

# IS THERE AN UNJUST ENRICHMENT DISASTER IN AUSTRALIA?

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*Australia presently stands at the crossroads with respect to restitutionary claims. The recent vehement critique of the classical unjust enrichment formula for grasping the nature of those claims deserves attention. It has ignited a new wave of scepticism, challenging the fundamentals of the formula and the very notion of unjust enrichment as a legitimate ground of liability in private law. Does this critique, made primarily in the UK context, apply to Australia? To answer this question this article presents the critique and contemplates whether it applies to the Australian landscape.*

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*'[W]e are in the midst of a longstanding and large systemic error'<sup>1</sup>*

## I INTRODUCTION

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<sup>1</sup> Robert Stevens, *The Laws of Restitution* (Oxford, Oxford University Press, 2023) 419 ('*The Laws of Restitution*').

Professor Peter Birks' four-stage formula of unjust enrichment has been widely accepted as the normative framework for grasping the nature of the restitutionary claims. This formula asks the following four questions:<sup>2</sup>

1. Has the defendant been enriched?
2. Was the enrichment at the plaintiff's expense?
3. Was the enrichment unjust?
4. Do any defences apply?

The formula requires demonstrating that a plaintiff transfers some economic value/benefit to the defendant (aka 'enrichment').<sup>3</sup> The 'at the plaintiff's expense' element requires establishing a causal link between the defendant's enrichment and the plaintiff.<sup>4</sup> The 'justice' element in the formula has been perceived as referring to a broad range of factors or causative events recognised by law, such as mistake or undue influence.<sup>5</sup> Finally, once the plaintiff establishes the first three elements of the formula, the defendant could argue that one of the defences applies. For example, the defendant could argue that they changed their position by spending the received value in good faith. Consider a trivial scenario of a mistaken payment according to which A confuses one of the numbers during an online bill payment process, erroneously paying \$100 to C, instead of B. In order to meet the first three elements in this formula, A would need to show that C received the value (i.e. \$100) from A and this benefit took place within the context of one of previously recognised unjust factors (i.e. mistake). C on their part could argue that they innocently spent the \$100, what could amount to their 'change of position'.<sup>6</sup>

The Birks' four-stage formula has been firmly endorsed by the United Kingdom's (UK) highest courts.<sup>7</sup> Following a wave of academic and judicial support, unjust enrichment has also been recognised as a separate cause of action in other jurisdictions, such as Canada,<sup>8</sup> South Africa,<sup>9</sup> Singapore,<sup>10</sup> New

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<sup>2</sup> Peter Birks, *An Introduction to the Law of Restitution* (Oxford, Oxford University Press, rev edn 1989) 7, 20 ('*An Introduction*').

<sup>3</sup> *Ibid*, 109.

<sup>4</sup> *Ibid*, 132-133.

<sup>5</sup> *Ibid*, 20, 99; See, eg, Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment*, 9<sup>th</sup> edn (London, Sweet & Maxwell, 2016) part 5 ('*Goff & Jones*'); *Buchan v Young* [2020] QDC 216.

<sup>6</sup> Birks, *An Introduction* (n 2) 1, 21, 27; Peter Birks, *Unjust Enrichment* (Oxford, Oxford University Press, 2003) 9-10, 35, 40, 267 ('*Unjust Enrichment*'). See also Gerard McMeel, 'What Kind of Jurist Was Peter Birks' (2011) 19 *Restitution Law Review* 15, 30.

<sup>7</sup> *Crown Prosecutors Service v Eastenders Group* [2015] AC 1 [102] (Lord Toulson, with whom Lady Hale and Lords Kerr, Wilson and Hughes agreed); *Benedetti v Sawiris* [2014] AC 938 [10] (Lord Clarke, with whom Lords Kerr and Wilson agreed); *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn) (*Banque*).

<sup>8</sup> *Degelman v Guaranty Trust Co of Canada (Administrator of the Estate of Laura Constantineau Brunet, deceased)* [1954] SCR 725.

Zealand,<sup>11</sup> Germany,<sup>12</sup> France<sup>13</sup> and China.<sup>14</sup> While some differences are present amongst the systems,<sup>15</sup> it is clear that the core notion according to which defendant's unjustified enrichment provides the normative basis for understanding the nature of the restitutionary claims, has been gaining overwhelming support. The law of unjust enrichment claims its distinctive place alongside the traditional categories of private law, such as property, contract and torts. The recognition of unjust enrichment is therefore critical to facilitating the internal rationality and coherency of private law.

However, unjust enrichment's role in Australia is somewhat complicated. Australia's jurisprudence hesitates on this point.<sup>16</sup> Despite the early recognition of unjust enrichment in the seminal *Pavey* decision,<sup>17</sup> the High Court remained hesitant to substantively engage with and apply the unifying formula;<sup>18</sup> primarily influenced by the reasoning of Justice Gummow<sup>19</sup> and the *Farah*<sup>20</sup> decision where the brakes on the emerging unjust enrichment jurisprudence were firmly pressed, holding that 'it was not the place of lower courts to develop or recognise novel forms of claims based on unjust enrichment reasoning that might render established equitable doctrine otiose'.<sup>21</sup> Overall, 'to read the High Court's references to unjust enrichment is to appreciate the impressive range over which judicial prose can express disapproval'.<sup>22</sup>

As it currently stands in Australia, unjust enrichment is not itself a cause of action,<sup>23</sup> but instead functions as an analytical framework for structuring

<sup>9</sup> JE du Plessis, *The South African Law of Unjustified Enrichment* (Juta, Cape Town, 2012).

<sup>10</sup> Tang Hang Wu, 'The Role of the Law of Unjust Enrichment in Singapore' (9) (1) *Chinese Journal of Comparative Law* 1.

<sup>11</sup> *Commissioner of Inland Revenue v Stiassy* [2013] 1 NZLR 140.

<sup>12</sup> See, eg, Gerhard Dannemann & Reiner Schulze (eds), *German Civil Code: Article-by-Article Commentary* (Nomos, 2020)

<sup>13</sup> Pablo Letelier, 'Another Civilian View of Unjust Enrichment's Structural Debate' (2020) 79 (3) *Cambridge Law Journal* 529.

<sup>14</sup> Siyi Lin, *The Law of Unjust Enrichment in China: Necessary or Not?* (Springer, 2022).

