham* was wrongly decided.⁶⁸

If ‘implied contract’ is not the explanation of the right to recover mistaken payments, what is? The cases discussed above accept that the principles of unjust enrichment provide the explanation. A unanimous High Court said exactly that in *ANZ v Westpac*. There is an independent category of rights that may be maintained in court which arise in response to events of unjust enrichment. Payment by mistake is one such event; a payment made on a basis that fails is another.

Gummow J rejects that proposition, and argues instead that the true explanation is the avoidance of unconscionable conduct.⁶⁹ Of course, all legal rights are designed to uphold what is ‘fair’. But beyond this, ‘unconscionable’ or ‘uncon-

⁶¹ *Kelly v Solari* (1841) 9 M & W 54; 152 ER 24; *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677. See above nn 34, 36 and accompanying text.

⁶² *Lipkin Gorman* [1991] 2 AC 548; *David Securities* (1992) 175 CLR 353.

⁶³ *David Securities* (1992) 175 CLR 353, 388–9 (Brennan J), quoting *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61 (Lord Wright).

⁶⁴ [1914] AC 398.

⁶⁵ A proprietary claim to the traceable proceeds of the deposits still held by the institution was allowed: *ibid* 423 (Viscount Haldane LC), 438 (Lord Dunedin), 450 (Lord Parker), 459 (Lord Sumner).

⁶⁶ *Ibid* 415 (Viscount Haldane LC).

⁶⁷ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 710 (Lord Browne-Wilkinson), 719 (Lord Slynn), 723 (Lord Woolf).

⁶⁸ *Ibid* 710 (Lord Browne-Wilkinson), 718 (Lord Slynn), 738 (Lord Lloyd). The ‘implied contract’ theory was rejected in Australia in, for example, *Pavey* (1987) 162 CLR 221; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 356–7 (Mason CJ).

⁶⁹ *Roxborough* (2001) 208 CLR 516, 555.

scientious' conduct has no explanatory force in the context of payments by mistake. To say that it is unconscientious to retain a mistaken payment does not explain *why* the law requires repayment. As Professor Peter Birks said: 'The only relevant unconscientiousness in such a case is unconscientiousness *ex post*. It is unconscientious to retain what ought to be given back.'⁷⁰

'Unconscientiousness' does not explain why a mistaken payment ought to be given back. Even if it were true to say that the law creates no right of recovery *until* the payee learns of the mistake (which, as discussed immediately below, is not true), this still does not explain why, having learnt of the mistake, it becomes 'unconscientious' for the recipient to refuse to return the payment. Unconscientiousness is either circular and/or meaningless.⁷¹

Moreover, it cannot possibly be 'unconscientious' to retain a mistaken payment if one does not know that the payment was made by mistake. How else, besides by knowledge or notice of the mistake, could it be said that the payee's conscience is affected? In fact, the law requires neither knowledge nor notice. 'It is well established that the cause of action for the recovery of money paid under a mistake of fact accrues at the time of payment.'⁷² In other words, and as Justice Keith Mason has recently said: 'It is receipt, not retention, of benefit that triggers a personal restitutionary remedy'.⁷³ Importantly, in many cases the payee will not know of the mistake at the moment the payment is received. The right to restitution arises nonetheless. In *Kleinwort Benson Ltd v Lincoln City Council*, for example, no-one knew of the mistake until years after the payments were made, yet the House of Lords affirmed that the right to recover a mistaken payment arose at the moment of receipt.⁷⁴

An explanation that looks to the 'conscience' of the retention of the payment fails, therefore, to adequately explain mistaken payments. Similarly, 'unconscientiousness' does not explain the right to recover payments made for consideration that fails. The proper explanation of these rights is that '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'.⁷⁵ The law responds to certain events by giving one or more of the participants rights. One example is an event of unjust enrichment at the expense of the plaintiff. The law responds to this by giving the plaintiff a *prima facie* right to restitution.⁷⁶

With that understanding of the right, there is neither need nor utility in seeking fictional explanations based on 'unconscionable' or 'unconscientious' conduct.

⁷⁰ Peter Birks, 'Undue Influence as Wrongful Exploitation' (2004) 120 *Law Quarterly Review* 34, 36.

⁷¹ See also Peter Birks, *Unjust Enrichment* (2nd ed, 2005) 5–9, 18–19, 275–7, 289–90.

⁷² *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 386 (Lord Goff), with whom Lord Browne-Wilkinson and Lord Hoffman agreed on this point: at 357 and 398 respectively. See also at 409 (Lord Hope), quoting *David Securities* (1992) 175 CLR 353, 389 (Brennan J).

⁷³ Justice Keith Mason, 'Where Has Australian Restitution Law Got to and Where Is It Going?' (2003) 77 *Australian Law Journal* 358, 362, citing *ANZ v Westpac* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

⁷⁴ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 384 (Lord Goff).

⁷⁵ *Pavey* (1987) 162 CLR 221, 257 (Deane J).

⁷⁶ *Ibid* 237 (Brennan J).

Indeed, such explanations should be avoided whenever possible. As McHugh J said in *Perre v Apand Pty Ltd*:

attractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts arising from real life activities. While the training and background of judges may lead them to agree as to what is fair or just in many cases, there are just as many cases where using such concepts as the criteria for duty would mean that 'each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind'.

