*Michael Bryan**

RESTITUTION PAST, PRESENT AND FUTURE — ESSAYS IN HONOUR OF GARETH JONES

Edited by W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo

Hart Publishing, Oxford 1998
xxiii, 347 pp
ISBN 1 901 362 42 6

THE essays in this volume were originally presented as papers at a conference held in January 1998 to mark the retirement of Gareth Jones from the Downing Chair at the University of Cambridge. The title of the book was also the title of the conference. The volume is not a festschrift, in the sense of being a celebration of the range, as well as the outstanding quality, of Professor Jones's work. Such a volume would have had to take account of his pioneering research into the history of charities,[1] as well as a steady flow of journal articles, such as those on *Phipps v Boardman*[2] and on the liability of trustees for breaches of trust committed by their agents,[3] which have not lost their relevance in the thirty or forty years since they were written. The papers instead pay tribute to his contributions to the law of restitution, which include not only the justly influential Goff and Jones on the *Law of Restitution* but also many other academic writings and his teaching.

The twenty-one essays consist of papers delivered by leading restitution scholars (or in some cases by interlopers into territory claimed by restitution scholars) as well as responses to most of the papers. The responses often engage critically with the principal themes of the papers. They vary from reasoned disagreement (for example, Andrew Tettenborn taking issue with Peter Birks's retraction of his previously held credo that restitution necessarily arises from unjust enrichment), through delicate undermining (Sarah Worthington's careful probing of Roy Goode's thesis that the award of a proprietary remedy can only be justified in cases where the defendant has acquired value from the plaintiff, or where the defendant has made a gain through dealings which should have been entered into, if at all, for the benefit of the plaintiff) to the vigorous extirpation of 'categorical error' (William Swadling denouncing Graham Virgo's argument that a

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1 Gareth Jones, *History of the Law of Charity 1532-1827* (1969).

2 [1967] 2 AC 46. Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 *Law Quarterly Review* 472.

3 Gareth Jones, 'Delegation by Trustees: A Reappraisal' (1959) 22 *Modern Law Review* 381.

function of restitution is to vindicate property rights). The publication of the responses conveys something of the flavour of what must have been a spirited conference.

For many Australian readers, Justice Finn's contribution on 'Equitable Doctrine and Discretion in Remedies' will probably hold the greatest interest. The themes of his paper will come as no surprise to anyone familiar with his recent writings. In outline, it is that Part V of the *Trade Practices Act 1974* (Cth), as significantly amended by s 51AA(1) (the unconscionability provision), has not only incorporated large tracts of equity into its domain, but also initiated the process of loosening remedies from their jurisdictional, and other formal, constraints. The process is far from complete, but the momentum towards a system of private law which selects remedies according to a conception of appropriateness is irreversible. The removal of historical limitations on the selection of a remedy does not of course mean that fashioning the remedy to meet the justice of the case will always be straightforward. On the contrary, the task of picking from the 'basket' of remedies can raise critical questions relating to the function and purpose of doctrine and remedies, and the relationship between the two. The paper concludes with a formidably long list of 'propositions' (some of them are really open-ended questions) demanding attention at some stage as the flexible remedial regime takes shape.

The thrust of the paper is not in any crude sense 'anti-restitutionary'. Justice Finn accepts the role and utility of unjust enrichment as a 'unifying legal concept'.[4] His criticism is, rather, directed at taxonomies of private law which inhibit the development of a loose but dynamic confederation of contract-like and tort-like equitable obligations and obstruct the realisation of a system of remedies informed by the general principle of appropriateness. A particular target is Peter Birks's scheme of 'events' and 'responses', expounded in a series of articles including his Cambridge conference paper,[5] according to which, for example, measures of restitution respond to events such as unjust enrichment or wrongs. At one level, therefore, Justice Finn's paper is a contribution to a continuing debate on the merits and drawbacks of a system of private law which assesses relief solely according to its appropriateness in resolving the dispute in hand.[6] At this level the paper revives, in a new setting, the well-known dialectical argument on the respective merits of predictive certainty and individualised justice which can be found in many other legal contexts and about which readers will hold their own opinions.

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4 See *Pavey and Matthews Ltd v Paul* (1987) 162 CLR 221, 256 (Deane J).

5 Peter Birks, 'Misnomer' in W R Cornish et al (eds), *Restitution Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 1. See also Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623; 'The Law of Restitution at the End of an Epoch' (1999) 28 *University of Western Australia Law Review* 13; 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (1997) 1.