<sup>15</sup> See, eg, Warren Swain & Sagi Peari (eds), *Rethinking Unjust Enrichment: History, Sociology, Doctrine and Theory* (Oxford, Oxford University Press, 2023 forthcoming).

<sup>16</sup> Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) It? Implications for Legal Reasoning and Practice' (2020) 43(3) *Melbourne University Law Review* 903 ('Unjust Enrichment').

<sup>17</sup> *Pavey & Mathews Pty Ltd v Paul* (1987) 69 ALR 577 ('*Pavey*').

<sup>18</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('*Farah Constructions*'); *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 (*Lumbers*); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269.

<sup>19</sup> Elise Bant, 'The Evolution of Unjust Enrichment and Restitution Law in the High Court of Australia' (2017) 25 *Restitution Law Review* 121 ('*Evolution*'), 128; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335, 549 (Gummow J) ('*Roxborough*').

<sup>20</sup> *Farah Constructions* (n 18) [134].

<sup>21</sup> Bant, 'Evolution' (n 19) 127.

<sup>22</sup> Ian Jackman, *The Varieties of Restitution* (The Federation Press, 2<sup>nd</sup> ed, 2017) 1.

<sup>23</sup> *Farah Constructions* (n 18) [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 [29] (French CJ, Crennan and Kiefel JJ) ('*Equuscorp*'); *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 [212]-[213] (Nettle,

restitutionary claims.<sup>24</sup> The distinction between ‘cause of action’ and ‘analytical framework’ is an obscure one that has only furthered conceptual uncertainty regarding the scope and nature of restitutionary claims in Australia.<sup>25</sup> A solid framework is required to ensure these claims are not based on ‘idiosyncratic notions of what is fair and just’.<sup>26</sup>

Against this background, the recent vehement critique of the Birks’ four-stage formula by University of Oxford academic, Professor Robert Stevens, deserves attention. Presented in the powerful 2018 article titled *The Unjust Enrichment Disaster*<sup>27</sup> and more recently in *The Laws of Restitution* monograph (2023, Oxford University Press),<sup>28</sup> the critique has ignited a new wave of scepticism, challenging the fundamentals of the four-stage formula and the very notion of unjust enrichment as a legitimate ground of liability in private law.<sup>29</sup> Clearly, the effect of Stevens’ critique goes beyond fostering increased academic discourse. Thus, Lord Andrew Burrows, a former academic<sup>30</sup> frankly acknowledged that the critique was influential in, and provided the foundation for, the Supreme Court’s decision to overrule *Sempre Metals Ltd* in *Prudential Assurance Ltd*<sup>31</sup> in the UK.<sup>32</sup>

This article has two goals. First, it involves a presentation and examination of the Stevens’ critique. Second, it considers the relevancy of those to the Australian jurisprudence. Accordingly, Part II presents the negative and positive aspects of Stevens’ argument, traces Stevens’ examples made primarily within UK jurisprudence and discusses the possible concerns that have been and could be raised against Stevens’ views. Part III examines the key restitutionary decisions in Australia and contemplates whether Stevens’ argument (and the

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Gordon and Edelman JJ) (*Mann*); *Belgravia Nominees Pty Ltd v Lowe Pty Ltd (No 3)* [2015] WASC 442, [61] (Tottle J).

<sup>24</sup> See, eg, Barker, ‘Unjust Enrichment’ (n 16).

<sup>25</sup> *Ibid*, 903.

<sup>26</sup> *Pavey* (n 17) 604; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 109 ALR 57, 74 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) (*David Securities*).

<sup>27</sup> Robert Stevens, ‘The Unjust Enrichment Disaster’ (2018) 134 (Oct) *Law Quarterly Review* 574 (*Disaster*).

<sup>28</sup> Stevens, *The Laws of Restitution* (n 1). For some previous accounts who challenged the unjust enrichment theory, see, eg, Steve Hedley, ‘Unjust Enrichment as the Basis of Restitution – an Overworked Concept’ (1985) *The Journal of the Society of Legal Scholars* 56; Peter Jaffey, ‘The Unjust Enrichment Fallacy and Private Law’ (2013) 26 (1) *The Canadian Journal of Law and Jurisprudence* 115.

<sup>29</sup> See, eg, *Prudential Assurance Ltd v HRC* [2018] 3 WLR 652 (*Prudential Assurance*).

<sup>30</sup> Andrew Burrows & Alan Rodger, ‘Introduction’ in Andrew Burrows & Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, Oxford University Press, 2006) 1.

<sup>31</sup> *Prudential Assurance* (n 31).

<sup>32</sup> Andrew Burrows, ‘In Defence of Unjust Enrichment’ (2019) 78(3) *The Cambridge Law Journal* 521, 523 (referring to overruling of *Sempre Metals Ltd* by the Supreme Court as ‘unfortunate and appears to have been influenced by Stevens’ excessively narrow approach to the meaning of ‘at the expense of’) (*In Defence*).

concerns expressed against it) applies to the Australian landscape. Part IV offers some concluding remarks.

## II THE NEGATIVE AND POSITIVE CASES AGAINST UNJUST ENRICHMENT

### A *The Disaster Argument*

On the deepest level, Stevens identifies the normative inadequacy of the unjust enrichment theory as relating to its failure to epitomise the relational structure of private law. This structure is embedded in the bipolar relationship between the particular plaintiff and the defendant.<sup>33</sup> Unjust enrichment's plaintiff-sided account 'provides no explanation as to why the defendant should be obliged to do anything at all'.<sup>34</sup> For example, in the simple scenario where A's mistaken payment to B has nothing to do with B, by which mechanism can another's actions impose obligations on B to which B does not consent? Whilst Stevens acknowledges there are areas of law whereby strict liability is imposed<sup>35</sup> this 'fails to provide a positive explanation for imposing liability but merely a negative, explaining why an obligation explicable on another basis may be morally unobjectionable'.<sup>36</sup> In other words, it is immoral because it requires the defendant to 'correct an injustice that was not their doing'.<sup>37</sup> This suggests that the entire unjust enrichment theory has been built on shaky foundations, commenting 'we are in the midst of a longstanding and large systemic error'.<sup>38</sup>

Stevens takes issue with each one of the elements of the four-stage formula. With respect to the defendant's 'enrichment' element, he argues that the fact of a defendant's enrichment should not play a normative role in the restitutionary liability structure. A close look at the case law supports this point. As Stevens explains, the legal doctrine tends to focus on the transaction between the parties rather than on the consequences of that transaction. The factual question of whether the defendant is better off or worse off following a transaction is usually irrelevant for the purposes of the liability determination.<sup>39</sup>

The element requiring a loose causal link between the enrichment and the plaintiff is no less problematic. Whilst the unjust enrichment formula embraces this link, much of Stevens' criticism focuses precisely on this aspect of the formula. Consider the so-called 'destroyed stamp' and 'rising heat' scenarios. The first scenario involves a situation where there are only two rare stamps in the

<sup>33</sup> Stevens, *The Laws of Restitution* (n 1) 19-21.