Furthermore, when legislatures and courts formulate legal criteria by reference to indeterminate terms such as 'fair', 'just', 'just and equitable' and 'unconscionable', they inevitably extend the range of admissible evidentiary materials. Cases then take longer, are more expensive to try, and, because of the indeterminacy of such terms, settlement of cases is more difficult, practitioners often having widely differing views as to the result of cases if they are litigated. Bright lines rules may be less than perfect because they are under-inclusive, but my impression is that most people who have been or are engaged in day-to-day practice of the law at the trial or advising stage prefer rules to indeterminate standards.⁷⁷

Echoes of that view appear in extra-judicial speeches of two other present members of the High Court, Chief Justice Gleeson⁷⁸ and Justice Hayne.⁷⁹ Similar, albeit softer, criticisms were advanced by five members of the High Court, Gummow J amongst them, in *Tanwar Enterprises Pty Ltd v Cauchi*.⁸⁰

Perhaps the law in Australia, more so than the law in England, requires resort on occasion to principles that incorporate notions of 'unconscionable' or 'unconscientious' conduct, with the adverse consequences that were described by McHugh J in *Perre v Apand Pty Ltd*. However, rights that arise in response to events of unjust enrichment, such as the right to recover a mistaken payment and the right to recover a payment made on a basis which fails, provide no such occasion. Such rights are explained by, and arise because of, the law of unjust enrichment — a law accepted by the highest courts in England and Australia.

C Failure of Consideration Is a Category of Unjust Enrichment

The third element of a claim in unjust enrichment — whether the enrichment of the defendant at the plaintiff's expense was *unjust* — must be based on a category of unjust enrichment recognised by the cases.⁸¹ One common example

⁷⁷ (1999) 198 CLR 180, 211–12 (citations omitted).

⁷⁸ Chief Justice A M Gleeson, 'Individualised Justice — The Holy Grail' (1995) 69 *Australian Law Journal* 421, 426: 'It is important to note, however, one feature of the principle of unconscionability. It has an alarming capacity to provoke judicial disagreement as to its application to the facts of even fairly straightforward cases.'

⁷⁹ Justice Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling' (2001) 27 *Monash University Law Review* 12.

⁸⁰ (2004) 217 CLR 315, 325 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

⁸¹ *Spangaro* (2003) 47 ACSR 285, 301–2 (Finkelstein J).

is a payment by mistake. Another, which applied in *Spangaro*, is failure of consideration. Mr Spangaro paid for his interests in the investment project on the specific basis that the investment would go ahead. It did not, and he was entitled to the return of his money.⁸²

A commentator has suggested that in *Roxborough* ‘the High Court rejected the theory that “unjust enrichment” is the determinant of the restitutionary action for failure of consideration’.⁸³ If that were in fact correct, Finkelstein J must have seriously misread *Roxborough*, for his Honour stated the exact opposite when he affirmed that:

one must turn to the recognised categories of unjust enrichment to identify the basis for the obligation to make restitution. A common basis is when money has been paid for a consideration which has failed: *Moses v Macferlan* (1760) 2 Burr 1005 at 1012; 97 ER 676 at 680–681; *Royal Bank of Canada v R* [1913] AC 283 at 296; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 ...⁸⁴

In other words, unjust enrichment *is* the basis of the restitutionary action for failure of consideration. As can be seen, one of the three cases cited by Finkelstein J for that proposition was *Roxborough*.

Finkelstein J’s view is correct. The commentator’s view of *Roxborough* is not. Only Gummow J in *Roxborough* dismissed unjust enrichment as the underlying principle in ‘failure of consideration’ cases. The most that can be justifiably said about the judgment of Gleeson CJ, Gaudron and Hayne JJ in *Roxborough* is that it is equivocal as to whether their Honours viewed unjust enrichment as the principle underlying the ‘failure of consideration’ claim in that case.

On the one hand, Gleeson CJ, Gaudron and Hayne JJ expressly accepted the existence of ‘general restitutionary principles’ and quoted with approval from Mason CJ’s judgment in *Royal Insurance*. In that case, Mason CJ said that ‘[r]estitutionary relief ... operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched.’⁸⁵

Gleeson CJ, Gaudron and Hayne JJ in *Roxborough* did not expressly say that the relevant claim in that case, for failure of consideration, was a claim in unjust enrichment. But their Honours’ comments quoted above came very close to saying just that, for to speak of ‘a benefit derived at the expense of the appellants’⁸⁶ is to use the language of unjust enrichment.

However, it is arguable that Gleeson CJ, Gaudron and Hayne JJ in *Roxborough* made several remarks inconsistent with the general principles of the law of unjust enrichment recognised in the Australian and English cases quoted above. Their Honours said:

⁸² The issue of whether the enrichment of CIAFM was at the expense of Mr Spangaro is discussed below Part III.

⁸³ Kremer, above n 2, 188.

⁸⁴ *Spangaro* (2003) 47 ACSR 285, 301–2.

⁸⁵ (1994) 182 CLR 51, 75.

⁸⁶ See above n 37 and accompanying text.

