# Book reviews

## Editor: Judge Alan Wilson SC

### UNJUST ENRICHMENT IN COMMERCIAL LAW

*Unjust Enrichment in Commercial Law* by Degeling S and Edelman J (eds): 2008, Lawbook Co, ISBN 978 045522 5043. Pages: 470, hardcover.

The High Court of Australia has recently had cause to discuss the reach of what is a dynamic creature within the private law (*Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635; [2008] HCA 27). For this reason alone, this compilation of papers delivered by the "worldwide protagonists" in the debate concerning the boundaries of the law of unjust enrichment is of some moment.

In a joint judgment (Gummow, Hayne, Crennan and Kiefel JJ), it was emphasised that unjust enrichment is simply a *concept* that gives coherence to a "variety of distinct categories of case" (see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 257 (Deane J); [1987] HCA 5). Moreover, unjust enrichment is not a principle which can be taken as a sufficient premise for direct application in particular cases (See *Lumbers* at 665).

The restitution framework elucidated by Professor Peter Birks (*An Introduction to the Law of Restitution* (revised ed, Oxford University Press, 1989) and upon which the chapters of the book are organised, is not universally accepted by some influential members of the High Court (see in particular *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 553 (Gummow J); [2001] HCA 68) This only goes to illustrate the tension between the aims of "restitution lawyers" and "equity lawyers" (see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 685 (Lord Goff)).

Despite this tension there was a strong consensus amongst the majority of participants at the conference (this work is a compilation of papers presented at the Restitution in Commercial Law Conference held in Sydney in August 2007) that unjust enrichment is a recognised category of law.

The opening chapters of the book from Professors Robert Stevens and Lionel Smith speak generally of the concepts underpinning unjust enrichment theory and argue strongly that courts in England, Canada and Australia have clearly articulated and firmly recognised the law of unjust enrichment as a distinct category. Professor Stevens notes that the sorts of claims that exist beyond the recognised categories of contract and tort cannot be "lost in the dark, linked together by nothing more than preventing injustice" (p 34). Professor Stevens also points out that the essential reason for the independence of the law of unjust enrichment is the defence of change of position (explored by Professor John McCamus in Ch 19). At the outset of his paper, Professor Smith recognises the urgency in which the boundaries of this field of law need to be clarified, its existence having been confirmed by even the most "sceptical" appellate courts (p 35).

The next group of papers deals with the first element of Professor Birk's inquiry – has the defendant been enriched? It is here that the sole rejector of the law of unjust enrichment at the conference, Professor Steve Hedley, argues that the inherent complexity in determining whether the defendant has been enriched cannot be overcome. Professor Hedley asserts "[that] Restitution might almost be defined as the waste-basket of the common law" (p 102). John McGhee QC in Ch 4 similarly considers the differing conceptions of enrichment and proffers his preferred two-pronged approach whereby enrichment is assessed as a question of fact and then against whether the retention of the enrichment by the defendant infringes upon the claimant's autonomy.

The next three chapters consider the second inquiry – has the enrichment been at the expense of the claimant? Professor Mitchell McInnes's approach to this difficult question centres on a broader conception of what constitutes loss beyond mere financial disadvantage. Using the famous example posited by Lord Mansfield in *Hambly v Trott* ((1776) 1 Cowp 371; 98 ER 1136.) Professor McInnes demonstrates that the claimant in that case does suffer an expense that is equal to a defendant's gain even though her horse is returned none the worse for wear. He does so by arguing that a "temporary and non-harmful interference with property that triggers compensatory relief under the user principle

in tort law may simultaneously constitute a transfer of economic value for the purposes of unjust enrichment" (p 106). By contrast, Professor Charles Mitchell argues, through the examination of complex multi-party scenarios, that examination of causal links between the claimant and the defendant or by establishing transactional linkages via tracing satisfies the second enquiry. Professor Mitchell also addresses the inherent danger in these types of cases in double recovery and double liability. In Ch 8, Professor Graham Virgo argues that examining the second enquiry with reference to causation and remoteness principles can help resolve long standing difficulties in unjust enrichment law.

Chapters 9 to 16 consider what is at the core of any unjust enrichment claim – the unjust factors. Associate Professor Simon Degeling and Professor James Edelman open the section with an introductory chapter examining those unjust factors which are already well established (such as mistake, duress and failure of consideration) which fall into two distinct well-recognised categories – imperfect consent and policy – and those which are more contentions ("ignorance", "free acceptance" and "exploitation of weakness").

Warren CJ discusses the archetypical unjust factor of mistake. The Chief Justice explores in detail the concept of voluntariness and its relationship to causation in the context of mistaken payments. In so doing, her Honour comments on the reasoning of Ormiston JA in *Hookway v Racing Victoria Ltd* (2005) 13 VR 444; [2005] VSCA 310, and warns that "restitutionary principles should not be used to re-rationalise otherwise established equitable doctrines". Nevertheless, Warren CJ appears happy to accept the inevitably rocky incremental progression and "gap filling" that will occur in this area of law in the years to come (p 208). McLure J's exciting and insightful chapter is concerned with failure of consideration and whether it can be considered an unjust factor, thereby triggering the restitutionary mechanism, in circumstances where a valid and *enforceable* contract exists. Necessarily, McLure JA explores in considerable detail, and questions, the reasoning of the High Court in *Roxborough* which, broadly, stands against the rationale that a claim in restitution ordinarily is not permitted to subvert contractual obligations.