<sup>34</sup> *Ibid* 576. See also Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37 (4) *Oxford Journal of Legal Studies* 844.

<sup>35</sup> Stevens, 'Disaster' (n 29) 577.

<sup>36</sup> *Ibid*. See also Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016).

<sup>37</sup> Stevens, 'Disaster', 580.

<sup>38</sup> Stevens, *The Laws of Restitution* (n 1), 419.

<sup>39</sup> *Ibid*, 9, 49-50, 66-70, 164-172, 10-213, 259-263, 355.

world, one owned by A and another owned by B. Person A mistakenly destroys their stamp, as a result the value of B's stamp increases. B then sells the appreciated stamp.<sup>40</sup> In the second scenario person A lives in an apartment below person B. A, by heating their own apartment, is indirectly heating B's apartment.<sup>41</sup> Applying the unjust enrichment formula, prima facie a claim for restitution should be available in both scenarios. The causal connection could not be clearer.<sup>42</sup> However, as a matter of moral principle, no claim in restitution should succeed, accordingly, in the words of Stevens 'something has gone wrong with the theory'.<sup>43</sup>

True, the UK's reason for denying restitution in the above scenarios is the 'incidental benefit limitation', which states a claim will fail where the defendant's benefit is incidental.<sup>44</sup> However, Stevens argues that the incidental benefit limitation is an ad hoc attempt to explain away the inadequacies of the unjust enrichment theory which provides no explanation as to why it is relevant that the enrichment is unconnected with any objective of the plaintiff.<sup>45</sup> Furthermore, the case law is rife with examples where the defendant's enrichment is unrelated to any objective of the plaintiff, yet restitution is ordered, including in the leading case of *Lipkin Gorman*.<sup>46</sup> No explanation is proffered as to why incidental benefits sometimes do and sometimes do not provide the basis for restitution.<sup>47</sup>

The 'justice' element in the unjust enrichment formula only underlies its failure to grasp the normative structure of the restitutionary liability. Whilst the literature and the case law perceived this element as referring to a broad range of 'unjust factors',<sup>48</sup> the remarkable diversity of those factors reveals the fallacy of the unjust enrichment's thesis. An attempt to bind those factors together under the single normative framework represents an unnatural exercise that undermines the uniquely distinctive liability structures of restitutionary cases.<sup>49</sup> This suggests, in Stevens' words, 'unjust enrichment should cease to be discussed as unified areas of law'.<sup>50</sup> The very multiplicity and divergence of the unjust factors proves the impossibility of situating them under the common thread of the formula.

<sup>40</sup> Stevens, 'Disaster', 577.

<sup>41</sup> This scenario follows a concern expressed by Professor Lionel Smith (See Lionel Smith, 'Restitution: A New Start?' in P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018) 91, 98) and the dictum of Lord Dunedin in *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99 (IH) 105-106 (Lord President Dunedin).

<sup>42</sup> Smith (n 43) 8.

<sup>43</sup> Stevens, 'Disaster' (n 29), 577.

<sup>44</sup> *Revenue and Customs Commissioners v Investment Trust Companies* [2018] AC 275, [52] (Lord Reed) (*Revenue and Customs Commissioners*).

<sup>45</sup> Stevens, 'Disaster' (n 29) 577.

<sup>46</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. For the discussion of this case see II C (1) below.

<sup>47</sup> Stevens, 'Disaster' (n 29), 577.

<sup>48</sup> See n 2-6 above.

<sup>49</sup> Stevens, *The Laws of Restitution* (n 1) 7, 84-89, 417.

<sup>50</sup> *Ibid*, 3.

Finally, Stevens' negative thesis points to the problematic foundations of the various defences which the unjust enrichment theory embraces under its unifying thread. Similarly to the 'unjust factors', the defences seem to be remarkably unrelated to each other. Their blunt application to every case of restitutionary liability is impermissible without a proper delineation of the underpinnings of each defence.<sup>51</sup> In this way Stevens challenges the internal unity of the four-stage formula on its deepest levels.

### *B The Alternative: The Laws of Restitution*

The alternative to the four-stage formula exists. In fact, these are *alternatives*. According to Stevens, restitutionary claims should be broken up into at least 6 separate normative categories. While the unifying unjust enrichment formula aims to encompass all cases under its auspices, Stevens' categories are robust enough to claim their normative distinctiveness. These are liability grounds that 'any properly constructed system of private law ought to recognise'.<sup>52</sup> The universal aspirations of this argument are evident.

So, what are the 6 categories aiming to displace the unjust enrichment formula? *First*, there is a 'performance acceptance' category.<sup>53</sup> This category focuses on the specific interaction between the parties, requiring the plaintiff to perform certain action towards the defendant. This may involve such actions as a transfer of goods, payment of money or a performance of certain services. A plaintiff's performance towards the defendant stands at the core of the normative interplay. Hence, Stevens characterises the UK Supreme Court's adoption of terminology relating to the 'transfer of wealth or value',<sup>54</sup> as both 'unfortunate' and 'legally meaningless'.<sup>55</sup> Returning to the rising heat and destroyed stamp scenarios, the reason why no recovery should be available in these cases is not because the benefit is incidental, but because there was no performance from plaintiff to defendant.<sup>56</sup>

The 'acceptance' dimension of the category means the defendant's liability hinges on their acceptance of the plaintiff's performance, or at least, having a reasonable opportunity to reject it.<sup>57</sup> In this way the performance acceptance category embraces the unjust enrichment doctrine of 'free

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<sup>51</sup> *Ibid*, 353-420.

<sup>52</sup> Stevens, 'Disaster' (n 29) 574.

<sup>53</sup> Stevens, *The Laws of Restitution*, 37.

