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"RESTITUTION OF (PROPERTY) RIGHTS"

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The problem

It was with a considerable degree of trepidation that I agreed to present a paper on this proffered topic, revisiting a subject which I had first written on in detail more than a decade ago. My doctoral thesis at Oxford was on the law of restitution and dealt with the issues I discuss in this paper. One evening in 2000, shortly before I completed my thesis, one of my housemates (a medievalist) asked me to explain to him what I had been working on for nearly two years. We opened a bottle of wine. I spoke into the small hours of the morning explaining the twists and turns of what I considered to be complicated issues thrown up by my subject. Tom listened mostly in silence. Eventually I finished speaking. Tom seemed deep in thought. He frowned and, giving me a puzzled look, asked ‘So your thesis question is whether someone should give back something that they shouldn’t have received?’ I paused. No-one had ever really put it that way. “I guess that’s right,” I said. His frown lightened. ‘And your answer, after nearly two years, is that the recipient should give it back?’ He was right again. For years afterwards he delighted in explaining that his flatmate during his studies was a lawyer who had worked on the ‘thorny problem’ of whether people should give back things that they shouldn’t have received.

It would perhaps surprise the general public to learn that this question presents any difficulty for lawyers. Suppose a plaintiff mistakenly conveys the title to Blackacre which she holds to a defendant, in discharge of a non-existent debt. Or if she mistakenly convey her title to an antique motor vehicle under the same mistake. In each case, it is well established that she has a prima facie claim for restitution of the value of the title which she has conferred upon the defendant. But is that the only restitutionary response? Why can’t she seek restitution of the title to Blackacre which she mistakenly conveyed? Or title to the antique motor vehicle?

Each of these scenarios has caused great confusion in the common law. The various cases and commentators have suggested numerous different approaches ranging as follows:

(1) Never: when restitution of unjust enrichment is available it is only of the value of the rights received, not the rights themselves. Restitution can be made of the money value of the transferred title to Blackacre, but not the title itself.¹

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¹ The strongest proponent of this position is Professor Graham Virgo: G Virgo *Principles of the Law of Restitution* (2nd edition, 2006).

(2) Sometimes: restitution of the rights received, rather than merely their value, is possible only where the rights are transferred without any intention to benefit the recipient.²

(3) Always: if restitution is available the restitution should not be limited to the value of the rights which the defendant obtains but should permit the re-transfer of the very rights conveyed.³

The best answer to this question is "sometimes", although the lack of an intention to benefit a recipient may be neither necessary nor sufficient. The starting point is that once the law has reached the conclusion that a transfer of rights from one person to another is unjust, then the best response ought to be to undo that transfer however possible. This may mean that a recipient should give up the *rights* held, not merely their value. There is a simple, and coherent, way in which the common law might easily reach this position. This is the thesis of a book recently published by Dr Andrew Lodder which develops and refines work of Professor Robert Chambers. The key is said to be the treatment of the receipt of the *rights* as the defendant's enrichment rather than simply seeing the defendant as enriched by their *value*.

The mechanism by which restitution of rights can be achieved is by recognition of a trust of the rights held by the defendant or by recognition that a plaintiff has a power of rescission. However, there will be many cases in which restitution of rights should not be available. The most common cases where restitution is sought, involving a payment of money by some unjust factor, should rarely permit restitution of the rights obtained. The reason is that full justice, and complete reversal of an unjust transfer, is achieved in these cases by restitution of the value obtained by the defendant.

Restitution of value

Restitution of an unjust enrichment

I have discussed elsewhere the evolution of the law of unjust enrichment over its 2000 year history dating back to Roman law.⁴ It suffices here to jump to the modern Anglo-Australian recognition of the subject in the last half-century.

The first significant recognition of the law of unjust enrichment in Australia was presaged in 1985 by Deane J when he said⁵ that the use of unjust enrichment is an 'informative generic label for the purposes of classification in Australian law' of a 'notion underlying a variety of distinct categories of case ... [in which] a benefit [is] derived at the expense of a plaintiff.' Two years later, in *Pavey and Matthews Pty Ltd*

² This was the position taken by Lord Millett in relation to the award of resulting trusts L P Millett 'Restitution and constructive trusts' (1998) 114 LQR 399 and *Air Jamaica Ltd v Charlton* [1999] UKPC 20; [1999] 1 WLR 1399, 1412 (Lord Millett).

³ The closest to this position is R Chambers *Resulting Trusts* (1997), although Chambers does not endorse the restitution of rights in all cases of restitution for failure of consideration.

⁴ J Edelman 'Unjust Enrichment and the Law of Trusts' (2011) 35 *Australian Bar Review* 219, 221 - 228.

⁵ *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583, 617.

v Paul,⁶ Deane J said, in a passage later approved by five High Court justices,⁷ that unjust enrichment is

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

The High Court of Australia unanimously confirmed this approach in *Bofinger v Kingsway Group Limited*⁸ reiterating that ‘the concept of unjust enrichment may provide a means for comparing and contrasting various categories of liability.’ It may also ‘assist in the determination by the ordinary processes of legal reasoning of the recognition of obligations in a new or developing category of case’.⁹

The most recent pronouncement by the High Court of Australia concerning the nature of unjust enrichment was this year in *Equuscorp Pty Ltd v Haxton*.¹⁰ In a joint judgment, French CJ, Crennan and Kiefel JJ explained that unjust enrichment has ‘a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another’. The approach to be taken is as follows:

- (1) recovery depends upon **enrichment** of the defendant **by reason of** one or more recognised classes of "qualifying or vitiating" factors;
- (2) the category of case must involve a **qualifying or vitiating factor** such as mistake, duress, illegality or failure of consideration, by reason of which the enrichment of the defendant is treated by the law as unjust;
- (3) unjust enrichment so identified gives rise to a prima facie obligation to make restitution;
- (4) the prima facie liability can be displaced by **defences**, or ‘circumstances which the law recognises would make an order for restitution unjust’.