Hayne J discusses the elements of an action in unjust enrichment in the context of anticipated contracts that fail to materialise. Hayne J concludes that the articulation of a broad and all-encompassing principle intended to cover these types of cases is an impossibility (p 251) and that the characterisation of the outcomes of commercial transactions as "unfair" or "unjust" ignores not only a fundamental premise of our legal system (that of voluntary entry into commercial relationships) but also the objective nature of contractual analysis conducted by the courts. Hayne J also makes some interesting general comments. His Honour asks, "what would be the purpose of trying to relate the conclusion reached by the application of well-known and (relatively) long-established doctrines to some wider principle, described in general and all-embracing terms?" (p 249).

Professors Robert Chambers and James Penner discuss "ignorance" and misdirected trust assets and conclude that ignorance cannot serve as an unjust factor. In its place, the authors prefer, albeit without absolute conviction, "lack of authority", ie where there was lack of authority to carry out a transaction, as an unjust factor.

The Hon Keith Mason QC gives an entertaining and learned exposition of the history and development of "economic duress" or "restitution for improper pressure". In so doing, he argues for its abandonment stating that it "should not be permitted to distract attention away from established principles of contract, unjust enrichment and equity that already address improper pressure in all its forms in a coherent and efficient manner" (p 277). Professor Michael Bryan advocates in Ch 15 for the recognition of unconscionable conduct as an unjust factor and not as a "wrong" in equity. In so doing, he accepts that the weight of precedent and academic opinion is against him but asserts forcefully and methodically that there is nothing "unsound or radical in recognising unconscientious conduct as an unjust factor" (p 314).

The part concludes with a magisterial exegesis of *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL; [2007] 3 WLR 354 by Lord Rodger of Earlsferry.

The penultimate section of the book deals with whether remedies for unjust enrichment should be proprietary or personal. Professor Andrew Burrows opens his chapter by stating "[that] the most difficult questions in the law of restitution/unjust enrichment continue to be those concerned with whether unjust enrichment does, or should, trigger a proprietary right" (p 333). Notwithstanding these opening remarks Professor Burrows argues, as he has done previously, that unjust enrichment is the best explanation for the proprietary (and personal) rights conferred in unauthorised substitution cases (eg *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 and *Foskett v McKeown* [2001] 1 AC 102). He does so by analysing and commenting on the work of those who argue against the recognition of unjust enrichment triggered proprietary rights in these types of cases (Lord Millett, Professor Virgo and Mr Calnan, a partner at firm Norton Rose). William Swadling concludes this section by arguing that the usual justifications for the creation of proprietary rights, particularly in the event of a defendant's insolvency (such as "arguments from policy" and "doctrinal arguments") as a response to unjust enrichment are illegitimate.

The final group of chapters concern the defences raised to a prima facie claim for restitution for unjust enrichment. Professor John McCamus's analysis considers the defence of change of position with a particular focus on the varying conceptions of the role of "fault" with respect to the availability of the defence. In so doing, Professor McCamus attacks the dicta in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All Er 193 and concludes, after a exhaustive examination of the arguments and analysis of the differing models of what constitutes "wrongdoing" with nine thought provoking propositions. Bret Walker SC examines the defence of illegality which, as he considers, is a defence not unique to unjust enrichment but encroaches on many areas of the private law. The book concludes with an examination of the importance of "imputed knowledge" in restitutionary claims by Professor Peter Watts.

Other chapters include a discussion by Professor Adrian Briggs of the interplay between unjust enrichment and conflict of laws and the difficulties that arise when unjust enrichment is proffered in the exercise of characterisation.

The papers in this volume offer a valuable insight into the issues at the core of this fascinating and emerging area of the law. Each author makes a valuable contribution to the cause of advancing, at the very least, debate and perhaps even acceptance of an area of the law with deep historical roots. Minds, however, will continue to differ as to the acceptable boundaries of unjust enrichment in Australia.

*Chris Tam*

## TAKEOVERS LAW & STRATEGY

*Takeovers Law & Strategy* by Levy R and Pathak N: 2009, 3rd ed, Thomson Reuters, ISBN 978 045522 4428. Pages: 415 Price: $159.95 rrp, softcover.

Edward Lewis bought companies, took them apart, and sold the bits for more than he paid. So it was for the corporate raider with a heart of gold in the movie, *Pretty Woman*. The cultural reference might be dated, but the current economic climate is ripe with opportunities to amass one's corporate interests. There are, of course, a variety of ways to accumulate shares, but *Takeovers Law & Strategy* limits its discussion to the heavily regulated area of takeover bids for public companies in Australia. The text intersperses strategic considerations with a helpful examination of the relevant law, including both offensive and defensive advice for bidders and targets.

The book is structured around the bidding process after a brief overview of Ch 6 of the *Corporations Act 2001* (Cth) which regulates the takeover process, and the 20% prohibition that restricts the acquisition of an interest in issued voting shares greater than 20%, or from a starting point between 20% and 90% as per s 606. The fundamental purpose of the prohibition is to prevent a shareholder from affecting the control and direction of a public company.

The book caters for legal practitioners engaged in both transactional and contentious aspects of takeovers work. In addition to their detailed examination of the bidding process, the authors review the role and functions of the Australian Securities and Investments Commission (ASIC) with respect to takeovers practice. ASIC has significant powers to exempt persons from compliance with Ch 6, and