The autochthonous development and evolving approach to unjust enrichment by the High Court in Australia

JOSHUA LING

Abstract

Although the High Court had once been lauded by English unjust enrichment scholars for its percipience in its early willingness to recognise the concept of unjust enrichment in 1987, its development and treatment of unjust enrichment has since been the subject of academic and legal controversy. This paper attempts to navigate and interrogate those controversies. It traces, examines and evaluates the evolving approach to unjust enrichment by the High Court from 1987 until today. In so doing, it proffers two observations. First, the High Court has developed and emphasised a conscience-based approach towards restitution, which has not been without contention. Second, despite the common refrain that the Australian and English courts have departed in almost incompatible ways with respect to their jurisprudential understanding and judicial methodology towards unjust enrichment, there is ostensibly greater substantive consistency between the two jurisdictions today than has been hitherto claimed.

Introduction

1987 and 1991 marked watershed moments when unjust enrichment was recognised in Australia and England.[1] Since then, however, it has been claimed that the two jurisdictions have diverged in irreconcilable ways.[2] More remarkably, Australia's approach to unjust enrichment has been censured as being 'in a sorry state'.[3] Given such criticisms, an evaluation of the High Court's approach is both apposite and timely.

[1] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 ('*Pavey*'); *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 ('*Lipkin Gorman*').

[2] See, eg, Paul Finn, 'Common Law Divergences' (2013) 37 *Melbourne University Law Review* 509, 512, 520.

[3] Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 43.

This paper begins with a historical background to restitution law and unjust enrichment. Thereafter, it traces the autochthonous development of unjust enrichment by the High Court, and makes two observations. First, the High Court has adopted a conscience-based methodology which was driven by concerns that unjust enrichment was illusory.[4] It is, however, questionable whether a conscience-based approach to the common money counts is truly a more cogent basis than unjust enrichment. Second, the disagreements underlying the unjust enrichment debate revolve largely around questions of taxonomy and form. Critics of the High Court's conscience-based approach tend to fixate on its outward inconsistencies with England and other common law jurisdictions. Yet, beyond the dissimilarities in judicial methodology, there is arguably little significant difference in substantive outcomes between the Australian and English approaches. Both approaches may, for instance, be explained by unjust enrichment rationale.[5] Ultimately, this essay suggests that when evaluated as a matter of substance, there is today greater similarity between Australia's and England's approaches to unjust enrichment than has been previously acknowledged.

A brief history of the law surrounding restitutionary claims

Restitution law

Since time immemorial, Roman law has provided restitutionary remedies that reverse a defendant's gains as opposed to providing compensation for losses arising from some wrongdoing.[6] Similarly, restitutionary claims could historically be brought in England via several forms of action at common law. These included the writs of debt and account,[7] which hid the restitutionary nature of the claim beneath a bare plea that money was owed as a debt or must be accounted for.[8] The forms of actions were extended following *Slade's case*,[9] whereby it became permissible for restitutionary claims to be pleaded on assumpsit – the action of

[4] See Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in William Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 251, 252.

[5] Michael Bryan, 'Peter Birks and Unjust Enrichment in Australia' (2004) 28 *Melbourne University Law Review* 724, 726.

[6] Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2nd ed, 2018) 2; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) 79.

[7] Barker and Grantham, above n 6.

[8] James Edelman, 'Australian Challenges for the Law of Unjust Enrichment' (Speech delivered at the Summer School, University of Western Australia, 24 February 2012) 3.

[9] (1648) Style 138.

which was premised upon the breach of a fictional implied contract.[10] Unfortunately, the formulaic nature of these claims meant there was no impetus for the early common law courts to articulate a more comprehensive theory for the various common money counts.[11] This state of affairs came to a head in *Moses v Macferlan*.[12] In that case, Lord Mansfield faced a doctrinal deficiency underpinning the action for money had and received, and thus acknowledging that the nature of the case was not one where such actions had traditionally laid, his Lordship supplemented the fiction of implied contract with principles of 'natural justice and equity'.[13] This, as shown below, has had lasting effects for unjust enrichment in Australia; particularly in the High Court's development of a conscience-based approach to unjust enrichment claims.