This four-fold approach was advocated by the late Professor Birks in 1985, drawing upon earlier work by Goff and Jones. Birks provided a structure for the law of unjust enrichment which focused upon four similar, although not identical, central issues for enquiry:¹¹ (1) The defendant must be enriched; (2) the enrichment must come at the expense of the plaintiff; (3) the enrichment must be unjust by reference to an ‘unjust factor’; and (4) a court should consider if any defences apply.

The same approach is taken in England. In 2011 when the 8th edition of Goff and Jones’ classic work, now edited by Professors Charles and Paul Mitchell and Dr Watterson, became known as *Goff and Jones’ The Law of Unjust Enrichment* the

⁶ *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257.

⁷ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

⁸ [2009] HCA 44; (2009) 239 CLR 269 at [88]. See also *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 [29] (French CJ, Crennan and Kiefel JJ)

⁹ [2009] HCA 44; (2009) 239 CLR 269 at [89].

¹⁰ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.

¹¹ P Birks *An Introduction to the Law of Restitution* (rev ed 1989 Oxford University Press Oxford) at 21.

editors cited the approach of Deane J¹² and explained that unjust enrichment is ‘an organising concept that groups together decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant’s expense in circumstances that the law deems to be unjust.’¹³

Each of these enquiries raises difficult issues. For instance, the boundaries of what will count as an unjust factor are controversial. Examples of unjust factors were given by Lord Mansfield in *Moses v Macferlan*:¹⁴

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

A quarter of a millennium later, it is well established in Australia that liability in unjust enrichment requires the existence of an ‘unjust factor’ and that the list of unjust factors is not closed.¹⁵ But the list has not developed far from Lord Mansfield’s 250 years ago. In one of the most recent pronouncements on this subject by the High Court of Australia, one joint judgment recognised the commonly recognised mistake, duress and illegality as unjust factors.¹⁶

Restitution of the value of an unjust enrichment

Once a plaintiff proves that the defendant has received value at the plaintiff’s expense, as a result of some unjust factor, then the plaintiff has a prima facie claim for restitution of the value received by the defendant. This is the standard, and well recognised, claim for restitutionary relief.

¹² C Mitchell, P Mitchell, S Watterson (eds) *Goff and Jones The Law of Unjust Enrichment* (8th edn, 2011) 6-7 [1-08].

¹³ C Mitchell, P Mitchell, S Watterson (eds) *Goff and Jones The Law of Unjust Enrichment* (8th edn, 2011) 6-7 [1-08].

¹⁴ (1760) 2 Burr 1005 at 1012; 97 ER 676 at 681.

¹⁵ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Wasada Pty Limited v State Rail Authority of New South Wales (No.2)*[2003] NSWSC 987 at [16] (Campbell J) (emphasis in original) citing K Mason & J Carter *Restitution Law in Australia* (1995 Butterworths Sydney) at 59-60; *Matland Holdings Pty Ltd v NTZ Pty Ltd* [2004] FCA 710 at [171] (Kenny J); *Ideas Plus Investments Ltd v National Australia Bank Ltd* [2005] WASC 51 at [81] (Commissioner Siopis SC); *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346 at 397 (Sackville J), an appeal to the High Court did not affect this obiter dictum: *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 158-159 [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Haxton v Equus Corp Pty Ltd (formerly Equus Financial Services Ltd)* (ACN 006 012 344) (2010) 265 ALR 336 at 384 [261] (Dodds-Streton JA); *Chidiac v Matouk* [2010] NSWSC 386 at [216] (Ward J); *Lahoud v Lahoud* [2010] NSWSC 1297, [152]-[164] (Ward J); *Crown in the right of New South Wales v Anthony Gevaux* [2011] NSWSC 608 at [96] (Ward J).

¹⁶ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). As to failure of consideration, see also *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516.

A claim for restitution of the value of an unjust enrichment does not require a defendant to account for and disgorge profits which the defendant has made. The award of restitution of value 'operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant'.¹⁷ Hence, an account and disgorgement of a defendant's profits is not a restitutionary remedy.¹⁸ In the words of the Supreme Court of Canada, an award of restitution of the value of unjust enrichment 'is concerned with giving back to someone [the equivalent value of] something that has been taken from them'.¹⁹

There will be some instances where the only possible award of restitution is restitution of the value transferred to the defendant. The most obvious example is a situation in which no rights are transferred. So, a plaintiff who unjustly enriches a defendant by the value of a service performed might confer no rights on the defendant at all. But the plaintiff will be entitled to restitution of the value received by the defendant which will often be the value of the services.²⁰

But the focus of this paper is on other cases, such as the examples with which this paper commenced, where the plaintiff might want to claim restitution of the rights transferred rather than merely their value. The plaintiff who mistakenly transfers a title to Blackacre or a title to the antique motor vehicle might want his rights to those things, not merely their value.

Restitution of rights

Property rights and personal rights

The topic I was initially assigned, 'restitution of proprietary rights' is difficult in two respects concerning the word 'proprietary'. The first is what the word 'proprietary' means. The second is why it matters.

As to what 'proprietary' means, one difficulty is that the words 'property' and 'proprietary' are used in a myriad of different senses in the law. If 'proprietary' means that a right is good against the world at large then the label ought to be applied to most torts. The right not to be defamed, or the right not to be beaten or assaulted, are all rights which are good against the world. They would be 'proprietary' rights. But this is not a common use of the term. Nor is it adequate to describe a right as 'proprietary' simply because it has a degree of permanence, and can be assigned. Lord Wilberforce said that '[b]efore a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third

¹⁷ *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* [1994] HCA 61; (1994) 182 CLR 51, 75 (Mason CJ); *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516, 529 [26] (Gleeson CJ, Gaudron & Hayne JJ).

¹⁸ *Anderson v McPherson (No 2)* [2012] WASC 19 [226].