If there had been a total failure of consideration, because, for example, there had been a prepayment for goods which were never delivered, the respondent's duty to make restitution would have been clear. But there are two questions. The first is whether there has been a failure of a severable part of the consideration. The second is whether, in the absence of restitution, the respondent will retain money at the expense of the appellants. The second problem arises because the appellants have passed on the burden of the tax. According to the respondent, if the respondent has been enriched, then that has been at the expense, not of the appellants, but of the customers of the appellants, and justice does not require it to make restitution to the appellants.⁸⁷

The law of unjust enrichment asks whether, on the basis of decided cases, the 'receipt' of the defendant at the expense of the plaintiff was unjust.⁸⁸ If it was, then the plaintiff has a right to restitution, subject to any available defence. The plaintiff does not need to prove in addition that in the absence of restitution, the defendant 'will *retain* money at the expense of the [plaintiff]'.⁸⁹ Similar references to the lack of the right of the defendant to 'retain' the money in question were made elsewhere in the judgment.⁹⁰

The better view of these passages is not that it was necessary for the plaintiff to prove that the defendant had no right to retain the money in question as part of the plaintiff's case. Rather, their Honours were dealing with the defence of 'passing on', on which the defendant sought to rely, and in that context spoke of the absence of the right to retain. When a defendant raises as a 'defence' the notion that the plaintiff has passed on his or her loss to third parties, then it is natural to speak of the defendant having no right to retain the enrichment despite that passing on. Yet, that does not detract from the principle, unequivocally accepted in the cases, that the plaintiff's right to restitution arises at the moment of receipt.

The same sort of explanation exists for two other parts of the judgment of Gleeson CJ, Gaudron and Hayne JJ. Their Honours discussed the defendant's defence of 'passing on' as having been

put on the basis that any enrichment of the respondent is not at the expense of the appellants and that, in consequence, the equitable foundation for a claim for restitution does not exist. But this, in turn, assumes that, in the circumstances of a case such as the present, it would only be unconscionable of the respondent to withhold repayment of the amounts referable to the tax if the appellants, for their part, were ultimately left impoverished to that extent.⁹¹

Their Honours also queried:

Why does it make a difference to the conscientiousness of the respondent's retention of the moneys that the products were sold by the appellants at prices

⁸⁷ *Roxborough* (2001) 208 CLR 516, 527.

⁸⁸ See above nn 24, 53, 58–9 and accompanying text.

⁸⁹ *Roxborough* (2001) 208 CLR 516, 527 (Gleeson CJ, Gaudron and Hayne JJ) (emphasis added).

⁹⁰ *Ibid* 529.

⁹¹ *Ibid* 528.

that had the practical effect of recouping the expense they bore in paying the ‘tobacco licence fees’?⁹²

Again, the better view of these comments is that they were directed to the defendant’s argument that it was not unconscionable for the defendant to retain the monies, given that the plaintiff had passed on the burden of the tobacco licence fees charged as part of the contract of sale between them. In answering that argument, it is only to be expected that their Honours might refer to the ‘conscientiousness’ of the defendant’s position. But that is a very different thing from saying that it is necessary for the plaintiff to prove as an element of its cause of action that the defendant had engaged in unconscionable conduct.

Taking the majority judgment in *Roxborough* as a whole, it cannot be said to support the proposition that unconscionable conduct and not unjust enrichment was the principle underlying and explaining the plaintiff’s cause of action. Indeed, if the majority in *Roxborough* had truly rejected ‘the theory that “unjust enrichment” is the determinant of the restitutionary action for failure of consideration’,⁹³ they would have been directly contradicting what Mason CJ and Brennan J said in *Royal Insurance*,⁹⁴ and indirectly contradicting what the High Court unanimously said in *ANZ v Westpac*.⁹⁵ *Royal Insurance* was a failure of consideration case. *ANZ v Westpac* was a mistaken payment case. Both cases accepted the principles of unjust enrichment as underlying the cause of action. There is no reason why mistaken payments and payments for a consideration that fails should be governed by different principles, and every reason why they should be treated alike. *ANZ v Westpac* held, unequivocally, that the principle which gives rise to a right to recover a mistaken payment is unjust enrichment. Mason CJ and Brennan J in *Royal Insurance* said that the same principle governs claims for failure of consideration. Lord Nicholls (with whom Lord Walker agreed) said the same thing in *Criterion Properties*.⁹⁶ In light of those authorities, Finkelstein J was right to say that a recognised category of unjust enrichment exists when money is paid for a consideration which has failed.

D *Absence of Basis — A Unifying Form of Unjust Enrichment*

It may be that ‘absence of basis’ will come to subsume all categories of unjust enrichment developed in the cases. Professor Birks, in his last major work, powerfully argued that absence of basis covers every species of unjust enrichment:

A single proposition covers every case: an enrichment at the expense of another is unjust when received without explanatory basis. Subject to very rare exceptions, it will be true of every case in which an enrichment is received without any explanatory basis that its claimant will not have intended it to accrue to the

⁹² Ibid 529.

⁹³ Kremer, above n 2, 188.

⁹⁴ See above nn 34, 36 and accompanying text.

⁹⁵ See above n 30 and accompanying text.

⁹⁶ See above n 50 and accompanying text.

defendant, for in every case it will either have accrued absolutely without his consent or, if with his consent, on a particular basis which has failed.⁹⁷

Brennan J advocated a similar approach. In *David Securities*, his Honour said:

Leaving aside defences that arise from supervening circumstances, the essential condition for an order for restitution of money paid by mistake is that the receipt of the payment by the defendant has unjustly enriched the defendant at the expense of the plaintiff. What is meant by unjust enrichment? *In essence, to say that a defendant has been unjustly enriched by the receipt of a payment is to say that the defendant has no right to receive it.*⁹⁸

The basis of an enrichment (or the right to receive a payment) can fail initially, either before or immediately upon the receipt of the enrichment, or it can fail subsequently, after its receipt.⁹⁹ A payment by mistake is a payment made without there ever being an explanatory basis. Usually, the payer mistakenly believes that he or she is obliged to make the payment. In fact, the obligation did not exist. The payment thus had no explanatory basis recognised by law. The absence of basis existed right from the start. Alternatively, the basis of the payment may fail subsequently, as when A pays B to paint A's house, but B thereafter refuses to do so. A could either sue B for damages with or without terminating the contract, or A could terminate the contract and sue B in unjust enrichment. The basis for the payment — the contractual obligation to make the payment and the expectation that the house will be painted in return — falls away.¹⁰⁰