Unjust enrichment

Moving into the twentieth century, the fiction of implied contract became increasingly curtailed,[14] and would ultimately be discarded.[15] Instead, unjust enrichment was first raised as a possible explanation for money had and received in the House of Lords in 1943,[16] and by 1954, had even become a cause of action in Canada.[17] In the latter half of the century, academic interest quickly burgeoned over the possibility of ridding the remnants of the old forms of action for restitution, at law and equity, and of unifying them under a singular theory and framework of unjust enrichment.[18]

Today, it is commonly accepted that a successful claim in unjust enrichment requires a four-part inquiry. First, the defendant must have benefited or have been enriched; second, the enrichment must be at the expense of the plaintiff; third, the enrichment must be unjust; and fourth, there must be no defences that are available, such as a change of position.[19] Such a framework is premised upon an 'event-based', as opposed

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[10] J Baker, 'The History of Quasi-Contract in English Law' in William Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 37, 39, 41–2, 53–5.

[11] Ibid 39.

[12] (1760) 2 Burr 1005.

[13] Ibid 1012; William Gummow, 'Moses v. Macferlan 250 Years On' 68(3) *Washington and Lee Law Review* 881, 883–4.

[14] See *Sinclair v Brougham* [1914] AC 398, 452 (Lord Sumner).

[15] *Pavey* (1987) 162 CLR 221; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 710 ('*Westdeutsche*').

[16] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61 (Lord Wright).

[17] *Deglman v Guaranty Trust of Canada* [1954] SCR 725.

[18] See Justice Keith Mason, 'Where has Australian Restitution Law Got To and Where is it Going?' (2003) 77 *Australian Law Journal* 358, 359; Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1st ed, 1966) 5.

[19] See Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones The Law of Unjust Enrichment* (2016, 9th ed, Sweet & Maxwell) 8; *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn); *Benedetti v Sawiris* [2013] UKSC 50 (17 July 2013) [10]; *Crown Prosecution Services v Eastenders Group* [2014] UKSC 26 (8 May 2014) [102]; *Menelaou v Bank of Cyprus* [2015] UKSC 66

to a 'response-based', taxonomical understanding of private obligations.[20] For example, Birks originally argued that unjust enrichment was one category, out of four, that covered every legal event which triggered a restitutionary remedy.[21] This 'generic conception' would be further subdivided into 'restitution from wrongs', and 'autonomous unjust enrichment' not arising from wrongs.[22] However, this broad conceptualisation of unjust enrichment – as being coterminous with restitution law – was heavily criticised as overly encompassing and therefore internally incoherent.[23] Consequently, Birks formulated a narrower theory which limited unjust enrichment to 'all events materially identical to the mistaken payment of a non-existent debt'.[24]

On Birks' subsequent and narrower view, unjust enrichment becomes a 'subset' of restitution law, and is decoupled from the remedy of restitution.[25] This view was better received, as restitution had since been recognised to arise from legal events *outside* of unjust enrichment too – such as from wrongs or property rights.[26] Ostensibly, the English Supreme Court recently adopted and affirmed the narrower view when it branded the concept of unjust enrichment with cases involving the correction of 'normatively defective transfers of value'.[27] Arguably, the High Court took the narrow view too when it held that the 'unjust factors' within 'unjust enrichment' are concerned with vitiated intention, and not wrongdoing.[28] Nevertheless, in addition to understanding the background history between restitution law and unjust enrichment, it is perhaps more critical to consider more carefully the High Court's particular evolving approach to unjust enrichment in Australia.

(4 November 2015) [18]; *Commissioners for her Majesty's Revenue and Customs v The Investment Trust Companies (in liq)* [2017] UKSC 29 (11 April 2017) [24] ('*Revenue and Customs*').

[20] See Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 17–20.

[21] Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) 16–17; see also Goff and Jones, above n 18, 5.

[22] Robert Stevens, 'Is there a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomas Reuters, 2008) 11, 14.

[23] Ibid 14–16; see especially Steve Hedley, 'Unjust Enrichment' (1995) 54(3) *Cambridge Law Journal* 578.

[24] Peter Birks, *Unjust Enrichment* (Clarendon Press, 2nd ed, 2005) 1.

[25] Ibid 17.

[26] Ibid; James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 19; Graham Virgo, 'What is the Law of Restitution About?' in William Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 305, 307; see also *Sempra Metals Ltd v Her Majesty's Commissioners for Inland Revenue* [2007] UKHL 34 (18 July 2007) [116] (Lord Nicholls).