¹⁹ *The Citadel General Assurance Company v Lloyds Bank Canada* [1997] 3 SCR 805 [30] (La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ). See also *Sempra Metals Ltd v Her Majesty's Commissioners of Inland Revenue* [2007] UKHL 34; [2008] 1 AC 561, 605 606 [116] [117] (Lord Nicholls).

²⁰ *Eg Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] SCR 725; *Dimond v Lovell* [2002] 1 AC 384; *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816.

parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'.²¹ This definition has been described by Professor Gray as 'riddled with circularity'.²² It has also been emphasised that assignability is not an essential characteristic of a property right.²³

If a proprietary right were to be illustrated by contrasting well accepted examples of such a right with an example of something which is not such a right then the contrast might be between ownership of an estate in land and a contractual right to payment of a debt. The latter is a right which is exigible against only a single person. However, contractual rights have been described in the High Court as *quasi-proprietary* in a limited sense. That description was used to identify the feature of contractual rights as involving protection against intentional inducement of breach of contract by third parties. In this sense the rights are of a different order from those between the contracting parties themselves.²⁴

There is a second problem with asking when restitution is available of property rights. This is why the question matters. In particular, when the concern is the response to an unjust enrichment, the contrast is not between restitution of personal rights and restitution of proprietary rights but it is a contrast between instances where, as we have seen, the plaintiff seeks restitution of value and instances where the plaintiff seeks restitution of rights. For instance, the examples with which I began this paper involved the unjust enrichment of a defendant by transfer of title to land, or title to a motor vehicle.

Recognition of restitution of rights when a defendant is unjustly enriched

As I have explained, in the examples with which this paper commenced, the plaintiff might want to claim restitution of the rights transferred rather than merely their value. The plaintiff who mistakenly transfers a title to Blackacre or a title to the motor vehicle might want his rights to those things, not merely their value. There is a simple and coherent way in which the law of unjust enrichment could accommodate a restitutionary award of the right transferred rather than merely the value transferred. This is by the expedient of recognising that the defendant's enrichment could be characterised either as the value of rights received or as the receipt of the rights themselves. If a defendant is unjustly enriched by the receipt of rights, then that enrichment ought to be reversed either by rescission and reversion of the rights or by recognising that the defendant holds the rights on trust for the plaintiff so that the plaintiff can demand conveyance of those rights. This insight has been recently emphasised by Professor Chambers²⁵ and Dr Lodder,²⁶ but has not yet been adopted

²¹ *National Provincial Bank v Ainsworth* [1965] AC 1165, 1247 - 1248.

²² K Gray and S F Gray *Elements of Land Law* (5th edn, 2009) 97.

²³ *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 311-312; [1994] HCA 6; *Barclay v Penberthy* [2012] HCA 40 [39] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

²⁴ *Zhu v Treasurer of New South Wales* [2004] HCA 56; (2004) 218 CLR 530 at 573 [125]; see also at 577 [135].

²⁵ R Chambers 'Two kinds of enrichment' in R Chambers, C Mitchell and J Penner *Philosophical Foundations of Unjust Enrichment* (2009).

by Australian or English courts. There are several arguments which might be marshalled in support of the approach.

First, the arguments for restitution of rights have strong support from the academy²⁷ and from a recent decision of the Supreme Court of Canada. In that case, Cromwell J, writing for the court, said that ‘a successful claim for unjust enrichment may attract either a “personal restitutionary award” or a “restitutionary proprietary award”’.²⁸

Secondly, there is a line of authority in England and Australia which recognises that a trust arises in circumstances involving a transfer of title where the recipient was not intended to benefit from the title received. The recognition of a trust in these cases does not necessarily involve any active duties of the trustee.²⁹ But the bare trust is recognition that the recipient receives the rights subject to a liability to reconvey them to the plaintiff.

The most common instance in which a constructive trust is recognised, which generally empowers a beneficiary to obtain restitution of rights is where the transferor has no intention to benefit the recipient.³⁰ One example from this line of authority is the imposition of a resulting trust which is imposed by law is where an attempt to create an express trust fails.³¹ The transferor usually does not intend to create a trust in favour of herself, but a trust arises ‘automatically’ because of the lack of intention, usually by the immediate transferor, to benefit the recipient.³² Another example is the line of cases where a trust is imposed upon the receipt of legal title by a recipient where the transfer of legal title to an asset or its substitute product occurs in circumstances ‘about which the transferor was entirely unaware’.³³ Although none of these English or Australian cases has explicitly recognised unjust enrichment as the source of the trust, there is a compelling reason why the reasoning in many of the cases concerning ‘automatic resulting trusts’ needs to be re-considered and re-examined. This is because it is often said in these cases that the trust arises because the transferor held both a legal and equitable interest and divested only the legal

²⁶ A Lodder *Enrichment in the Law of Unjust Enrichment and Restitution* (2012).

²⁷ See especially P Birks ‘Restitution and Resulting Trusts’ in *Equity: Contemporary Legal Developments* (1992) (ed. Goldstein) at 335; R Chambers *Resulting Trusts* (1997); B McFarlane *The Structure of Property Law* (2008) at 314-331; C Mitchell, P Mitchell and S Watterson (eds) *Goff and Jones’ The Law of Unjust Enrichment* (2011) 834-835 [38-36].

²⁸ *Kerr v Baranow* [2011] SCC 10; [2011] 1 SCR 269 [46].

²⁹ *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

³⁰ Cf *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, although the concerns of Lord Browne-Wilkinson in that case may have been motivated by a concern that the trust would include active duties.

³¹ See the discussion in *Knudsen v Kara Kar Holdings Pty Ltd* [2000] NSWSC 715 [49] (Austin J); and *Yard v Yardoo Pty Ltd* [2006] VSC 109 [298] (Cummins J), discussion not considered on appeal in either *Yard v Yardoo Pty Ltd* [2007] VSCA 35 or *Kara Kar Holdings Pty Ltd v Knudsen* [2001] NSWCA 276. See also J D Heydon and M J Leeming *Jacobs’ Law of Trusts* (7th ed, 2006) 236 [1205].