6 For a response see Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 *Melbourne University Law Review* 1.

At another level, however, Justice Finn is attempting to move the focus of academic inquiry beyond current preoccupations with schemes of classification of private law by asking a number of important questions about the ordering and application of remedies. The questions are only incidentally connected with the law of restitution but they are clearly important in their own right. For example, should the choice of remedy be dictated by the policy and purpose of the doctrine whose application justifies relief, even though an evaluation of the facts might suggest the award of a wholly different remedy? On the perhaps questionable assumption that the policies animating a decision to hold a defendant liable can be unambiguously identified, the weight to be attached to these policies in the selection of remedy will often be hard to determine. The tension between the perceived rationale of a doctrine and the judicial inclination to fashion a remedy appropriate to the circumstances underlies the long-running debate on whether compensation for breach of fiduciary obligation can be reduced by reason of the plaintiff's contributory negligence.[7] *Maguire v Makaronis*[8] affords another example of this tension. The award of rescission upon terms by the High Court significantly diluted the prophylactic basis of liability for fiduciary duties. In settling the terms upon which rescission was to be ordered the court's aim was to achieve 'practical justice' for both parties, and not only to punish the self-serving behaviour of the defendant. It is impossible to discuss such questions exhaustively in a conference paper, and Justice Finn states that he does not seek to resolve 'possible tensions or collisions' between his propositions. Some of these tensions have undoubtedly emerged in recent High Court decisions. They are not unique to systems of private law where remedies are selected according to their appropriateness, but they will be more noticeable under such a system.

Proprietary relief occupies a special place in the remedial calculus, and Justice Finn makes a few remarks on the availability of proprietary remedies (a topic also covered by other conference papers). He hopes that 'what is immanent in Australian law' would have entitled the 'non-allocated' claimants in *Re Goldcorp Exchange Ltd*[9] to a proprietary remedy. If by 'immanent' in this context is meant fundamental equitable principle, it seems to this reviewer to be unduly optimistic to hope that principles and presumptions can be transformed into a self-sufficient scheme for ordering priorities between different categories of claimant. They were not designed to bear this load, and more careful consideration needs to be given to the issue of meshing these principles with the statutory schemes of distribution. Some of the detailed adjustive schemes proposed by North American writers may be helpful here.[10] The judgments in the New Zealand decision of

7 *Day v Mead* [1987] 2 NZLR 443; R P Meagher, W M C Gummow, J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) [259], [552]–[553].

8 (1997) 188 CLR 449. Stephen Moriarty, 'Fiduciaries and Discretion' (1998) 114 *Law Quarterly Review* 9; David Wright, 'Fiduciaries, Rescission and the Recent Change to the High Court's Equity Jurisprudence' (1998) 13 *Journal of Contract Law* 166.

9 [1995] 1 AC 74.

10 For examples of such schemes see David Paciocco, 'The Remedial Constructive Trust: A Principled Basis for Priority over Creditors' (1989) 68 *Canadian Bar Review* 315; Emily

Fortex Group Ltd v MacIntosh,[11] at first instance and in the Court of Appeal, sound a warning against altering the balance between ownership and obligation solely on the basis of diffuse ideas such as assumption of risk.

In his paper, Peter Birks restates and amplifies his argument that restitution is not solely triggered by a claim based on unjust enrichment but can equally well be a response to a wrong, a consent-based obligation or to some other miscellaneous event. The argument is not new[12] but it is developed with Professor Birks's characteristic fervour and analytical rigour. The category of miscellaneous events (or the 'odds and sods' category, to use Andrew Tettenborn's irreverent term) is, however, amorphous and expanding, and threatens the utility of the whole taxonomic scheme. A failure to account for all phenomena within an area of intellectual inquiry is of course by no means a failure to account for any legal phenomena, but nonetheless the miscellaneous category in this scheme is becoming worryingly large.

Perhaps of greater concern is Professor Birks's concern with classifying legal phenomena while paying relatively little regard, at this stage in his enterprise, to the substantive material to be included in his categories. Restitution is a response to a variety of events, including unjust enrichment, but so far what ought to be included in the events of 'consent', 'wrong', 'unjust enrichment' or 'other' for the purpose of this taxonomic scheme has been sketched out in only a few suggestive lines. It is an article of faith for Professor Birks, as for most restitution writers, that the anatomy or skeleton of the subject must be clearly established before the detail can be examined.[13] Conceptual disorder is of course the enemy of accurate analysis, but it is also arguable that this abiding preoccupation with categorising material can be taken to extremes. Fifty years ago Edward Levi famously remarked that 'in the legal process ... the classification changes as the classification is made'.[14] Professor Birks stresses the static aspects of classification; in contrast Levi drew attention to the dynamic character of legal categories, which are themselves altered, often imperceptibly, by the processes of judicial application. It is the dynamic process of changing legal categories through the inductive processes of applying

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Sherwin, 'Constructive Trusts in Bankruptcy' [1989] *University of Illinois Law Review* 297.