[27] *Revenue and Customs* [2017] UKSC 29 (11 April 2017) [42]–[43]; see also *Lowick Rose LLP (in liq) v Swynson* [2017] UKSC 32 (11 April 2017) [22]; cf *Lipkin Gorman* [1991] 2 AC 548, 578 (Lord Goff).

[28] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [150] ('*Farah Constructions*'); see also James Edelman, 'A Principled Approach to Unauthorised Receipt of Trust Property' (2006) 122 *Law Quarterly Review* 174, 177–8.

Autochthonous development in Australia

Broadly speaking, Australia's treatment of unjust enrichment might be divided into three epochs. The first epoch began in 1987 when, without precedent, the High Court dispensed with the fiction of implied contract for restitutionary claims, and explicitly recognised unjust enrichment as a 'unifying legal concept' in *Pavey*.[29] In that case, contract could not form a 'juristic explanation' of the respondent's enrichment because of her repudiatory breach.[30] Thus, the appellant builders were entitled to restitution on the basis of *quantum meruit*, which in turn, was said to be 'based on unjust enrichment'.[31] Immediately thereafter, several lower court decisions attempted to follow suit by embracing unjust enrichment.[32] This was despite a gaping uncertainty as to whether unjust enrichment was a legal principle in its own right, or something else.[33] A high-water mark was reached in 1993 when Deane and Dawson JJ suggested there could even be an 'action in unjust enrichment'.[34] However, although this proposition was soon decisively rejected by the High Court,[35] greater relevance was made for unjust enrichment with the removal of the restitutionary bar for mistakes of law, the creation of a structured approach to unjust enrichment based upon unjust factors (such as mistake, duress or illegality),[36] and the incipient recognition of the change of position defence.[37]

A second epoch arrived at the turn of this century, which saw the High Court retreat from the concept of unjust enrichment, and which involved the development of a conscience-based approach towards restitutionary claims.[38] In *Roxborough*,[39] Gummow J cast much doubt on the continued relevance of unjust

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[29] (1987) 162 CLR 221, 227–8, 256.

[30] Bryan, 'Peter Birks and Unjust Enrichment in Australia', above n 5, 728.

[31] *Pavey* (1987) 162 CLR 221, 227–8; cf Romauld Andrew, 'The Fabrication of Unjust Enrichment in Australian Law: Pavey & Matthews v Paul Reassessed' (2010) 26 *Building and Construction Law Journal* 314.

[32] See, eg, *National Mutual Life Association of Australasia Ltd v Walsh* [1987] 8 NSWLR 585, 595; *Public Trustee v Fraser* [1987] 9 NSWLR 433, 443; *Nepean District Tennis Association Inc v Penrith City Council* (1988) 66 LGRA 440, 448–9.

[33] Warren Swain, 'Unjust Enrichment and the Role of Legal History in England and Australia' (2013) 36(3) *University of New South Wales Law Journal* 1030, 1041.

[34] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 379 ('*Baltic Shipping*').

[35] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 406 ('*David Securities*'); *Hill v Van Erp* (1997) 188 CLR 159, 239.

[36] See Michael Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v Commonwealth Bank of Australia' (1993) 15 *Sydney Law Review* 461, 474–5; see also Chief Justice Allsop, 'Restitution: Some Historical Remarks' (2016) 90 *Australian Law Journal* 561, 577.

[37] *David Securities* (1992) 175 CLR 353; see also Stevens, above n 22, 13.

[38] See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 ('*Roxborough*').

[39] Ibid.

enrichment in Australia. His Honour held that while the fiction of implied contract was conclusively rejected by *Pavey*,[40] that case did not identify 'a satisfactory doctrinal basis' for the common money counts.[41] Instead, though unjust enrichment might be useful in furthering 'legal inquiry' as a 'unifying legal concept', it could 'contrive legal analysis' if directly applied as a legal principle since it was apt to conceal the particular responsibilities and relationships which provide the legal and policy basis upon which restitution is granted.[42] Unjust enrichment was an 'all-embracing theory of restitutionary rights'.[43] Its acceptance would lead to 'top-down reasoning' upending common law judicial methodology, which 'may distort well settled [equitable] principles' and remedies.[44] Moreover, actions for money had and received were historically laid even against defendants who were never enriched.[45] Thus, his Honour suggested that a conscience-based approach, focusing on the unconscionability in retaining a conferred benefit, was a superior basis for restitution than unjust enrichment.[46] Such criticisms would be repeated by the High Court over subsequent years.[47]