³² *Robb Evans of Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82; (2004) 61 NSWLR 75, 99-100 [111]-[113] (Spigelman CJ) citing R Chambers *Resulting Trusts* (1997); *Air Jamaica Ltd v Charlton* [1999] UKPC 20; [1999] 1 WLR 1399, 1412 (Lord Millett).

³³ *Robb Evans of Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82; (2004) 61 NSWLR 75, 99 100 [111] [113] (Spigelman CJ).

interest.³⁴ But the holder of the legal right held no equitable right at all. When the trust is created a *new* equitable interest arises in favour of the settlor.³⁵ Unless these decisions are to be overturned, then the reasoning must be refined.

Since these decisions must be understood without the language or reasoning concerning the transferor's 'retention of an equitable interest', I can see only one other justification for the imposition of a trust. These trusts are imposed as a legal response to prevent the recipient having the use and enjoyment of rights for his or her own benefit where that use and enjoyment was not intended.³⁶ It is not a significant step from this reasoning to conclude that the imposition of a trust in these cases is concerned with preventing unjust enrichment. As Lord Millett has suggested, in part extra-judicially endorsing the thesis of Professor Chambers:³⁷ 'the development of a coherent doctrine of proprietary restitution for subtractive unjust enrichment is impossible unless it is based on the resulting trust as traditionally understood'.³⁸

Other cases have held that a constructive trust arises in cases of theft from the plaintiff. The leading decision is that of the High Court in *Black v S Freedman & Company*.³⁹ Mr Black stole approximately £1,400 from his employer in cash. He paid the money into his bank account. Subsequently he withdrew funds from his bank account and, in several transactions, paid them to his wife's bank account. The question for the High Court of Australia was whether Black's wife held her bank account (rights against her bank) on trust for Black's employer. The court unanimously upheld the trial judge's decision that the right against the bank was held by the wife on trust.

In an often quoted statement, O'Connor J said that '[w]here money has been stolen, it is trust money in the hands of a thief, and he cannot divest it of that character'.⁴⁰ This statement need not be taken literally; in the context of the case the only question was whether Black's rights against his bank were held on trust. The notes and coins originally stolen by Mr Black were owned by his employer. Black had an inferior right to possession of those notes, until those notes and coins were deposited in

³⁴ W Swadling 'Explaining Resulting Trusts' (2008) 124 LQR 72, 99-100 discussing *Vandervell v Inland Revenue Commission* [1966] UKHL 3; [1967] 2 AC 291, 313 (Lord Upjohn), 329 (Lord Wilberforce). See also *Air Jamaica Ltd v Charlton* [1999] UKPC 20; [1999] 1 WLR 1399, 1412 (Lord Millett).

³⁵ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14; (1982) 149 CLR 431, 463 (Aickin J); *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20; (2005) 220 CLR 592, 606 [30] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ); *Peldan v Anderson* [2006] HCA 48; (2006) 227 CLR 471, 485 [37] (Gummow ACJ, Kirby, Hayne, Callinan & Crennan JJ).

³⁶ *Anderson v McPherson (No 2)* [2012] WASC 19 at [103].

³⁷ R Chambers *Resulting Trusts* (1997).

³⁸ P Millett 'Restitution and constructive trusts' (1998) 114 LQR 399, 410.

³⁹ *Black v S Freedman & Company* [1910] HCA 58; (1910) 12 CLR 105.

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

Black's bank. One interpretation of the reasoning of O'Connor J is that Mr Black's inferior right of possession was held on trust for his employer.⁴¹ But upon the deposit by Mr Black of the notes and coins with his bank, any rights that the employer had to the notes were extinguished. The bank had title to the notes and coins, as fungibles. Ultimately, the decision in *Black* concerned the exchange product of the thief's title to the notes which passed to the bank. The exchange products for the thief's title to notes and coins were the debt (the promise) that the bank made to pay money to Black and, later, to his wife. As Griffith CJ explained in *Creak v James Moore & Sons Pty Ltd*,⁴² the decision in *Black* concerned the 'fund representing the proceeds'.

All these cases involve the common element that the plaintiff did not intend to benefit the recipient from the use and enjoyment of the rights which the recipient obtained. Ames traced this principle to the 14th century. Ames' conclusion was that in such cases, along with cases involving claims for recovery of chattels after the death of a bailee, or for return of the consideration for a promise the defendant failed to perform, 'the plaintiff is seeking restitution from the defendant, who is trying to enrich himself unconscionably at the expense of the plaintiff'.⁴³ However, in Australia the cases where the enrichment was entirely without the knowledge of the plaintiff cannot easily be explained as arising as a result of unjust enrichment. The High Court of Australia has said that there is no 'unjust factor' merely because a defendant is enriched at the plaintiff's expense without the plaintiff's knowledge. Referring to the argument that an 'enrichment was unjust because it was without [the plaintiff's] knowledge or fully informed consent', the High Court said that '[n]o case, even in England, has treated ignorance as a "reason for restitution"'.⁴⁴

Thirdly, there are numerous instances where courts have recognised a trust, which trust has the effect of making restitution of rights transferred by mistake (whether the mistake was spontaneous,⁴⁵ or induced by innocent misrepresentation⁴⁶ or fraud⁴⁷),

⁴¹ There has been considerable debate about the meaning of this sentence of O'Connor J. But since a trust arises over the substitute for the thief's right to possession of the stolen asset and since the owner has a superior right to possession of the stolen tangible property, it may be that little will depend on whether or not a trust arises of the thief's initial right to possession. For the debate see J Tarrant 'Property rights to stolen money' (2005) 32 UWAL Rev 234; J Tarrant 'Theft Principle in Private Law' (2006) 80(8) ALJ 531; S Barkehall Thomas 'Thieves as trustees: The enduring legacy of *Black v S Freedman & Co Ltd*' (2009) 3 J Eq 1; J Tarrant 'Thieves as trustees: In defence of the theft principle' (2009) 3 J Eq 170; R Chambers 'Trust and theft' in E Bant and M Harding (eds) *Exploring Private Law* (2010) ch 10.