<sup>54</sup> *Revenue and Customs Commissioners* (n 46) [42] (Lord Reed).

<sup>55</sup> Stevens, 'Disaster' (n 29) 580.

<sup>56</sup> *Ibid*, 578.

<sup>57</sup> Stevens, *The Laws of Restitution* (n 1), 37-38.

acceptance',<sup>58</sup> requiring an objective manifestation of the defendant's choice. Free acceptance applies in circumstances where the benefit is not incontrovertible and holds that 'the defendant will be held to have benefited from the services rendered if he, as a reasonable man should have known that the claimant [plaintiff] who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services'.<sup>59</sup> Stated in these terms, the free acceptance doctrine has been accepted by both Australian<sup>60</sup> and UK courts<sup>61</sup> to regulate situations analogous to Pollock's aphorism that 'one cleans another's shoes, what can one do but put them on?'.<sup>62</sup> In this shoes example, the key question becomes whether the person whose shoes were cleaned had a reasonable opportunity to decline the service.<sup>63</sup>

This vision of the performance acceptance category becomes incompatible with situations when the plaintiff unilaterally improves the property of the defendant. Stevens says: 'In principle, there should be no freestanding claim to the value of the work done, absent some kind of acceptance'.<sup>64</sup> The 'core' case<sup>65</sup> of mistaken payments are different. Due to the distinctive nature of the payment mechanism, the plaintiff usually does have an opportunity to reject the payment. Banking agency plays a central role in monetary transfers. This suggests that the acceptance could be attributed to the defendant. Stevens explains: 'The customer [the defendant] has accepted [the payment] because its agent [the bank] has accepted. Banks are agents for receipt'.<sup>66</sup>

What then justifies the restitution in the performance acceptance category is lack of any objective obligation that would justify a defendant's entitlement to a plaintiff's performance. These could be a valid contract between the parties or statutory duty, such as tax obligation toward a revenue authority.<sup>67</sup> Accordingly, the reason for restitution in the classical *Kelly v Solari*<sup>68</sup> does not relate to the consent or the state of mind of the plaintiff at the time of the mistaken payment transfer. Rather, it is about the lack of an objective legal reason for the payment: there was no contractual obligation for the performance.<sup>69</sup> This position sheds

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<sup>58</sup> Lord Robert Goff and Gareth Jones, *The Law of Restitution* (London, Sweet & Maxwell, 1966); Birks, *An Introduction* (n 2) 265-93.

<sup>59</sup> Goff & Jones (n 5), 92 [4-29] fn 61.

<sup>60</sup> *Hughes v Molloy* [2005] VSC 240; *Fensom v Cootamundra Racecourse Reserve Trust* [2000] NSWSC 1072, [97] (Bryson J).

<sup>61</sup> See, eg, *R (on the application of Rowe) v Vale of White Horse District Council* [2003] 1 Lloyd's Rep 418; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2009] 1 WLR 1580.

<sup>62</sup> *Taylor v Laird* (1856) 25 LJ Ex 329, 332 (Lord Pollock).

<sup>63</sup> For this reading of the shoes example, see Peter Jaffey, 'The Way Forward' in Swain & Peari (n 15).

<sup>64</sup> *The Laws of Restitution* (n 1) 265.

<sup>65</sup> Birks, *Unjust Enrichment* (n 6), 3.

<sup>66</sup> Stevens, *The Laws of Restitution* (n 1), 50.

<sup>67</sup> *Ibid*, 71-105.

<sup>68</sup> (1841) 9 M & W 54, 152 ER 24.

<sup>69</sup> Stevens, *The Laws of Restitution* (n 1), 72



light on the remedial aspect of restitution: the plaintiff is entitled to receive back the market value of their performance, regardless of the degree to which a given service/goods/money might have proven beneficial for the defendant.<sup>70</sup>

*Second*, Stevens perceives cases where a contract exists between the parties as analytically distinctive. Here, the restitutionary claims must be based on the expressive terms and conditions made by the parties. This position epitomises the primacy of the contract under which the actual agreement between the parties spells out the normative character of their interaction. If A pays a deposit to B based on the contractual condition according to which B will perform a certain service towards A, the failure to perform that condition (i.e. service) grounds the nature of the restitutionary claim of the plaintiff against the defendant.<sup>71</sup> In other words, within the existing contract between the parties, the restitutionary claim must rely on the expressively conditional nature of the performance.<sup>72</sup> Stevens coins this category of restitutionary liability as ‘conditional performance’.<sup>73</sup>

*Third*, the cases where the plaintiff discharges the defendant’s pre-existing obligation towards a third party represent a hurdle for the performance acceptance argument, as no direct action takes place between the plaintiff and the defendant. Stevens resolves this difficulty through a reference to the considerations of distributive justice: ‘Such cases can be seen as a kind of localized distributive justice. We are trying to ensure that burden fall where they ought to’.<sup>74</sup> This means that the liability in cases involving the discharge of the defendant’s obligation hinges on considerations regarding the way a society allocates benefits and burdens amongst its members. In contrast to the bipolar structure of private law, these are public law’s considerations. In similar, these considerations underpin the case of statutory illegality.<sup>75</sup> Stevens says that even if the statute which establishes the illegality of a certain action or dealing fails to specify the restitution implications of the illegality, the operational force of the statute shall not stop there. As he puts it ‘it is a mistake to think that the statute then [in circumstances that it is silent on private law’s aspects of illegality] falls away, and the common law ‘takes over’.<sup>76</sup> For him, the key question remains whether the restitutionary remedy would facilitate the underlying public purposes of the statute.<sup>77</sup>

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<sup>70</sup> Ibid, 66.

<sup>71</sup> See also Alexander Georgiou, ‘Mistaken Payments, Quasi-contracts, and the “Justice” of Unjust Enrichment’ (2022) 42 *Oxford Journal of Legal Studies* 606.

<sup>72</sup> Stevens, *The Laws of Restitution* (n 1) 7, 109-110, 137.

<sup>73</sup> Ibid, 109.

<sup>74</sup> Ibid, 153.

<sup>75</sup> Ibid, 385-390.

<sup>76</sup> Ibid, 397.

<sup>77</sup> Ibid.