The third epoch, arriving at the start of this decade, has most noticeably been marked by the High Court's softening of its criticisms against unjust enrichment, and return to the structured approach towards unjust enrichment claims as originally expounded upon in *David Securities*.[48] Thus, in a 2012 decision, it was reaffirmed that restitutionary rights were distinct from contractual claims.[49] In so doing, however, the High Court stated that unjust enrichment retained a useful 'taxonomical function referring to [the] categories of cases' which attract restitution.[50] To that extent, unjust enrichment was not the 'all-embracing theory' as

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[40] (1987) 162 CLR 221.

[41] *Roxborough* (2001) 208 CLR 516, 540 [64].

[42] Ibid 543 [70].

[43] Ibid 544 [72].

[44] Ibid 544–5 [72]–[74]; cf Carmine Conte, 'From Only the 'Bottom-up'? Legitimate Forms of Judicial Reasoning in Private Law' (2015) 35(1) *Oxford Journal of Legal Studies* 1.

[45] *Roxborough* (2001) 208 CLR 516, 543–4 [71], citing *Martin v Pont* [1993] 3 NZLR 25; cf Burrows, *The Law of Restitution*, above n 3, 37.

[46] *Roxborough* (2001) 208 CLR 516, 554 [100].

[47] *Farah Constructions* (2007) 230 CLR 89, 156 [150]–[151]; *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635, 662 [77]–[78] ('*Lumbers*'); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300 [90]–[91] ('*Bofinger*').

[48] (1992) 175 CLR 353, 376; see especially *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 516 [30] ('*Equuscorp*').

[49] *Equuscorp* (2012) 246 CLR 498, 514–15.

[50] Ibid 516 [30].

previously thought,[51] and may develop the law in 'novel occasions'.[52] Furthermore, although the High Court was divided over whether illegality or the failure of consideration provided the qualifying or vitiating factor in that case, the full bench agreed that the more critical question was whether the allowance of restitution, in circumstances of illegality, would stultify statutory purpose, and hence undermine coherence in the law.[53] Ostensibly, it has been argued that the High Court had, in effect, permitted 'policy-motivated reasons' for restitution that were independent of the existence of a 'qualifying or vitiating unjust factor'.[54] If true, unjust enrichment is not merely a 'sterile exercise in taxonomy', but may have taken on more 'normative force' in Australia than has been explicitly recognised.[55] In the proceeding section of this paper, two observations are made as commentary on the High Court's evolving approach to unjust enrichment.

Observations

Conscience

The first observation that may be made on the High Court's evolving approach to unjust enrichment relates to its apparent reliance upon the concept of conscience. A closer evaluation of the High Court's conscience-based approach is germane given its tendency for controversy between 'equity' and 'restitution' lawyers.[56] Since *Roxborough*,[57] conscience-based reasoning has seen increased prominence in the courts.[58] Most recently, it was reiterated that unjust enrichment (and disenrichment) was 'not the basis for restitutionary relief in' Australia.[59] Instead, restitution is awarded pursuant 'to equitable principles',[60] viz., whether the

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[51] Ibid; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 595 [74] ('*Hills*'); cf *Roxborough* (2001) 208 CLR 516, 544 [72].

[52] *Equuscorp* (2012) 246 CLR 498, 516 [30].

[53] Ibid 518 [33]–[34] (French CJ, Crennan and Kiefel JJ), 541 [103] (Gummow and Bell JJ), 547–8 [122] (Heydon J).

[54] Elise Bant, 'Illegality and the Revival of Unjust Enrichment in Australia' (2012) 128 *Law Quarterly Review* 341, 344; see also *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70; *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192.

[55] Bant, 'Illegality and the Revival of Unjust Enrichment in Australia', above n 54; Swain, above n 33, 1051; see also Greg Weeks, 'The Public Law of Restitution' (2014) 38 *Melbourne University Law Review* 198.

[56] See, eg, *Westdeutsche* [1996] AC 669, 685 (Lord Goff).

[57] (2001) 208 CLR 516.