⁴² *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426, 432 (Griffith CJ).

⁴³ J B Ames *Lectures on Legal History and Miscellaneous Legal Essays* (1913) 234.

⁴⁴ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, 158-159 [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁴⁵ *Chase Manhattan NA v Israel-British Bank (London) Ltd* [1981] 1 Ch 105; *Re Berry* 147 F 208 (1906); *Neste Oy v Lloyd's Bank plc* [1983] 2 Lloyd's Rep 658, 665-666..

⁴⁶ Cf *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326. The history and debate is explored in detail in Meagher, Heydon and Leeming (eds) *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th edn, 2004) 471-473 [13-075]-[13-090]. Rejection of *Seddon's* case can be seen in *Baird v BCE Holdings LPty Ltd* (1996) 40 NSWLR 374, 379-380 (Young J); and muted criticism in *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 369 (Mason P).

⁴⁷ *Samuel John Malouf v MBF Australia Limited* [2007] NSWSC 1020 [26] (Einstein J) approved in *MBF Australia Limited v Malouf* [2008] NSWCA 214 [32] (Hodgson JA); *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589, [41] (White J); *Menzies v Perkins* [2000] NSWSC 40 at [9] (Hunter J); *Orix Australia Corporation Limited v Moody Kiddell &*

undue influence⁴⁸ and failure of consideration.⁴⁹ Each of mistake and failure of consideration, and probably undue influence, is an unjust factor which permits restitution of value. It is hard to resist the conclusion that a trust of rights transferred as a result of each of these unjust factors is a response to unjust enrichment. Indeed, when recognising restitution of *value* following an unjust enrichment by failure of consideration, the leading judgments in the High Court of Australia relied upon the principles of failure of consideration set out in a decision involving restitution of *rights* following a failure of consideration.⁵⁰

The New South Wales Supreme Court, without being referred to any of these decisions, has held that a trust will arise only from the time when the recipient has knowledge that the payment was made by mistake.⁵¹ No argument was made in those cases that the nature of the trust sought might have been a bare trust akin merely to a power to obtain rescission of the transaction and conveyance of the rights. It may be that, as Lord Browne-Wilkinson envisaged, a trust embodying positive fiduciary duties would require some circumstances demonstrating knowledge by the trustee of his or her role, but a bare trust for conveyance (which Lord Browne-Wilkinson would not have called a trust)⁵² might not.

How should an award of restitution of rights be described?

Some cases involving a trust which arises to effect restitution of rights describe the trust as 'constructive',⁵³ others describe it as 'resulting'.⁵⁴ Some cases refer to the trust as being either resulting or constructive,⁵⁵ or a 'constructive (resulting) trust'⁵⁶ or simply as a trust.⁵⁷

The view of Professor Chambers, following the late Professor Birks, is that the label 'resulting trust', from the Latin *resalire*, invokes a metaphor of rights 'jumping back' to

Partners Pty Limited [2005] NSWSC 1209 at [156] (White J); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Limited* [2011] NSWSC 267, [92] (Einstein J).

⁴⁸ *McCulloch v Fern* [2001] NSWSC 406; *Reid v Reid* 1997, NSW Supreme Court, unreported, 30 November 1998.

⁴⁹ *Muschinski v Dodds* (1985) 160 CLR 583.

⁵⁰ *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516, [16] (Gleeson CJ, Gaudron and Hayne JJ) and [100] (Gummow J), and especially [153] (Kirby J) relying upon *Muschinski v Dodds* (1985) 160 CLR 583. See also *John Nelson Developments Pty Limited v Focus National Developments Pty Limited* [2010] NSWSC 150 (Ward J).

⁵¹ *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589, [42] (White J); *Westpac Banking Corporation v Ollis* [2007] NSWSC 956, [20] (Einstein J); *Credit Union Australia Ltd v Lyons* [2009] NSWSC 1188, [29] (White J).

⁵² *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 706 focusing upon the need for a trustee to be accountable for his actions before a trust can be recognised.

⁵³ *McCulloch v Fern* [2001] NSWSC 406; *Menzies v Perkins* [2000] NSWSC 40 at [9] (Hunter J); *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 387-390 (Brennan J; Wilson J agreeing).

⁵⁴ *Reid v Reid* 1997, NSW Supreme Court, unreported, 30 November 1998. *Samuel John Malouf v MBF Australia Limited* [2007] NSWSC 1020 [26] (Einstein J) approved in *MBF Australia Limited v Malouf* [2008] NSWCA 214 [32] (Hodgson JA); *Evans v European Bank Limited* [2004] NSWCA 82; (2004) 61 NSWLR 75 at [111]- [116] (Spigelman CJ); *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1, 11-12 (Millett J).

⁵⁵ *Orix Australia Corporation Limited v Moody Kiddell & Partners Pty Limited* [2005] NSWSC 1209 at [156] (White J).

⁵⁶ *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep Bank 438, 461-462 (CA).

⁵⁷ *Black v S Freedman & Company* [1910] HCA 58; (1910) 12 CLR 105, 110 (O'Connor J).

the settlor.⁵⁸ The metaphor of jumping back is inapt. The transferor of a legal right in these cases holds no equitable rights or powers prior to transfer. The High Court of Australia has recognised this on numerous occasions.⁵⁹ Nothing 'jumps back'. Instead, the resulting trust *inter vivos* involves the creation of new equitable powers in favour of the transferor.