*Fourth*, there are cases in which the restitutionary claims are based on the nature of the plaintiff's right involved. What justifies the liability in those cases is the relational structure of private law in which the remedy vindicates the proprietary or equitable right held by the plaintiff.<sup>78</sup> The legal response thus involves an exercise of identification and trace of the existing right of the plaintiff. In these cases, the plaintiff simply recovers from the defendant what is already belongs to them, regardless the question of enrichment (or dis-enrichment) of the defendant.<sup>79</sup>

*Fifth*, the nature of the gain-based remedies follows a related exercise of tackling the nature of the involved rights. The key question remains whether a wrong that a defendant committed against a plaintiff could explain a restitutionary response in a way that would mirror the character of the right infringed by the defendant.<sup>80</sup> Accordingly, Stevens carefully considers the various instances of the gain-based remedies, tracing the link between the nature of the infringed right and the gain-based remedy.

*Finally*, the unjust enrichment defences are grounded on non-identical rationales. Thus, the considerations of distributive justice lie at the core of the 'passing on' defence<sup>81</sup> according to which the defendant makes an argument that the plaintiff suffers no loss. The operational force of this defence must be limited and must, for instance, not apply in cases of an existing contract between the parties.<sup>82</sup> The central change of position defence is different. Here, the reason for the restitution denial lies in the innocence of the defendant and their moral responsibility. As Stevens explains: 'Defendant's moral responsibility for what the plaintiff seeks to reverse is low, and the lack of any wrongdoing on their part.'<sup>83</sup> This law aims to ensure that any 'innocent person is left no worse off by a claim to reverse an unjustified performance between the parties.'<sup>84</sup> This vision of the change of position defence suggests its possible limits. For example, the defence should not be available to the defendant in the context of claims for restitution due to failure of an expressive contractual condition.<sup>85</sup>

### *C Wrongly Decided and Wrongly Reasoned Cases*

Stevens lists what he calls 'problematic English Ultimate Appellate Court

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<sup>78</sup> *Ibid*, 216-217.

<sup>79</sup> *Ibid*, 210-213, 259-263. See also Robert Stevens, *Faute de Mieux* in Swain & Peari (n 15).

<sup>80</sup> Stevens, *The Laws of Restitution* (n 1) 297. See also Ernest Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 *Chicago-Kent Law Review* 55.

<sup>81</sup> Stevens, *The Laws of Restitution* (n 1), 385-390.

<sup>82</sup> *Ibid*, 375.

<sup>83</sup> *Ibid*, 356.

<sup>84</sup> *Ibid*, 15.

<sup>85</sup> *Ibid*.

cases',<sup>86</sup> exposing deficiencies in their unjust enrichment reasoning; leading him to conclude these cases were either wrongly reasoned or, more concerningly, wrongly decided.

### 1 *The Wrongly Reasoned Cases*

The first wrongly decided case was *Lipkin Gorman*.<sup>87</sup> This is problematic given this is the case where 'authoritative blessing was finally given to the law of unjust enrichment'.<sup>88</sup> In *Lipkin Gorman* Cass, a partner in a law firm, used client account money, which he was able to access as an authorised signatory to subsidise his gambling. An action was brought against the club where Cass had gambled the money away. There was no direct performance by the firm to the club because Cass' gambling was clearly for his own purposes. However, their Lordships endorsed the Birks' unjust enrichment formula, holding that in the circumstances the club enriched at the expense of the firm. Stevens argues *Lipkin Gorman* is rightly decided because Cass' law firm was a partnership, with no separate legal personality. When a bank account is opened in a partnership's name all partners have joint title to any credit balance. When Cass gambled the money, he was not spending money he had sole title to. Therefore, the unauthorised payments of partnership assets could have provided a sufficient basis for a claim by the firm against the club, despite the lack of performance directedness between the two.<sup>89</sup>

The second wrongly reasoned case was *Menelaou*,<sup>90</sup> which involved the decision of parents to sell their home to buy a house for their daughter. The plaintiff, a financial institution had a charge over the parents' house and had agreed to release their charge on the basis that they would acquire a charge over the daughter's property. This charge was deemed ineffective because the daughter had not agreed to its creation. The majority, in awarding restitution, adopted a causal analysis which misidentified the relevant enrichment as being the improvement of the defendant's (i.e. daughter's) position and mistakenly assumed that a correlative loss suffered by the financial institution constitutes a sufficient connection between the parties. This reasoning would infer a claim should also be allowed in the stamp scenario. It is impermissible because it relies on uncommunicated conditions, which the defendant is not privy to, and cannot justify imposing obligations upon them, by subrogation or otherwise.<sup>91</sup> An alternative justification for restitution is that because the proceeds of the parents' house were not at their free disposition, they were not free to utilise the proceeds

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<sup>86</sup> Stevens, 'Disaster' (n 29) 586.

<sup>87</sup> *Lipkin Gorman* (n 48).

<sup>88</sup> Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3<sup>rd</sup> edn, 2011), 4.

<sup>89</sup> *Ibid.* See also Stevens, *The Laws of Restitution* (n 1), 207-208.

<sup>90</sup> *Menelaou v Bank of Cyprus* [2016] AC 176 ('*Menelaou*').

<sup>91</sup> Stevens, 'Disaster' (n 29) 590.

of sale until the bank had been repaid what was owed.<sup>92</sup> In other words, the proceeds were subject to a charge in favour of the bank; this reasoning was reflected in Lord Reed's subsequent explanation of *Menelaou*.<sup>93</sup>

The third wrongly reasoned case was *Zurich Insurance*,<sup>94</sup> a case which Stevens labelled 'the most startling example of a modern court ignoring the importance of whether there is a justifying reason for the performance rendered'.<sup>95</sup> The facts concerned insurers who had insured an employer against liability for mesothelioma for six years of an employee's 27 years of employment. During the remaining years the employer had self-insured. Prior to the decision, the UK Supreme Court in *Barker v Corus*<sup>96</sup> held that in relation to the mesothelioma victims, each employer should be liable in full for the damages rather than being liable only in proportion to their own contribution to the exposure. Accordingly, the employer was deemed liable in full for any period of exposure to asbestos that created a risk to their employees; thus the insurer was prima facie liable to match liability regardless of length of cover. The insurer sought to recover from the insured a proportionate amount paid by way of a contribution. The insured argued this contribution would contradict their right to payment under the contract. The majority, adopting the unjust enrichment formula, allowed the contribution on the basis there was no rule barring recovery of payments owing under a contract, no policy was thereby violated. The Court was required to do equity between the parties based on unjust enrichment considerations.<sup>97</sup> The minority reached the same result by construing the contract as not entitling the insured to be paid anything more than a proportionate share of the time insured.<sup>98</sup> Stevens agreed with the minority's reasoning arguing that if the insured had a contractual right to be paid the money owed, and no agreed condition had failed, no claim in restitution should be allowed and that 'allowing exceptions based upon vague notions of equity does the law no credit'.<sup>99</sup> Given the fact of the existing contract between the parties, the prerogative must be given to the expressive contractual arrangements made by the parties under the conditional performance category.