E Failure of Consideration in the Context of Contract

Finkelstein J in *Spangaro* said that '[i]n the context of restitutionary claims founded on failure of consideration it is important to note the historical requirement that any relevant contract be ineffective.'¹⁰¹ That is correct. The same point can be made in slightly different terms: 'The orthodox doctrine is that an enrichment transferred under a valid contract cannot be recovered unless the contract is [validly] rescinded or terminated'.¹⁰²

Finkelstein J went on to say '[t]hat requirement may now have been dispensed with: *Roxborough*'.¹⁰³ That statement goes too far. The orthodox doctrine will

⁹⁷ Birks, *Unjust Enrichment*, above n 71, 116. The proof of the absence of basis approach to the law of unjust enrichment lies in the fact that it provides the only rational explanation of the swaps cases: at ch 5.

⁹⁸ *David Securities* (1992) 175 CLR 353, 392 (emphasis added).

⁹⁹ Birks, *Unjust Enrichment*, above n 71, ch 6.

¹⁰⁰ Unless, oddly, the right to receive the payment is an accrued right that survives termination of the contract, or the contract clearly deals with repayment or recompense after discharge: see, eg, *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883. A contracting party is presumed not to intend to abandon its common law rights: *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717 (Lord Diplock).

¹⁰¹ *Spangaro* (2003) 47 ACSR 285, 302.

¹⁰² Peter Birks, 'Failure of Consideration and Its Place on the Map' (2002) 2 *Oxford University Commonwealth Law Journal* 1, 4. See also *Pavey* (1987) 162 CLR 221, 256 (Deane J); *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152, 165 (Lord Goff); *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 All ER 470, 473–5 (Lord Goff).

¹⁰³ *Spangaro* (2003) 47 ACSR 285, 302.

apply in almost every case. It is only in exceptional cases that it will be possible to advance a claim in unjust enrichment to recover a payment made under a valid contract that is not rescinded or terminated. The exception can be invoked only where the claim would not disturb legitimate hopes and fears inherent in the bargain.¹⁰⁴ *Roxborough* was an example of such an exceptional case: it does not represent, or undermine, the rule.¹⁰⁵

One situation in which the rule is applied from time to time is the claim made by a bank to recover a mistaken payment made to a third party on behalf of the bank's customer. Suppose I have \$500 in my account. I write out a cheque payable to X for \$1000. By mistake, the bank thinks I have \$5000 in my account. It therefore makes payment on the cheque to X. If the bank had known that I had only \$500 in my account, it would have dishonoured the cheque. Although the bank had a discretion to allow me to overdraw on my account, I had a bad credit history and the bank was not prepared to run the risk of non-recovery from me. Can the bank recover from X? The answer is no.¹⁰⁶ The payment is recoverable by the bank only from me, pursuant to a valid contract between us. That contract was initially valid and remains so — it cannot be lawfully rescinded or terminated.¹⁰⁷ The bank is therefore confined to its contractual rights. Though it paid X by mistake, the bank has no claim in unjust enrichment against X.

F *Two Other Minor Issues with Spangaro*

One aspect of *Spangaro* which one might question relates to Finkelstein J's description of the elements of a cause of action in unjust enrichment.¹⁰⁸ Four elements were stated, prefaced by the words: 'To obtain restitutionary relief, a plaintiff must demonstrate ...'.¹⁰⁹ The fourth element listed was that 'no restitutionary or other defences would preclude restitution being made'.¹¹⁰ It is doubtful whether Finkelstein J intended to suggest that the onus of proof lies on the plaintiff to demonstrate the absence of a defence. Clearly, the defendant bears the burden of establishing a restitutionary defence (such as change of position) or some other defence.

Another aspect was his Honour's use of the description of the relevant cause of action as being a 'claim in restitution'. That language is very common, but it is

¹⁰⁴ J Beatson, 'The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 142, 151–4.

¹⁰⁵ The orthodox rule requiring rescission of the contract was applied recently by the New South Wales Court of Appeal in a 'knowing receipt' case: *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 45 ACSR 244, 258–9 (Mason P), 260 (Stein and Giles JJA agreeing).

¹⁰⁶ *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110. To precisely the same effect are two cases involving the provision of a service to a third party (car repair): *Brown & Davis Ltd v Galbraith* [1972] 1 WLR 997; *Gray's Truck Centre Ltd v Olaf L Johnson Ltd* (Unreported, Court of Appeal of England and Wales, Neill and Farquharson LJ and Sir John Megaw, 25 January 1990).

¹⁰⁷ Or if it can be terminated, not in such a way as to affect the bank's accrued contractual right to recover from me.

¹⁰⁸ See above n 24 and accompanying text.

¹⁰⁹ *Spangaro* (2003) 47 ACSR 285, 300 (Finkelstein J).

¹¹⁰ *Ibid.*

preferable to speak of an action as being a ‘claim in unjust enrichment’.¹¹¹ ‘Restitution’ is the remedy the plaintiff seeks. One cause of action (but not the only one) that leads to a restitutionary remedy is a claim in unjust enrichment. The label used for the cause of action should seek as accurately as possible to describe the event to which the law responds by giving the right alleged by the plaintiff. If X has insured against a loss which the insurer Y refuses to pay, we would not describe X’s cause of action as a ‘claim in compensation’. Rather, it is a claim in contract. It is the event of X and Y entering into a contract that gave X the right he seeks to uphold in court.