An alternative view which does not invoke the metaphor of jumping back suggests that 'resulting' ought merely to be understood as 'resulting' from the circumstances of the case.⁶⁰ On this view, there is little difference, as a matter of labelling, between 'resulting' and 'constructive', since constructive trusts have also been described as involving a court 'constru[ing] the circumstances in the sense that it explains or interprets them'.⁶¹ In fact, express trusts also arise from construing the circumstances. The constructive and the resulting trusts were also closely associated historically. In *Grey v Grey*,⁶² Lord Nottingham LC spoke interchangeably of a use by implication (now, resulting trust) and a constructive trust.⁶³ Historical separation may have occurred with the epexegetical interpretation of the word 'construction' in the expression in the *Statute of Frauds* 1677 'by the implication or construction of law'.⁶⁴

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

Other cases recognise the plaintiff as having a power to rescind the transfer of rights rather than having rights under a trust.⁶⁵ In most contexts this distinction is also of no consequence. As four Justices of the High Court said in *Giumelli v Giumelli*, a constructive trust 'does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests'.⁶⁶ If the trust is a response to unjust enrichment, it should operate only as a power to revest rights which arise from defective transfers in the law of unjust enrichment; there is no warrant for the imposition of fiduciary duties. In this respect, when the plaintiff litigates to assert a demand for re-conveyance, recognition of a trust is no different

⁵⁸ *Resulting Trusts* (2007) 4. See also J D Heydon and M J Leeming *Jacobs' Law of Trusts* (7th ed, 2006) 234 [1201].

⁵⁹ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1982] HCA 14; (1982) 149 CLR 431, 463 (Aickin J); *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20; (2005) 220 CLR 592, 606 [30] (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ); *Peldan v Anderson* [2006] HCA 48; (2006) 227 CLR 471, 485 [37] (Gummow ACJ, Kirby, Hayne, Callinan & Crennan JJ).

⁶⁰ *Black Uhlands Inc v New South Wales Crime Commission* [2002] NSWSC 1060 [131] (Campbell J, as his Honour was then).

⁶¹ *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 111 [2] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

⁶² (1677) 2 Swan 594, 598; [1677] EngR 86; (1677) 36 ER 742, 743.

⁶³ See also M McNair 'Coke v Fountaine (1676)' in C Mitchell and P Mitchell (eds) *Landmark Cases in Equity* (forthcoming) ch 2.

⁶⁴ W Holdsworth, *A History of English Law* (1924) VI, 643.

⁶⁵ *Allcard v Skinner* (1887) LR 36 Ch D 145. More recently, see *Quek v Beggs* (1990) 5 BPR 11 761 where McLelland J recognised a power to rescind a gift for undue influence.

⁶⁶ *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

from a 'mere equity' or power to rescind: the bare trust is 'akin to orders for [re]conveyance'.⁶⁷ In *Stump v Gaby*⁶⁸ Lord St Leonards even equated rescission with the trust saying that a person with the right to rescind a transaction for fraud 'remains the owner' in equity. And as Sir Peter Millett once said, eschewing the awkward label of 'mere equity', '[i]t probably does not matter if we say that the relationship is not a trust relationship, so long as we call it something else. The trouble is that we have no other name for it.'⁶⁹

In contrast, Mr Swadling has suggested that the language of 'trust' or 'rescission' should be replaced by a description of the order as an order for conveyance at the date of judgment.⁷⁰ However, for the reasons below, it is not a legitimate exercise of judicial power to create new rights at the date of judgment. And if the well established terms such as 'trust' or 'power to rescind' should be eschewed in favour of the cumbersome expression 'power to obtain conveyance' then it is necessary to explain why it is an error to describe a power to obtain a conveyance as a trust or a power of rescission.

In summary, although there is debate about the appropriate label to describe the trust which is imposed in cases concerning restitution of rights to a plaintiff, this debate has almost no meaningful consequence. Whether the label used is a constructive trust, resulting trust, power of rescission, or something else entirely, the important point is that where the award is made to reverse an enrichment by the receipt of rights at the expense of another by an unjust factor, then the award should be recognised as part of the law of unjust enrichment.

When should restitution of rights be recognised?

(a) The illegitimacy of a date of judgment award

There is some Australian authority for the recognition only at the date of judgment of a trust of rights obtained as a result of the unjust factor of failure of consideration. In *Muschinski v Dodds*,⁷¹ Ms Muschinski and Mr Dodds lived in a de facto relationship. They purchased a title to land as joint tenants. Their purpose was to share the land as part of their home and as an arts and crafts centre. When their relationship ended, that purpose or condition failed. Ms Muschinski had contributed ten times more to the acquisition and improvement of the land than had Mr Dodds. Mason and Deane JJ held that the parties held the title on trust for themselves as tenants in common in proportion to their contributions. Controversially, the trust was imposed only at the time of publication of the reasons of the court.⁷² Brennan and Dawson JJ dissented and Gibbs CJ, whilst agreeing in the final order of Mason and Deane JJ, would have

⁶⁷ *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

⁶⁸ (1852) 2 De GM & G 613 at 630; 42 ER 1015 at 1018. See also *Gresley v Mousley* (1859) 4 De G & J 78, 93; 45 ER 31, 36 (Turner LJ) and R Chambers *Resulting Trusts* (1997 Oxford University Press Oxford) 172-174.

⁶⁹ P Millett 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 404.

⁷⁰ W Swadling 'The Fiction of the Constructive Trust' (2011) 64 *Current Legal Problems* 399.

⁷¹ *Muschinski v Dodds* (1985) 160 CLR 583. See also *John Nelson Developments Pty Limited v Focus National Developments Pty Limited* [2010] NSWSC 150 (Ward J).

⁷² (1985) 160 CLR 583 at 623.

preferred to impose a charge or lien.⁷³ The possibility of an award conveying the rights, but only at the date of judgment, was also recognised in *Lister & Co v Stubbs*.⁷⁴

In *Grimaldi v Chameleon Mining NL (No 2)*⁷⁵ the Full Federal Court, echoing the words of Meagher, Gummow and Lehane, rightly described this date of judgment award, operating prospectively, as an ‘astounding proposition’. Although the Full Federal Court later explained that the award of a trust was ‘discretionary’⁷⁶ the Court was not suggesting there that the trust could arise at the date of judgment. The suggestion was only that upon receipt of a bribe a trust would not always be a consequence and that the trust might also be defeasible as a result of later events (much like an order for specific performance).