[58] See, eg, *Equuscorp* (2012) 246 CLR 498; *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392; *Pitt v Holt* [2013] 2 AC 108; *Hills* (2014) 253 CLR 560.

[59] *Hills* (2014) 253 CLR 560, 596 [78].

[60] Ibid 597 [78].

retention of money paid to the defendant is 'inequitable'[61] or 'unconscionable'.[62] As aforementioned, the preference for a conscience-based approach stemmed from concerns that unjust enrichment was vague, and so shrouded the nature of liability for restitution.[63] Moreover, a conscience-based approach is consistent with the equitable language of settled case law for money had and received;[64] and the judicial predisposition in Australia for remedies to be guided by 'appropriateness and not *a priori* specification'.[65]

It is nonetheless doubtful that a conscience-based approach is more cogent than the four-part inquiry framework as strictly set out under unjust enrichment theory. First, unconscionability, especially when used as a 'basal principle', may be more ambiguous than unjust enrichment.[66] This is because unlike unjust enrichment, unconscionability has no self-evident content.[67] Conscience's 'guiding criteria'[68] would always require ex post facto enunciation by the courts to be practically understood by lawyers,[69] and it is little consolation that unconscionability 'is not indeterminate' if given time to develop.[70] Indeed, the judicial norms underpinning unconscionability and its function (as a doctrinal rationale or determinant of liability) differ according to the legal doctrine at hand.[71] This may result in 'judicial idiosyncrasy' in its application.[72]

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[61] Ibid 568 [1], 594 [69].

[62] Ibid 592 [65].

[63] *Roxborough* (2001) 208 CLR 516, 543 [70].

[64] *Moses v Macferlan* (1760) 2 Burr 1005, 1008–12, quoted in *Roxborough* (2001) 208 CLR 516, 548 [83]; see also Ben Kremer, 'Case Comment: Restitution and Unconscientiousness: Another View' (2003) 119 *Law Quarterly Review* 188.

[65] Finn, 'Equitable Doctrine and Discretion in Remedies', above n 4, 266; see *Roxborough* (2001) 208 CLR 516, 545 [75]; see also *Bofinger* (2009) 239 CLR 269, 300–1 [92]–[93]; see, eg, *Trade Practices Act 1974* (Cth) s 87.

[66] J Beatson and G Virgo, 'Case Comment: Contract, Unjust Enrichment and Unconscionability' (2002) 118 *Law Quarterly Review* 352, 354; see also *Garcia v National Australia Bank* (1998) 194 CLR 395, 409 (Gaudron, McHugh, Gummow and Hayne JJ); *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 73 (Gummow and Hayne JJ).

[67] Edelman and Bant, *Unjust Enrichment in Australia*, above n 6, 93 n 130; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 392 (Lord Nicholls).

[68] *Hills* (2014) 253 CLR 560, 576 [16].

[69] Elise Bant, 'Constructive Trusts, Unconscionability and the Necessity for Working Criteria' (2014) 8 *Journal of Equity* 259, 280.

[70] Cf James McConvill and Mirko Bagaric, 'The Yoking of Unconscionability and Unjust Enrichment in Australia' 7(2) *Deakin Law Review* 225, 240.

[71] Pauline Ridge, 'Modern Equity: Revolution or Renewal from Within?' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Bloomsbury Publishing, 2018) 251, 266.

[72] Robert Boadle, 'Conscience and Unjust Enrichment' (2015) 89 *Australian Law Journal* 641, 650.

Second, a conscience-based approach may also be incompatible with the structured approach as laid down by *David Securities*.[73] Unconscionability's opaqueness lends itself to conceptual confusion.[74] Arguably, this has manifested in the lower courts' attempts at developing an alternative jurisprudence of 'unconscionable retention of benefit'.[75] This may have the effect of threatening unjust enrichment's conceptual coherence by requiring knowledge on the defendant's part, and by subsuming the secondary issue of change of position under the primary question of liability.[76] Additionally, a focus on a defendant's unconscionable *retention* (as opposed to receipt) suggests liability is *contingent* upon the quality of the defendant's conduct.[77] Thus, there is a risk that unconscionability introduces considerations of wrongdoing inconsistent with the strict liability approach taken in *David Securities*.[78] Consequently, because restitution focuses upon the defendant's gain, and not loss caused,[79] the more appropriate remedy for cases like *Roxborough* [80] should arguably be compensation.[81] If understood as a species of wrongdoing, unconscionability may paradoxically need to 'generate new fictions … to support its thesis'.[82] This is because wrongdoings typically require further judicial pronouncement of the antecedent obligation that was breached.[83]