III ‘LEAPFROGGING’ THE IMMEDIATE ENRICHEE

Spangaro faced an immediate problem in pursuing a claim in unjust enrichment against CIAFM. He himself had paid CIAFM nothing. Instead, Spangaro paid Cardinal, which had passed the money on to CIAFM.¹¹² The basis of the payment by Spangaro to Cardinal — namely, that the investment scheme would commence operation — had failed. There was no doubt, therefore, that Spangaro had a claim in unjust enrichment against Cardinal. But such a claim was worthless. Cardinal was in liquidation, and had nothing to show for the money it had received from investors for interests in the scheme. All of that money had been paid to CIAFM. As a result, the key question was whether CIAFM could be the subject of a claim in unjust enrichment founded on the same failure of basis.

‘At the expense of the claimant’ is an essential ingredient of a claim in unjust enrichment. It provides the link between plaintiff and defendant. In many cases, that link is easily proved. A pays B by mistake. B’s enrichment is at A’s expense, because it came directly from A. But what if A pays B money, who then pays C? Can A recover from C in unjust enrichment?

Professor Birks referred to this issue as ‘leapfrogging’.¹¹³ The plaintiff has a claim against the person who was immediately enriched at the expense of the plaintiff, but that claim is unsatisfactory, usually because the immediate enrichee is insolvent. The plaintiff wants to ‘leapfrog’ the immediate enrichee and sue a remote recipient. When can the plaintiff establish that the remote recipient was enriched at the plaintiff’s expense?

The circumstances in which leapfrogging is or is not permitted are very difficult to describe. Four propositions will be briefly discussed. Only the first two are completely settled. The first is that a claim in unjust enrichment lies against a remote recipient if he or she is the principal of the immediate recipient. Receipt of the agent is receipt of the principal, even before passing on.¹¹⁴

¹¹¹ Birks, *Unjust Enrichment*, above n 71, 1–4, 11–19, 277–81.

¹¹² As the payment of the money from Cardinal to CIAFM was a breach of trust, Mr Spangaro was able to pursue a claim in ‘knowing receipt’ against CIAFM. The nature of that claim is discussed below.

¹¹³ Birks, *Unjust Enrichment*, above n 71, 89–98.

¹¹⁴ *Coulthurst v Sweet* (1866) LR 1 CP 649, 655 (Willes J), 655 (Byles J), 656 (Montague Smith J); *National Westminster Bank Ltd v Barclays Bank Ltd* [1975] 1 QB 654, 673 (Kerr J); *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202, 207 (Millett LJ).

The second proposition is that if the payment was made pursuant to an initially valid contract that cannot be terminated or rescinded, no leapfrogging is allowed. This principle was encountered above,¹¹⁵ although the element of leapfrogging was not exposed there. The example given was a payment by my bank to a third party X, the bank being mistaken as to the funds I had available in my account. When the bank seeks to sue X, it is in reality attempting to leapfrog. A payment made by my bank on my behalf to X is correctly analysed as a consolidation of two separate payments: a payment by my bank to me, and a payment by me to X. Thus, when the bank sues X, it wants to leapfrog over me to get to X. The bank's claim against X must fail. The first payment to the immediate recipient (me) was made pursuant to an initially valid contract that cannot be terminated by the bank or rescinded.

The third proposition is that a remote recipient may be sued in unjust enrichment when he or she receives the plaintiff's property. Several authorities seemingly provide examples.¹¹⁶ *Lipkin Gorman* is one. On one view, these cases are not really leapfrogging situations at all. A subsequent recipient of the plaintiff's property is as much a direct recipient from the plaintiff as a first recipient. Professor Birks gave the following example:

If I find your wallet it makes no difference whether I am the first recipient or the second or the twenty-second. Suppose a pickpocket took it and, in alarm, threw it down, and then I find it. My position would be the same as if your wallet had fallen from your pocket into the road in front of me without your noticing its loss. A receipt of your money is always a receipt directly from you.¹¹⁷

However, the third proposition is controversial. There are those who doubt that a claim in unjust enrichment can ever exist when the defendant has received the plaintiff's original property or its traceable substitute and the plaintiff seeks to recover that property or substitute. Graham Virgo says that such a claim 'forms part of the law of property and has nothing to do with the principle of reversing the defendant's unjust enrichment'.¹¹⁸ This view is in line with that of the House of Lords.¹¹⁹ However, Professor Andrew Burrows has convincingly shown that the better view is to the contrary:

It is fictional to say that P is given ownership of traced property because P's ownership of the original property continues through to the substitute property:

¹¹⁵ See above nn 102–5 and accompanying text.

¹¹⁶ *Clark v Shee* (1774) 1 Cowp 197, 200; 98 ER 1041, 1043 (Lord Mansfield); *Marsh v Keating* (1834) 1 Bing NC 198, 220–1; 131 ER 1094, 1102–3 (Park J); *Calland v Lloyd* (1840) 6 M & W 26; 151 ER 307; *Lipkin Gorman* [1991] 2 AC 548, 562–7 (Lord Templeman); *Banque Belge Pour l'Etranger v Hambrouck* [1921] 1 KB 321, 328 (Bankes LJ), 330 (Scrutton LJ), 333–6 (Atkin LJ); *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 738 (Millett J) (reversed on other grounds: [1994] 2 All ER 685); *Jones & Sons (trustees) v Jones* [1997] Ch 159, 169–70 (Millett LJ). It is very difficult to work out what relevant proprietary interest the plaintiffs in *Lipkin Gorman* had: see Birks, *Unjust Enrichment*, above n 71, 95–8.