## 2 *The Wrongly Decided Cases*

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<sup>92</sup> *Ibid*, 591.

<sup>93</sup> *Revenue and Customs Commissioners* (n 46) [65] (Lord Reed).

<sup>94</sup> *International Energy Group v Zurich Insurance* [2016] AC 509.

<sup>95</sup> Stevens, 'Disaster' (n 29) 589.

<sup>96</sup> *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 A.C. 572, [2006] 5 WLUK 75.

<sup>97</sup> *Zurich Insurance* (n 98) [24] (Lord Mance JSC with whom Lords Clarke, Carnwath and Hodge agreed).

<sup>98</sup> *Ibid* [113] (Lord Sumption with whom Lords Neuberger and Reed agreed).

<sup>99</sup> Stevens, 'Disaster' (n 29) 590. See also Stevens, *The Laws of Restitution* (n 1) 255-256.

The first case that Stevens argues is wrongly decided is *Banque*.<sup>100</sup> In *Banque* the plaintiff BFC agreed to lend money to Parc on the basis of a ‘postponement letter’, stating claims by companies in the same group as Parc would be subservient to BFC’s loan. BFC was mistaken because the letter was not binding on OOL, a company in the same group as Parc. OOL was owed a large sum by Parc, secured by a second charge over Parc’s core asset, with Parc having used the BFC loan to pay off the first charge, owned by a third-party bank, over the asset. BFC successfully argued its mistake in issuing the loan left OOL unjustly enriched because it resulted in the first secured charge on the asset being discharged. Parc subsequently became insolvent. In response, the House of Lords allowed BFC to be subrogated against OOL to the first charge over the land which the money had discharged. Stevens argues *Banque* was wrongly decided, because there was no performance rendered by BFC to OOL as no money which BFC had any entitlement to, was used to discharge the secured loan to the bank, and no obligation that ought to have been borne by OOL had been discharged. The mere fact that A in making an unsecured loan to X, makes B better off, should not leave B susceptible to a claim. Stevens opines, if A’s money is used to discharge X’s debt, the law may allow A to be subrogated to the debt, however, in the circumstances of *Banque* the money used to pay off the secured charge was Parc’s not BFC’s.<sup>101</sup>

The second case Stevens argues was wrongly decided is *Deutsche Morgan Grenfell (DMG)*.<sup>102</sup> Following a decision of the European Union Court of Justice rendering one of the UK’s revenue tax provisions invalid due to inconsistency with the EC treaty, the plaintiff argued they would have paid fewer taxes, by submitting them at an earlier time if the invalid legislation had not prevented it from doing so. The claim was for the interest representing this earlier payment, with mistake of law being the purported unjust factor warranting restitution. This reasoning was based on the pre-existing principle that taxes paid following an ultra vires demand were recoverable.<sup>103</sup> The defendants (i.e. the UK Revenue), erroneously in Stevens’ view, conceded a claim was available based on this principle. Stevens argues recovery should have been denied because although the money would not have been paid absent the mistake, it was due, and therefore not recoverable, noting the impugned law still had effect domestically in the UK.<sup>104</sup> Therefore, *DMG* could not be described as a case where there was no reason for the payment made. The statutory duty to pay the tax existed at the time of the

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<sup>100</sup> *Banque* (n 7).

<sup>101</sup> Stevens, *The Laws of Restitution* (n 1) 255-256.

<sup>102</sup> *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2003] EWHC 1779 (‘DMG’).

<sup>103</sup> See, *Woolwich Equitable Building Society v IRC* [1993] AC 70.

<sup>104</sup> Stevens, *The Laws of Restitution* (n 1) 87-88.

payment performance. Accordingly, Stevens agreed with Lord Scott's dissent which reasoned that whilst the tax had been wrongly demanded it was still due and payable, therefore the claim for restitution ought to have failed.<sup>105</sup>

The third case Stevens argues was wrongly decided was *Sempra*,<sup>106</sup> noting *Sempra* was overruled in *Prudential* after Stevens' *Unjust Enrichment Disaster* article was published in 2018,<sup>107</sup> effectively marking an end to the overpaid tax legislation cases.<sup>108</sup> In *Sempra* the claim was for interest payable on a corporation tax prematurely paid. The House of Lords awarded the plaintiff compound interest on the basis the defendant was unjustly enriched by having the opportunity to use the unjustifiably paid money during the period of prematurity. In doing so the House of Lords succumbed 'to the temptation to circumvent the unacceptable statutory rule'<sup>109</sup> that interest be calculated on a simple, not compound basis. Stevens argues it is inaccurate to describe the opportunity to use the money as constituting a legitimate performance from the plaintiff towards the defendant. The relevant performance between the parties was the payment of the capital sum while afterwards, there was no fresh performance capable of supporting a claim. Further, if the recipient were to immediately donate the payment, then the opportunity to use the payment would be non-existent. Accordingly, the *Sempra* decision is only explicable as an understandable attempt to circumvent the statutory entitlement to interest, however, in doing so the House of Lords threatened to undermine the basis of claims for restitution.<sup>110</sup>

#### *D Some Reservations*

##### *1 Questioning the Positive Thesis*

Alongside the compelling criticism of the four-stage formula and the key UK case law decisions, Stevens' positive thesis is not free from deficiencies. Some preliminary objections could be offered which challenge, at least in part, the internal coherency of the argument. Thus, there is a clear tension in reconciliation between the fundamentally bipolar structure of private law on the one side and the distributive public law's reasoning, on the other. While Stevens situates claims such as discharge of existing obligations within the public law domain, one could challenge this view on the grounds that there is no reason to exclude those claims from private law's analysis. While Stevens does situate the cases of improperly

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<sup>105</sup> Ibid, 88.

<sup>106</sup> *Sempra Metals v Inland Revenue Commissioners* [2008] 1 AC 561.