Nevertheless, attempts have been made to strengthen the doctrinal cogency of the conscience-based approach, although they have not been wholly satisfactory. One academic, for instance, argues that unconscionability is an unjust factor grounding restitution for unjust enrichment, and not a wrong unless statutorily prescribed.[84] Others argue that normativity in judge-made law is inevitable, and unconscionability is but an honest way of confronting this reality.[85] More pertinently, the High Court has

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[73] (1992) 175 CLR 353, 376; see also Bryan, 'Peter Birks and Unjust Enrichment in Australia', above n 5, 733.

[74] See Edelman and Bant, *Unjust Enrichment*, above n 26, 27.

[75] *Heperu Pty Ltd v Belle* (2009) 258 ALR 727; *Ford v Perpetual Trustees Victoria Ltd* (2009) 257 ALR 658.

[76] Bant, 'Illegality and the Revival of Unjust Enrichment in Australia', above n 54, 344; cf Justice Susan Kiefel, 'Lessons from a "Conversation" about Restitution' (2014) 14(2) *Queensland University of Technology Law Review* 1.

[77] Ross Grantham, 'Restitutionary Recovery Ex Aequo et Bono' (2002) *Singapore Journal of Legal Studies* 388, 398–9.

[78] (1992) 175 CLR 353, 376; see also Edelman and Bant, *Unjust Enrichment in Australia*, above n 6, 32–3, 94.

[79] Grantham, above n 77, 400.

[80] (2001) 208 CLR 516.

[81] Grantham, above n 77, 400.

[82] *Roxborough* (2001) 208 CLR 516, 545 [74].

[83] Grantham, above n 77, 401–2.

[84] Michael Bryan, 'Unconscionable Conduct as an Unjust Factor' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters, 2008) 295–315.

[85] See, eg, Ridge, above n 71, 269–70; Kremer, above n 64, 191–2.

moved to narrow Gummow J's comments in *Roxborough*.[86] Thus, unconscionability is not a 'subjective evaluation of what is fair or unconscionable',[87] but must be understood by reference to 'a qualifying or vitiating factor'.[88] The High Court has even gone so far as to clarify that 'principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience';[89] thereby suggesting that unconscionability has no separate function than to describe the presence of unjust factors.[90] Yet, if true, this reduces unconscionability to mere tautology;[91] and, if so, the question remains about the utility of retaining unconscionability as the 'fifth wheel on the unjust enrichment coach'.[92]

Form over substance

A second observation that may be made is that criticisms of Australia's approach to unjust enrichment tend to fixate upon its outward discrepancies with England and other common law jurisdictions.[93] Disagreements tend to be over questions of form – taxonomy, methodology and what unjust enrichment '*should look like*' – than of substance.[94] One illustration is captured by the debates surrounding the role unjust enrichment *ought* to play. For example, Barker writes that unjust enrichment serves four potential roles: it may be a 'classificatory unit'; an 'extrinsic norm'; a legal principle with normative force and legal status; or a cause of action.[95] Similarly, Virgo suggests that unjust enrichment is typically understood in a 'descriptive sense', which simply describes 'a state of affairs where the defendant [obtains] a benefit in circumstances of injustice';[96] or in a 'substantive sense', where unjust enrichment is legally dispositive of a defendant's

[86] (2001) 208 CLR 516.

[87] *Equuscorp* (2012) 246 CLR 498, 518 [32].

[88] Ibid; see also *Hills* (2014) 253 CLR 560, 596 [76].

[89] *Hills* (2014) 253 CLR 560, 576 [16], 595 [74].

[90] Bant, 'Illegality and the Revival of Unjust Enrichment in Australia', above n 54; Edelman and Bant, *Unjust Enrichment in Australia*, above n 6, 94.

[91] Birks, above n 24, 5–6; Edelman and Bant, *Unjust Enrichment*, above n 26, 27.

[92] Burrows, *The Law of Restitution*, above n 3, 37.

[93] See, eg, ibid 35.

[94] Kit Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15(3) *Oxford Journal of Legal Studies* 457, 463; see also Edelman and Bant, *Unjust Enrichment*, above n 26, 15–19.