The date of judgment approach has serious difficulties. It has never been the role of the common law to make a determination about what rights *should be* at the date of judgment. Rather, the common law focuses upon the effect that events—things that happen in the world—have upon existing rights. In *The Native Title Act Case*⁷⁷ a joint judgment of six High Court Justices set out a far reaching thesis concerning the nature of the common law. The Justices explained that the notion of the ‘common law’ could be understood either by its source (judicial reasons for decision) or by its content. The content of the common law is recorded in the perceptions of those empowered to make judicial decisions. But in ‘the view of a court sitting at the present time, earlier decisions which are not binding upon it do not necessarily represent the common law of the earlier time, though they record the perception of the common law which was then current.’⁷⁸ In other words, judicial reasons for decision are the judge’s best effort at representing the state of the law at the relevant time. They are an adjudication of the operation of the law upon real events which happen. It is for this reason that prospective overruling was held to be illegitimate in a joint judgment of four Justices in *Ha v New South Wales*:⁷⁹

A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power.

This is a point which has been iterated,⁸⁰ and reiterated.⁸¹ It should cause serious pause before any court makes a pronouncement that a plaintiff had no pre-existing right before trial, yet the judge can create a right at the date of judgment. This is quite different from a plaintiff having a pre-existing or prima facie *defeasible* right which might be extinguished at the date of trial by subsequent events such as third party rights or other matters which affect the court’s discretion to make the award.

⁷³ (1985) 160 CLR 583 at 598.

⁷⁴ (1890) 45 Ch D 1,12-13 (Cotton LJ) and 11 (Stirling J at first instance).

⁷⁵ [2012] FCAFC 6 [569].

⁷⁶ [2012] FCAFC 6 [582].

⁷⁷ *Western Australia v Commonwealth* [1995] HCA 47

⁷⁸ *Western Australia v Commonwealth* [1995] HCA 47 quoting *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543 at 584 (Brennan J).

⁷⁹ *Ha v New South Wales* [1997] HCA 34; (1997) 189 CLR 465, 503 - 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

⁸⁰ *In Re Ranger Uranium Mines* [1987] HCA 63; (1987) 163 CLR 656 at 666.

⁸¹ *Precision Data Holdings Ltd v Wills* [1991] HCA 58; (1991) 173 CLR 167 at 189.

(b) The lack of principled support for a trust of rights based on unjust enrichment in cases of payment of money

At the start of this paper I explained that the principled basis for the recognition of restitution of rights is that this may be the most perfect way of making restitution. The plaintiff should not be confined to restitution of the value of the mistaken transfer of a title to Blackacre or of the mistaken transfer of the title to a prized antique motor car. Instead the plaintiff should be entitled to restitution of the rights to those things. As I have explained, the mechanism by which restitution of rights can be achieved is by recognition of a trust of the rights held by the defendant or a plaintiff's power of rescission.

However, there will be many cases in which restitution of rights should not be available. If A mistakenly instructs his bank (Bank A) to pay money into B's account with another bank (Bank B), the best way of reversing the transfer of value from A to B is for an order that B make restitution to A of the value received. This would generally occur by a cheque from B which would be paid back into A's initial account, restoring the situation before the mistake. In contrast, an attempt to make restitution of the *rights* received by B, by recognition of a trust of B's rights against his bank, would not reverse the transfer. Far from it. A started with rights, subject to particular terms and conditions, against Bank A. A concludes with the benefit of a trust of different rights, subject to different terms and conditions, against Bank B.

Such a conclusion means that many of the cases discussed above cannot justify a trust on the basis of unjust enrichment, although in cases of fraud or other wrongdoing a trust might be otherwise justified. This has real consequences. For instance, suppose I mistakenly instruct my bank to pay money into your bank account. You honestly withdraw money from your bank and pay it to a friend. If I can establish that you held your rights against your bank on trust for me then I can seek restitution from either you or your friend. Any recognition that your rights were held on trust for me would permit me to trace the rights to the receipt, and consequent enrichment, of your friend.

There are strong signs that the recognition of a trust, effecting restitution of rights, should not be a standard response to unjust enrichment. When the Supreme Court of Canada recently recognised the availability of an award of restitution of rights, the court explained that this award of a constructive trust which arose when a monetary award is inappropriate or insufficient.⁸² Similarly, in *Bathurst City Council v PWC Properties Pty Ltd*⁸³ the High Court observed that 'before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy.' This point has been emphasised, and re-emphasised.⁸⁴ Most recently, it was said by the

⁸² *Kerr v Baranow* [2011] SCC 10; [2011] 1 SCR 269 [50].

⁸³ *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585.

⁸⁴ See also *Giumelli v Giumelli* (1999) 196 CLR 101, 113 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Napier v Hunter* [1993] AC 713, 738 (Lord Templeman), 744-745 (Lord Goff), 752 (Lord Browne-Wilkinson).

High Court that ‘a constructive trust ought not to be imposed if there are other orders capable of doing full justice’.⁸⁵

The same approach is taken in relation to specific performance. This is not a coincidence. As Lord Millett has observed:⁸⁶

the right to reconveyance is a form of specific performance (or 'specific unperformance') which equity makes available because a money judgment is an inadequate remedy. If this is right, then the remedy should be confined to cases of land or other property of special value to the transferor.