<sup>107</sup> *Prudential Assurance* (n 31) [71] (Lord Reed, Lord Hodge and Lord Mance with whom Lords Sumption and Carnwath agreed). See text to nn 29-34 above.

<sup>108</sup> Charles Mitchell, 'End of the Road for Overpaid Tax Litigation?' (2019) 9 *The UK Supreme Court Yearbook* 225.

<sup>109</sup> Stevens, 'Disaster' (n 29) 588.

<sup>110</sup> Ibid, 584. See also Stevens, *The Laws of Restitution* (n 1) 62-65.

collected taxes within the borders of private law, paradoxically it could be argued that those cases belong to public law, epitomising such considerations as the mode of interaction between a state (and its subsidiaries) and its citizens; duties owed by the state and the operational constraints of public authority.<sup>111</sup>

The application of the performance acceptance thesis to cases of mistaken payments seems to be doubtful and perhaps require some further qualification. It could be argued that the defendant does not really have a reasonable option to resist monetary transfers in most of the cases.<sup>112</sup> This point leads to a deeper objection, pointing to the analytical difficulty to equalise between all types of performances. One would argue that the cases of provisions of services and the improvement of somebody's else property must be sharply delineated from the cases involving a transfer of goods and financial property.<sup>113</sup> On a related note, Stevens sharp division between the performance acceptance and conditional performance categories might not be adequate. Thus, it could be argued the cases of improperly collected taxes, such as *DMG*, are grounded in social contract theory which insists on the contractual relationships between a state and the taxpayers.<sup>114</sup>

Finally, the explicit rejection of the rights-based analysis of restitutionary claims,<sup>115</sup> seems to be inconsistent. While Stevens says that 'it is unnecessary show that any right of the claimant [plaintiff] was infringed'<sup>116</sup> and there is no need to demonstrate a 'breach of pre-existing duty',<sup>117</sup> noticeably several categories of Stevens' alternatives precisely embrace this right-based analysis, as evident in Stevens' treatment of gain-based remedies and rights' tracing. This aspect of the positive thesis perhaps requires a qualification as well.

## 2 *Burrows' Response*

Some contours of the above-outlined preliminary reservations could be traced in Lord Burrows' (then academic) response to Stevens' critique in Burrows' *In*

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<sup>111</sup> See eg Rebecca Williams, 'Compound Interest on Restitution of Overpaid Tax: An Inevitable Answer to the Wrong Question' (2018) 77 *Cambridge Law Journal* 468; Sagi Peari, 'Improperly Collected Taxes: The Border between Public and Private Law' (2010) 22 *The Canadian Journal of Jurisprudence* 165.

<sup>112</sup> For a related line of criticism has been raised against the 'acceptance' dimension of corrective justice's vision of the unjust enrichment structure of liability. See Sandy Steel, 'Private Law & Justice' (2013) 33 (3) *Oxford Journal of Legal Studies* 607; James Penner, 'Restitution, Corrective Justice and Mistakes' in Swain & Peari (n 15).

<sup>113</sup> See eg Samuel Stoljar, *The Law of Quasi-Contract* (2nd edn, Law Book Company 1989); Peter Watts, 'Unjust Enrichment'—the Potion that Induces Well-meaning Sloppiness of Thought' (2016) 69 *Current Legal Problems* 289.

<sup>114</sup> Brennan, Geoffrey, and James M. Buchanan. *The Power to Tax* (Cambridge, Cambridge University Press, 1980).

<sup>115</sup> Stevens, *The Laws of Restitution* (n 1) 6, 20, 32-33, 80, 191.

<sup>116</sup> *Ibid*, 6.

<sup>117</sup> *Ibid*, 20.

*Defence of Unjust Enrichment* (2019).<sup>118</sup> While *The Laws of Restitution* has just been published, Burrows was replying to Stevens' 2018 *Disaster* article, aiming to defend the four-limb unjust enrichment formula and cast doubt on the performance acceptance aspect of Stevens' positive argument.<sup>119</sup>

Naturally, Burrows' criticism of the acceptance of performance thesis centred on Stevens' shift from focusing on enrichment to focusing on performance.<sup>120</sup> He rejects Stevens' central claim that restitutionary claims are 'not concerned with enrichment or benefit in any sense of the word'.<sup>121</sup> Instead, if it is clear the defendant has been enriched, the normative work of the defendant's acceptance has been exhausted and the defendant's acceptance has nothing to do with matching the plaintiff's conduct. In doing so, Burrows distinguishes the law of torts where the 'correlativity between the plaintiff who has suffered the infringement of a right and the defendant who has infringed that right seems obvious'.<sup>122</sup> Instead in the law of unjust enrichment where 'one precisely is not concerned with wrongs, the equivalent inextricable link between the plaintiff and defendant is to be found in the enrichment of the defendant at the claimant's expense'.<sup>123</sup>

Burrows argues the focus on enrichment provides a normative means for justifying the imposition of restitutionary liability. Birks' notion of 'subjective devaluation'<sup>124</sup> serves to effectively respect the defendant's freedom of choice. An example of subjective devaluation's role, in a construction context, is that when valuing services, including materials, the starting value is the objective market value which then may be reduced to respect the defendant's freedom of choice, so that it is a saving of expense and not a factual increase of the defendant's wealth that is in issue.

Accordingly, Burrows argues that it is difficult to see why, normatively, acceptance is regarded as so important. For example, in a mistaken payment scenario where both parties are mistaken it is difficult to see what role acceptance has. Accordingly, acceptance is only normatively relevant where enrichment is a fact in issue, as in the case of services, but is irrelevant in mistaken payment scenarios.<sup>125</sup> Burrows suggests Stevens' emphasis on acceptance suggests 'free acceptance' by the defendant is necessary whatever the type of benefit, with 'free acceptance' being developed to overcome the difficulties associated with

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<sup>118</sup> Burrows (n 34).

<sup>119</sup> Naturally, the other aspects of Stevens' positive thesis were not available at the time of the *In Defence* publication.

<sup>120</sup> Stevens, 'Disaster' (n 29) 531.

<sup>121</sup> Burrows (n 34) 532.

<sup>122</sup> *Ibid* 534.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid* 532.