¹¹⁷ Birks, *Unjust Enrichment*, above n 71, 87.

¹¹⁸ Graham Virgo, *The Principles of the Law of Restitution* (1999) 12. See also Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 *Modern Law Review* 905.

¹¹⁹ *Foskett v McKeown* [2001] 1 AC 102.

the truth is that P is given a new title to reverse D's unjust enrichment at P's expense ...¹²⁰

The fourth proposition, which is the least stable of the four, is that absent a proprietary connection between claimant and defendant, a claimant suing a remote recipient in unjust enrichment must *at least* establish that, but for the unjust enrichment of the first recipient, the defendant would not have been enriched. Several cases, all of which are concerned with claims to recover mistaken payments from remote recipients, appear to be explicable only on this basis.¹²¹

It seems clear that it was the third of the four propositions upon which Mr Spangaro was permitted to sue CIAFM in unjust enrichment. There was a proprietary connection between the money paid by Spangaro and the money received by Cardinal.¹²² Those cases in which the receipt of the plaintiff's property had given rise to a claim in unjust enrichment against a subsequent recipient were expressly relied upon by Finkelstein J.¹²³ One doubt about Finkelstein J's approach is whether the divide between common law and equity prevented the Court from deciding a common law claim for 'money had and received' by having regard to the fact that Spangaro had an equitable interest in the money paid by Cardinal to CIAFM. Those who advocate in favour of the 'fusion fallacy' might protest that such reasoning was impermissible. But it seems preferable to say that, in determining whether an otherwise unjust enrichment was at the expense of the plaintiff, the plaintiff can rely on any proprietary link to the defendant, including an equitable interest (or a power in rem which arises when a property transfer is voidable), even if the claim is a common law one.

IV CLAIMS IN 'KNOWING RECEIPT'

Three types of claims may be made against recipients of trust assets (including money) applied by a trustee in breach of trust:

- 1 a proprietary claim against the holder of the very same trust asset;
- 2 a proprietary claim against the holder of the traceable proceeds of the trust asset; and
- 3 a personal claim against the recipient of the trust asset.

¹²⁰ Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 *Law Quarterly Review* 412, 417 (emphasis removed).

¹²¹ *Bannatyne v D & C MacIver* [1906] 1 KB 103, 109 (Romer LJ); *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 (reinterpreted in *Re Cleadon Trust Ltd* [1939] Ch 286); *Butler v Rice* [1910] 2 Ch 277. All of these cases are discussed in Charles Mitchell, *The Law of Subrogation* (1994) 124–9, 133–5; Birks, *Unjust Enrichment*, above n 71, 96–8. Professor Burrows supports a different approach, one in which there is a general rule against suing anyone other than a direct recipient. This rule is subject to a number of exceptions: Andrew Burrows, *The Law of Restitution* (2002) 31–42.

¹²² *Spangaro* (2003) 47 ACSR 285, 301 (Finkelstein J).

¹²³ *Ibid.*

An example of the type of claim in (1) is *Macmillan Inc v Bishopsgate Investment Trust plc [No 3]*.¹²⁴ That case involved a claim for a declaration that shares mortgaged to several banks in breach of trust were held by the banks subject to that trust. An example of the type of claim in (2) is *Foskett v McKeown*.¹²⁵ That involved a proprietary claim to a beneficial interest in the proceeds of an insurance policy, the premiums for which were paid with misapplied trust funds.

The origins of the type of claim in (3) are generally traced back to *Barnes v Addy*.¹²⁶ The history of the present position concerning such claims is captured in a very important article by Lord Nicholls:

Trusts are the creation of the law of equity. The common law knew nothing of these matters of conscience. So the law of equity developed its own principles concerning the circumstances in which a third party recipient would become personally liable. The approach adopted was that, in general, the mere receipt of another's property did not trigger any personal liability. If the recipient still had the property or its identifiable proceeds, he must return it. If not, he incurred no personal liability unless he had been at fault in some way. If he was guilty of fault in the eyes of equity, equity treated him as though he were a trustee. He was clothed with the mantle of a 'constructive' trustee.¹²⁷

As this passage indicates, it was assumed by most commentators and judges that some degree of fault was required before a recipient of misapplied trust property would be held personally liable to restore the value received to the trust's beneficiaries. Until recently, the main debate centred on the degree of fault necessary to render the defendant subject to that personal liability. The majority of cases and commentators suggested that it was sufficient if the defendant had constructive knowledge of the plaintiff's equitable interest and the trustee's breach of trust.¹²⁸ Others, however, said that 'knowing receipt' would not render the defendant liable as a constructive trustee unless he or she had acted with actual knowledge of the beneficiaries' conflicting interest.¹²⁹ Lord Nicholls noted that what was missing in much of the debate was an analysis of the underlying principles — the reason for relief, and the relationship of that reason to other areas of the law: 'Controversies over the definition or scope of legal principles cannot be resolved without identifying their rationale.'¹³⁰

Building on the earlier work of Professor Birks,¹³¹ Lord Nicholls argues strongly in favour of a principled position different from the traditional view. He says that there are in fact two types of claim which have been hidden within the

¹²⁴ [1996] 1 All ER 585.

¹²⁵ [2001] 1 AC 102.

¹²⁶ (1870) LR 9 Ch App 244.

¹²⁷ Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W R Cornish et al (eds), *Restitution: Past, Present, and Future: Essays in Honour of Gareth Jones* (1998) 231, 233.