[95] Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in JW Neyers, M McInnes and S G Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004) 79, 84–90.

[96] Virgo, 'What is the Law of Restitution About?', above n 26, 310.

liability to make restitution upon the above-mentioned four-part inquiry.[97] Ostensibly, disagreements with the High Court's approach occur largely at this level of analysis.[98]

Unlike the High Court, unjust enrichment scholars posit that unjust enrichment *ought* to be understood in the substantive sense and given effect via a strict adherence to taxonomy. This is driven by the academic desire for coherence in the law that like cases be treated alike.[99] Such desire is demonstrated by a rigorous taxonomical approach that emphasises the purity of an 'event-based' taxonomy, and direct application of 'unjust enrichment at the claimant's expense [as a] *cause of action*'.[100] Unjust enrichment should be organised as a uniform 'category of claims … whose members respond to the same normative concerns and share the same normative justification'.[101] This is because there is intrinsic good in having a settled taxonomical paradigm which makes the law easier to apply, more accessible, logically transparent and elegant.[102] A taxonomical approach concerns itself with the 'deep structures' of normativity underlying legal doctrine, beyond the 'merely contextual or jurisdictional categories' characterising the old forms of action.[103]

Accordingly, it has been contended that the High Court's apparent preference for traditional pleadings and refusal to apply the four-part inquiry is reminiscent of the old forms of action and should be discouraged. For example, in *Farah Constructions*,[104] the High Court favoured a traditional equitable analysis and fault-based standard for knowing receipt over the unjust enrichment analysis and strict liability approach taken by the Court of Appeal. This conclusion was criticised as undermining legal coherence since it potentially meant having two 'models of restitutionary liability' — in equity and unjust enrichment — applying to 'essentially the same fact pattern'.[105] Similarly, the High Court's emphasis on the need to show work done

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[97] Ibid 310–11.

[98] Barker and Grantham, above n 6, 12.

[99] Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22(1) *Oxford Journal of Legal Studies* 1, 4.

[100] Burrows, *The Law of Restitution*, above n 3, 4–5, 27 (emphasis added); cf *Bofinger* (2009) 239 CLR 269, 301 [93]; cf *Revenue and Customs* [2017] UKSC 29 (11 April 2017) [41].

[101] Lionel Smith, 'Unjust Enrichment: Big or Small?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters, 2008) 35.

[102] Ewan McKendrick, 'Taxonomy: Does it Matter?' in David Johnston and Reinhard Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 1st ed, 2002) 627, 632–8; see also Steve Hedley, 'Rival Taxonomies Within Obligations: Is There a Problem?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) 78, 84–8.

[103] Simone Degeling and Mehera San Roque, 'Unjust Enrichment: A Feminist Critique of Enrichment' 36 *Sydney Law Review* 69, 71.

[104] (2007) 230 CLR 89.

[105] Burrows, *The Law of Restitution*, above n 3, 39.

at the defendant's request for a quantum meruit claim,[106] was denounced as contradictory to unjust enrichment's aims of disaggregating the old forms of action for greater logical transparency.[107]

Yet, focusing on the High Court's outward methodological discrepancies arguably distracts from the anterior question as to why such discrepancies exist,[108] and is apt to ignore the *substantive* similarities between Australia's approach and that taken by other common law jurisdictions. For example, the high-level 'quest for "coherence"' undertaken by unjust enrichment scholars is equally important to the High Court too.[109] Arguably, the High Court's apparently idiosyncratic methodology to unjust enrichment stems from a localised legal history more strongly rooted in equity than England.[110] Australia has a 'strong "preservationist" tradition' for equity owing to the 'late "fusion" of law and equity in New South Wales';[111] and equity continues to be normatively seen as indispensable today.[112] Thus, the taxonomical debates led by unjust enrichment scholars have not influenced the direction of unjust enrichment in Australia as it has in England.[113] Consequently, although coherence would be understood by the High Court and unjust enrichment scholars as a preference for 'doctrinal or conceptual fit to historical fit',[114] this has been expressed in outwardly divergent ways. A clear example is the role of equity within unjust enrichment. To unjust enrichment scholars, coherence means amalgamating restitution at common law and equity into an 'event-based' taxonomy as reflected under a four-part inquiry.[115] To the High Court, however, coherence means assimilating equitable notions of 'good conscience' into the 'fabric of the common law', with equity prevailing.[116]

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[106] See *Lumbers* (2008) 232 CLR 635.