11 [1998] 3 NZLR 171. Charles Rickett and Ross Grantham, 'Towards a More Constructive Classification of Trusts' [1999] *Lloyds Maritime and Commercial Law Quarterly* 111; David Wright, [1999] *Restitution Law Review* (forthcoming).

12 Graham Virgo, 'Reconstructing the Law of Restitution' (1996) 10 *Trust Law International* 20; S M Waddams, 'Restitution as Part of Contract Law' in Andrew Burrows (ed), *Essays on the Law of Restitution* (1991) 197, contains an excellent (and often overlooked) analysis of the role of restitutionary values in contract law.

13 Peter Birks, *An Introduction to the Law of Restitution* (1985) 1–3.

14 Edward Levi, *An Introduction to Legal Reasoning* (1948) 3. For a contemporary reassessment of Levi, see Dan Hunter, 'No Wilderness of Single Instances: Inductive Inferences in Law' (1998) 48 *Journal of Legal Education* 365.

them which is in danger of being overlooked in the quest for a neo-Darwinian scheme of private law classification.

Other papers illustrate the influence restitution writing has had on judicial thinking. Lord Nicholls announces his conversion to the principle of imposing strict personal liability, subject to the defence of change of position, on recipients of property from defaulting fiduciaries. The respective merits of fault and strict liability have not yet been authoritatively considered by Australian courts,[15] and a considered exposition by the High Court of the principles applicable to this head of accessory liability would be welcome. Lord Millett's paper accepts the thesis of Dr Robert Chambers that a resulting trust arises whenever the legal title has been transferred to another where the transferor did not intend to pass the whole beneficial interest to the recipient.[16] He does not, however, agree with Dr Chambers's objections to classifying the right to the retransfer of property as a mere equity where the original transfer was vitiated by fraud, misrepresentation and mistake. In a wide-ranging review of the law of constructive trusts, which takes issue with much of Lord Browne-Wilkinson's judgment in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[17] though not with the actual House of Lords decision, the author emphasises the necessity of developing clear rules governing the passing of title to property as a precondition for establishing criteria for the award of restitutionary proprietary relief. The existence of 'contradictory rules for the passing of property in equity and the right to a proprietary restitutionary remedy' is deplored. Lord Millett also endorses the American analysis of constructive trusteeship which holds that a constructive trustee is not necessarily subject to the personal liabilities of an express trustee unless, as a discrete question, the circumstances giving rise to the constructive trust also give rise to the imposition of fiduciary duties. The volume of writing on the duties of a constructive trustee does not approach the quantity, or quality, of literature on the circumstances giving rise to the imposition of a constructive trust, and these remarks on the obligations of a constructive trustee are helpful and thought-provoking.

It is impossible in the space available to do justice to all the essays in this stimulating collection. This reviewer particularly enjoyed the essays by Professor Baker on 'The History of Quasi-Contract in English Law' and by Professor Langbein on 'The Later History of Restitution'. The former describes how an interesting jurisdictional divide emerged before the nineteenth century between trusts of land, which were clearly a matter for Chancery, and an equitable interest in money which could be claimed in an indebitatus count at common law on the basis that money could be recovered in the form of damages. It was left to Lord Eldon and his successors to distinguish an equitable trust of money from

15 But see *Koorootang Nominees Pty Ltd v ANZ Banking Group* [1998] 3 VR 16, 99–105; P D Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in Donovan Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 193.

16 Robert Chambers, *Resulting Trusts* (1997). Compare the book review by The Honourable Justice Gummow AC, (1997) 19 *Adelaide Law Review* 149.

17 [1996] AC 669.

the mere receipt of money to the use of a beneficiary. In spite of (some will say because of) the efforts of Lord Mansfield in *Moses v Macferlan*[18] restitutionary remedies available at common law remained under-theorised until the twentieth century. In a deliberate echo of Lord Justice Scrutton,[19] Professor Baker concludes that '[r]estitution thus developed in English law by allowing well-meaning remedies to be founded on the facts of particular cases, through what might be regarded as a common law reincarnation of pristine equity'.[20]

The editors and publishers are to be congratulated on bringing out *Restitution Past, Present and Future* within a few months of the Cambridge conference. Prompt dissemination of conference proceedings, taken for granted in other disciplines, rarely occurs in law. Less commendable, and a possible consequence of the rush to publish, are the typographical errors which are so numerous in several chapters as to be more than an irritating distraction. This is nonetheless an excellent collection of essays, worthy of the high scholarly standards set by the honorand. It reflects faithfully the strengths and weaknesses of contemporary restitution scholarship, and should be read by anyone with an interest in the direction the subject is likely to take in the twenty-first century.

18 (1760) 2 Burr 1005, 97 ER 676.
19 *Holt v Markham* [1923] 1 KB 504, 513.
20 J H Baker, 'The History of Quasi-Contract in English Law' in W R Cornish, above n 5, 56.