¹²⁸ See, eg, the Supreme Court of Canada in *Citadel General Assurance Co v Lloyds Bank Canada* [1997] 3 SCR 805, to be read with *Gold v Rosenberg* [1997] 3 SCR 767.

¹²⁹ *Re Montagu's Settlement Trust; Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264, 285–6 (Megarry V-C).

¹³⁰ Lord Nicholls, above n 127, 236.

¹³¹ See, eg, Peter Birks, *An Introduction to the Law of Restitution* (1985) 442–3. See also R P Austin, 'Constructive Trusts' in P D Finn (ed), *Essays in Equity* (1985) 196, 217.

misleading phrase ‘liability to account as a constructive trustee for knowing receipt’. Those two claims are:

- 1 the fault-based liability of the person who dishonestly receives trust property; and
- 2 the liability of a person who is unjustly enriched at the expense of the trust’s beneficiary.

Lord Nicholls argues that the principle underlying the liability in (2) is unjust enrichment.¹³² In other words, the plaintiff’s right to restitution from the defendant arises in response to an event of unjust enrichment. Moreover, Lord Nicholls says that liability should accord with the general model of liability in unjust enrichment: strict liability subject to defences.¹³³ In particular, the defence of change of position should be open to the defendant, as it is in almost all claims of unjust enrichment. The liability in (2) is thus a personal liability to make restitution of unjust enrichment. It has nothing to do with imposing the incidents of trusteeship or a constructive trust on the defendant.¹³⁴ Nor has the defendant’s liability anything to do with locating some trust property, or a traceable substitute thereof, in the possession of the defendant. Thus, if there is only personal liability in these circumstances the defendant should not be referred to as a ‘constructive trustee’.¹³⁵

The liability in (1) is a form of equitable wrongdoing,¹³⁶ a sub-species of the wider equitable wrong of dishonest participation in a breach of trust.¹³⁷ The wrongdoer is liable to fiercer remedies than a mere personal liability to make restitution of the value received. He or she will, for example, have to give up any profits made as a result of receiving the misdirected trust property. Moreover, the distinction between liability in unjust enrichment and liability for an equitable wrong may well have other implications with respect to limitation periods, rates of interest, service outside the jurisdiction, tracing rules, consequential losses and increases in the value of the property. It is therefore important to always bear in mind two possible claims in a ‘knowing receipt’ case — a claim in unjust enrichment, and a claim that the defendant is an equitable wrongdoer. With that caveat, when this article uses that phrase, only the unjust enrichment version of liability is intended.

Strong extra-judicial support for the strict liability view comes from three recent or current members of the House of Lords: Lord Millett,¹³⁸ Lord Hoffman¹³⁹ and Lord Walker.¹⁴⁰ Likewise, many commentators have come to share

¹³² Lord Nicholls, above n 127, 238–9.

¹³³ *Ibid* 237, 238–9.

¹³⁴ *Ibid* 237.

¹³⁵ See P J Millett, ‘Restitution and Constructive Trusts’ (1998) 114 *Law Quarterly Review* 395, 400.

¹³⁶ *Dubai Aluminium* [2003] 2 AC 366, 391 (Lord Millett).

¹³⁷ *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

¹³⁸ P J Millett, ‘Tracing the Proceeds of Fraud’ (1991) 107 *Law Quarterly Review* 71, 85; P J Millett, ‘Equity — The Road Ahead’ (1995) 9 *Trust Law International* 35, 39–40. Cf Lord Millett, ‘The Law of Restitution: Taking Stock’ (1999) 14 *Amicus Curiae* 4, 4–5.

¹³⁹ Sir Leonard Hoffman, ‘The Redundancy of Knowing Assistance’ in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 1, 27, 29.

the view that the innocent recipient of trust property should be subject to strict liability in unjust enrichment but have available the defence of change of position. Professor Gareth Jones,¹⁴¹ Professor Andrew Burrows¹⁴² and Professor David Hayton,¹⁴³ for example, support the Birks–Nicholls approach. Its acceptance by the courts (at least in England) seems inevitable. In delivering the judgment of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*, Lord Nicholls said of the two limbs of *Barnes v Addy* that recipient liability is restitution-based; accessory liability is not.¹⁴⁴

Hansen J favoured the unjust enrichment analysis in *Koorootang Nominees Pty Ltd v Australia & New Zealand Banking Group Ltd*.¹⁴⁵ So too did Foster AJ in *Gertsch v Atsas*¹⁴⁶ and Byrne J in *Lurgi (Aust) Pty Ltd v Gratz*.¹⁴⁷ In *Twinsectra Ltd v Yardley*, Lord Millett said:

Liability for ‘knowing receipt’ is receipt-based. It does not depend on fault. The cause of action is restitutionary and is available only where the defendant received or applied the money in breach of trust for his own use and benefit There is no basis for requiring actual knowledge of the breach of trust, let alone dishonesty, as a condition of liability. Constructive notice is sufficient, and may not even be necessary. There is powerful academic support for the proposition that the liability of the recipient is the same as in other cases of restitution, that is to say strict but subject to a change of position defence.¹⁴⁸

Similarly, in *Dubai Aluminium*, Lord Millett (with whom Lord Hutton agreed) said that a claim for knowing receipt

gives rise to concurrent liability, since the claim can be based on the defendant’s dishonesty, treating the receipt itself as incidental, being merely the particular form taken by the defendant’s participation in the breach of fiduciary duty; but it can also be based simply on the receipt, treating it as a restitutionary claim independent of any wrongdoing: see *John v Dodwell & Co Ltd* [1918] AC 563.¹⁴⁹

The strength of the strict liability position, and the unjust enrichment rationale which explains it, is clear from a simple example discussed by Lord Nicholls.¹⁵⁰ A trustee gives \$1000 of trust money as a gift to the defendant. The defendant spends the very notes and coins received on ordinary living expenses. There is

¹⁴⁰ Robert Walker, ‘Dishonesty and Unconscionable Conduct in Commercial Life — Some Reflections on Accessory Liability and Knowing Receipt’ (2005) 27 *Sydney Law Review* 187.