Specific performance is available whenever damages are inadequate. In *Coulls v Bagot's Executor and Trustee Co Ltd*,⁸⁷ Windeyer J explained that the inadequacy concerned whether damages could ‘satisfy the demands of justice’; his Honour explained, quoting Lord Selborne LC, that specific performance is awarded ‘instead of damages only when it can by that means do more perfect and complete justice’.⁸⁸ Hence, where a perfect substitute for the promised good is available in the market then damages will be adequate to secure performance to the purchaser. The damages ‘place the disappointed buyer or seller in as good a position as delivery of the articles or receipt of the price because it enables him to go upon the market.’⁸⁹ But if there is no generic substitute, or if the substitute has limited availability or can only be secured with difficulty, then specific performance will be awarded.⁹⁰

This approach does not require that insolvency considerations should cause a right to specific restitution to be lost. Insolvency regimes generally take the pre-existing distribution of rights as they are found. Hence, rights which are held on trust at the time of insolvency are not disturbed and those rights do not vest in a trustee in bankruptcy. The phrase in the 1604 statute of 1 Jac 1 c 15 (*An Act for the better relief of the creditors against such as shall become bankrupts*), ‘debts due or to be due to or for the benefit of the said bankrupt’, was construed to exclude rights which the bankrupt held as a trustee.⁹¹ Even where the proceedings took place in the courts of common law, the common law courts took ‘notice of a trust’.⁹² The same effect is true of specific performance. In *Swiss Bank Corp v Lloyds Bank Ltd*,⁹³ Browne-Wilkinson J said:

⁸⁵ *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* [2010] HCA 19; (2010) 241 CLR 1 [128].

⁸⁶ P Millett ‘Restitution and Constructive Trusts’ in W Cornish et al *Restitution* 216. See also A J Oakley ‘Restitution and Constructive Trusts: A Commentary’ in W Cornish et al *Restitution* 218, 230.

⁸⁷ *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] HCA 3; (1967) 119 CLR 460 at 503. See also *Zhu v Treasurer of NSW* [2004] HCA 56; 218 CLR 530, 575 [129] (the Court).

⁸⁸ *Wilson v Northampton and Banbury Junction Railway Co* (1874) 9 Ch App 279, 284.

⁸⁹ *Dougan v Ley* [1946] HCA 3; (1946) 71 CLR 142, 150 (Dixon J).

⁹⁰ *Dougan v Ley* [1946] HCA 3; (1946) 71 CLR 142.

⁹¹ *Winch v Keeley* (1787) 1 Term Rep 619, 623; [1787] EngR 38; (1787) 99 ER 1284, 1286 (Buller J); *Scott v Surman* (1742) Willes 400, 402; (1742) 125 ER 1235, 1236 (Wilkes CJ); *Boddington v Castelli* [1853] EngR 515; (1853) 1 El & Bl 879, 885; [1853] EngR 515; (1853) 118 ER 665, 667 (Parke B arguendo)

⁹² *Winch v Keeley* (1787) 1 Term Rep 619, 623; (1787) 99 ER 1284, 1286 (Ashurst J).

⁹³ [1979] 1 Ch 548, 566-567. See also *Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd (subject to a Deed of Company Arrangement)* [2004] FCA 393 [41] (Beaumont J).

‘[T]he court can and should order specific performance of an obligation of an insolvent company if that obligation was contracted before any insolvency, even if such specific relief will adversely affect third parties, the unsecured creditors of the company. In this regard I can see no relevant distinction between the position of an insolvent company and a bankrupt individual.’

Like specific performance, the extent to which this approach will apply will depend upon the extent to which courts recognise rights to things as unique and deserving of specific protection. Canadian courts now refuse specific performance of contracts for the sale of land for business purposes such as ‘a building lot under construction which would be interchangeable in all likelihood with any number of others’.⁹⁴ The Canadian approach treats differently those who have the wealth to purchase property with a ‘particular architectural design’ or property situate in a ‘particularly desirable location’.⁹⁵ It has been described as contrary to the principle of equality before the law.⁹⁶ Such a conception of specific performance ‘is without foundation’ in Australian law.⁹⁷

Conclusion

The primary step suggested by this paper has not been explicitly taken in any Australian case. It invites close attention to what is meant by ‘enrichment’ in the law of unjust enrichment. The suggestion is that ‘enrichment’ can be understood not merely in terms of value received (whether the value of the rights or value of services received), but also in terms of rights received.⁹⁸

The basic exercise of this paper has been to explore the ‘taxonomical function’ (to use the words of French CJ, Crennan and Kiefel JJ) of the law of unjust enrichment. Unjust enrichment ought to be capable of extending beyond instances of restitution of value to claims by a plaintiff for restitution of rights which have been transferred to another. The examples with which this paper began emphasise why the demands of basic justice require this response of ‘specific unperformance’. The mistaken transfer of title to land, or a unique asset, ought to entitle the plaintiff to the return of those specific rights, not merely their value. But there is no warrant to a claim for restitution of specific rights based upon unjust enrichment in many ordinary instances such as the mistaken crediting of the bank account of another or transfer of rights which can be easily obtained in the market. A personal award of the value of those (sometimes) rights obtained by the defendant is the best method to reverse the transfer.

⁹⁴ *Semelhago v Paramadevan* [1996] 2 SCR 415 (Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ).

⁹⁵ *Semelhago v Paramadevan* [1996] 2 SCR 415, 429, the joint judgment quoting from *Chaulk v Fairview Construction Ltd* (1977) 14 Nfld & PEIR 13, 21 (Gushue JA).

⁹⁶ R Chambers ‘The Importance of Specific Performance’ in S Degeling and J Edelman (eds) *Equity in Commercial Law* (2005) 440.

⁹⁷ *Pianta v National Finance and Trustees Ltd* [1964] HCA 61; (1964) 180 CLR 146, 151 (Barwick CJ).

⁹⁸ Australian law has not embraced a third possibility, which Dr Lodder advocates, that enrichment might also involve the reversal and reinstatement (by subrogation) of a discharged duty: A Lodder *Enrichment in the Law of Unjust Enrichment and Restitution* (2012); cf *Bofinger v Kingsway Group Limited* [2009] HCA 44; (2009) 239 CLR 269, 299 - 302 [88]-[98] (the Court).

The taxonomic function of unjust enrichment directs attention to the reason why restitution of rights is made in these cases; it provides the ultimate justification for the award. A justification permits an understanding of the boundaries of the principles involved. And it allows us to understand how and why defences might operate such as good consideration, change of position, or registration of title.