[107] Burrows, *The Law of Restitution*, above n 3, 41.

[108] Barker, 'Unjust Enrichment: Containing the Beast', above n 94, 463.

[109] Justice Mason, above n 18.

[110] Swain, above n 33, 1049–50.

[111] Barker and Grantham, above n 6, 55; see *Supreme Court Act 1970* (NSW) s 57.

[112] Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 239.

[113] Swain, above n 33, 1050.

[114] Justice Mason, above n 18; see also *Baltic Shipping* (1993) 176 CLR 344, 376 (Deane and Dawson JJ); *Hill v Van Erp* (1997) 188 CLR 159, 231 (Gummow J); *Tame v New South Wales* (2002) 211 CLR 317, 381 [191] (Gummow and Kirby JJ).

[115] Burrows, *The Law of Restitution*, above n 3, 25–6; Burrows, 'We Do This at Common Law but That in Equity', above n 99, 4–5.

[116] *Roxborough* (2001) 208 CLR 516, 554 [100].

Nevertheless, despite disagreements over judicial methodology, it has been noted that similar substantive outcomes would be reached under either approach.[117] Indeed, the High Court's preference for the old forms of action (e.g. money had and received) can easily be translated into the four-part framework and explained by unjust enrichment rationale.[118] Moreover, the apparent dissimilarities between the High Court's use of unconscionability, and England's preference for the four-part inquiry,[119] disappear when examined as a matter of substance. As above-mentioned, unconscionability has ostensibly been recently clarified as not having an independent role outside an unjust factor.[120] Thus, it may presently be the case, that whereas 'unjust enrichment operates to establish whether the receipt of the enrichment is unconscionable in a principled sense' in England,[121] 'unconscionability can only be interpreted in a principled way' by reference to unjust enrichment in Australia.[122] To distinguish one from the other simply on the basis of methodology is, today, arguably a distinction without difference.[123]

Conclusion

This paper has examined and evaluated the High Court's evolving approach to unjust enrichment since 1987. It began with a brief historical account of restitution law and the concept of unjust enrichment. Thereafter, it traced the autochthonous development of unjust enrichment by the High Court at case law and made two observations. First, the High Court has adopted a conscience-based methodology for cases involving unjust enrichment. This was driven by concerns that unjust enrichment was illusory. It, however, remains open whether a conscience-based approach is a superior basis for restitution than that provided by unjust enrichment. Second, criticisms of the High Court's approach tend to fixate upon its outward inconsistencies with the rest of the common law world. Yet, as this paper suggests, as a matter of substance there ultimately exists, today, greater similarity between Australia's and England's approaches to unjust enrichment than has been previously acknowledged. If this is true, it may now be possible to say, at least,

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[117] See *Baumgartner v Baumgartner* (1987) 164 CLR 137, 154 (Toohey J); see also Burrows, *The Law of Restitution*, above n 3, 35, 39–40, 42.

[118] See Lionel Wirth, 'Unjust Enrichment: Unifying Concept or Cause of Action?' (2015) 89(5) *Law Institute Journal* 34; see also Edelman and Bant, *Unjust Enrichment in Australia*, above n 6, 85 n 65.

[119] See *Revenue and Customs* [2017] UKSC 29 (11 April 2017) [24], [41].

[120] Bant, 'Illegality and the Revival of Unjust Enrichment in Australia', above n 54; see *Equuscorp* (2012) 246 CLR 498, 518 [32]; *Hills* (2014) 253 CLR 560, 596 [76].

[121] See especially *Revenue and Customs* [2017] UKSC 29 (11 April 2017) [39]–[41].

[122] Graham Virgo, 'Conscience or Unjust Enrichment?: The Emperor's Old Clothes: Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd' on *Opinions on High* (19 May 2014) <blogs.unimelb.edu.au/opinionsonhigh/2014/05/19/virgo-hills-industries/>.

[123] Ibid; see especially Boadle, above n 72, 653 n 128; Edelman and Bant, *Unjust Enrichment*, above n 26, 13–14.

that the Australian and English approaches to unjust enrichment are no longer so divergent or irreconcilable as popularly believed.

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