¹⁴¹ Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (5th ed, 1998) 743–6.

¹⁴² Burrows, *The Law of Restitution*, above n 121, 194–206.

¹⁴³ David J Hayton, *Underhill and Hayton: Law relating to Trusts and Trustees* (15th ed, 1995) 409, 415–16.

¹⁴⁴ [1995] 2 AC 378.

¹⁴⁵ [1998] 3 VR 16, 100–5. See also *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 902–3 (Knox J). The views of Lord Nicholls were cited, but not discussed, in *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286, 298 (Mason P).

¹⁴⁶ (1999) 10 BPR ¶97-855, 18 436.

¹⁴⁷ [2000] VSC 278 (Unreported, Byrne J, 4 August 2000) [75].

¹⁴⁸ [2002] 2 AC 164, 194 (citations omitted). His Lordship dissented on a different point.

¹⁴⁹ [2003] 2 AC 366, 87. See also *Criterion Properties* [2004] 1 WLR 1846. Dr Edelman was the first to note the previously-overlooked relevance of *John v Dodwell & Co Ltd*: James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002) 204.

¹⁵⁰ Lord Nicholls, above n 127, 237, 239.

now no hope of the beneficiaries following the original trust property (the cash) into the hands of a new defendant, or tracing the trust property into some asset purchased with the trust money and claiming that asset. In other words, the beneficiaries cannot bring either a proprietary claim vindicating the beneficiaries' right to the original trust money, or a proprietary claim in relation to proceeds of that money. Yet the defendant has obviously been unjustly enriched at the expense of the beneficiaries. The defendant's wealth was enhanced by the receipt of money which the trustee had no right to give away, the beneficiaries' wealth was reduced by the same amount, and the defendant has not spent one cent more than he or she would have spent had he or she not received the windfall. The enrichment was unjust because the persons beneficially entitled to the money in question gave no consent at all to the transfer to the defendant. There was no explanatory basis for the trustee's payment. Is it truly to be said that the defendant is free from liability simply because he or she is innocent? The answer must be no.

Despite this, there remains support for the view that there is only one claim for 'knowing receipt', and it is not a claim in unjust enrichment but rather an equitable wrong that requires proof of fault.¹⁵¹ Nevertheless, it now seems certain from the cases discussed above that the House of Lords will adopt the Birks–Nicholls view. It would be surprising, and disappointing, if the High Court did not do the same.

The world will not change when it is positively accepted that one type of claim available in 'knowing receipt' situations is a claim in unjust enrichment, involving strict liability subject to the defence of change of position. Very few of the old cases would have different results. But in one or two situations, the switch will make a difference. In particular, it will make a difference for the defendant who innocently received misapplied trust assets and who has not changed his or her position by the time the claim is brought but where the trust assets cannot be traced to an existing asset of the defendant. That person will be personally liable to make restitution to the claimant — and that is how it should be.

In *Spangaro*, there was no need for the claimant to argue that CIAFM should be strictly liable in 'knowing receipt', for two reasons. First, even if it was necessary for Spangaro to show that CIAFM knew that the payment made by Cardinal was in breach of trust, CIAFM clearly had that knowledge. This was, therefore, a case of the equitable wrong limb of 'knowing receipt' identified by Lord Nicholls. Secondly, the claimant had already established that the defendant's receipt had given rise to a cause of action in unjust enrichment, based on failure of consideration. There could not be another cause of action in unjust

¹⁵¹ Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 *Law Quarterly Review* 412, 428–34, criticised in Peter Birks, 'Knowing Receipt: *Re Montagu's Settlement Trusts* Revisited' (2001) 1(2) *Global Jurist Advances* 1, 14–18. See also Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115, 2173, who suggests that there is a claim in unjust enrichment, but only when the recipient uses the trust property received from the errant trustee.

enrichment based on the same receipt, though the facts could give rise to another way of establishing the one cause of action.¹⁵²

V CONCLUSION

Spangaro is an important decision. It expressly recognised and applied a claim in unjust enrichment. The claim was based on the failure of the consideration (basis) for the payment in question. Finkelstein J thereby rejects, *sub silentio*, the assertion of one commentator, and Gummow J, that such a claim is based not on the principles of unjust enrichment but on unconscionable conduct. That rejection is firmly based on Australian and English precedent. *Spangaro* is also important for another reason. It provides another instance of the ability of the law of unjust enrichment to reach a remote recipient. The defendant's enrichment was at the plaintiff's expense despite the plaintiff not having dealt directly with the defendant. Like *Lipkin Gorman* before it, the explanation for that aspect of *Spangaro* may well lie in the ability of a plaintiff to establish that the defendant's enrichment was at the plaintiff's expense by showing a proprietary link between the money or property transferred by the plaintiff, and that which was received by the defendant.

¹⁵² The relationship between typical 'knowing receipt' cases and the failure of consideration claim in *Spangaro* is discussed in detail by Michael Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (forthcoming, 2005).