<sup>125</sup> *Ibid* 533.



subjective devaluation.<sup>126</sup> Free acceptance is not a necessary condition of restitutionary liability, for example in the case of incontrovertible benefits, and that its role is limited to establishing whether the defendant has benefited.<sup>127</sup> Accordingly, Burrows argues Stevens is incorrect to seek to impose free acceptance as a necessary condition for imposing restitutionary liability.

Furthermore, Burrows argues Stevens' 'whole theory collapses',<sup>128</sup> when applied to mistaken improvement of land or goods scenarios. For example, where A mistakenly improves B's land or goods where B has not had the opportunity to accept or reject.<sup>129</sup> Restitution in this scenario is allowed in the UK and comparable jurisdictions,<sup>130</sup> yet applying the acceptance of performance thesis there can be no possible direct claim for restitution in this situation because there is no acceptance.

Burrows argues Stevens' notion of accepted performance is essentially the law of contract because the claimant offers performance on the basis the defendant will pay the value of the performance and by accepting performance the defendant is impliedly promising it will pay that value. In this scenario Burrows argues the requisite contract formation elements of offer, acceptance and consideration are present.<sup>131</sup> Burrows doubts whether the imposition of a law of 'non-contractual acceptance performance' makes sense and whether Stevens is conflating unjust enrichment with contract.

Ultimately Burrows argues the acceptance of performance thesis' deficiency is that its narrow meaning of the 'at the expense of' element of the unjust enrichment formula. Burrows reasons the Stevens' thesis' attractiveness stems from its ability to chime well with 'the recent authoritative clarification of the limits of unjust enrichment through the narrowing of the possible meaning of at the expense of'.<sup>132</sup> Burrows argues that post-*Prudential Assurance*<sup>133</sup> restitution by A against B should be denied in third-party scenarios where A pays X by mistake, and consequently X pays B as a gift; incidental benefit scenarios where A cuts down trees on her land, enhancing the view of B and increasing the value of B's land; and the consequential benefit issue where A pays B by mistake and B

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<sup>126</sup> Ibid 533.

<sup>127</sup> See, eg, *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; *Benedetti v Sawiris* [2010] EWCA Civ 1427.

<sup>128</sup> Burrows (n 34) 534.

<sup>129</sup> See, eg, *Greenwood v Bennett* [1973] QB 195.

<sup>130</sup> See eg, Jean Du Plessis, *The South African Law of Unjust Enrichment* (Cape Town 2012), ch 9; American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (Philadelphia, 2011), 111-136.

<sup>131</sup> Burrows (n 34) 535-536. See also Warren Swain, *The Law of Contract 1670-1870* (CUP 2015) 172-230 (demonstrating the classical common law's position requiring an expressed acceptance within contract law doctrine).

<sup>132</sup> Burrows (n 34) 536.

<sup>133</sup> Ibid.

uses the money to make a profit above the market interest rate. For Burrows, restitution would be denied in these scenarios as they do not satisfy the ‘at the expense of’ requirement because they do not constitute a direct conferral of a benefit from A to B. Accordingly, Burrows concludes a strength of Stevens’ thesis is it provides a clear framework for why there should be no restitution, without recourse to ‘directness’ policy considerations,<sup>134</sup> using the absence of performance as a means for denying restitution.

Yet, in Burrows’ opinion, the above scenarios demonstrate that Stevens’ performance thesis is ‘too narrow and inflexible and gives incorrect answers in other situations’, with *Sempre* being an example of a scenario where Burrows believes the thesis does not hold up as the interest on the capital sum in that case should be compensable as it is analogous to a restitutionary claim for receipt of a car where the benefits include both the receipt of the car and the ‘use value’ of the car for the period in possession.<sup>135</sup> Accordingly, Burrows argues the overruling of *Sempre* was incorrect as a matter of principle and demonstrates the deficiencies in the performance thesis reasoning.

Summarily, Burrows agrees that whilst some of the cases analysed by Stevens require an extended notion of ‘at the expense of’ as an exception to the normal ‘direct conferral’ approach, nearly all the decisions can be justified within the unjust enrichment framework. Burrows argues Stevens’ conclusions that the recent appellate decisions are ‘problematic’ is a result of his ‘narrow and inflexible notion of accepted performance’.<sup>136</sup> The difficulties associated with an overextended approach to the meaning of ‘at the expense of’ do not of themselves provide a good reason ‘for jumping ship or setting sail on different waters’, opining whilst unjust enrichment ‘may not yet be a glorious cruise liner but it is certainly not a disastrous shipwreck’.<sup>137</sup>

### III AUSTRALIAN JURISPRUDENCE

Stevens’ argument demonstrates the incoherencies and problematic reasoning within the UK appellate decisions and puts forwards an alternative. The pertinent issue remains whether the negative and positive aspects of this reasoning apply to Australian jurisprudence.

#### *A David Securities Pty Ltd v Commonwealth Bank of Australia*

In 1984 and 1985 the plaintiffs entered into loan agreements with the defendant,

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<sup>134</sup> Ibid 537.

<sup>135</sup> Ibid 538-541.

<sup>136</sup> Ibid 544.

<sup>137</sup> Ibid.

which offered them a facility to borrow foreign currency. A mortgage agreement provided security for the loans. The agreements required the plaintiffs to pay the defendant in respect of its withholding tax liability, however, due to adverse exchange rate fluctuations the plaintiffs suffered financial losses and brought an action against the defendant and their accountants, who had advised them to enter the loan agreements, under the provisions of the then *Trade Practices Act 1974* (Cth), today's section 18 of the *Australian Consumer Law*.<sup>138</sup> The plaintiffs argued that the defendant misled them in relation to the financial risk involved in foreign currency loans.<sup>139</sup>

The defendant cross-claimed seeking to recover the money due under the loan agreements. However, the claim was complicated because the clause requiring repayment under the loan agreement was rendered void by legislation and consequently, the payments were made by the plaintiff under a mistake of law. Accordingly, the core issue for the High Court was whether the plaintiffs were entitled to restitution of moneys paid under a mistake of law. The Court, in allowing the appeal, rejected the principle that money paid under a mistake of law is irrecoverable and instead held a narrower principle, 'founded firmly on the policy that the law wishes to uphold bargains and enforce compromises freely entered into, would be more accurate and equitable'.<sup>140</sup> This was justified on two distinct bases, firstly, it is difficult and illogical to seek to draw a rigid distinction between cases of mistake of law and mistake of fact, and secondly, that the unifying formula of unjust enrichment supported this principle.

*David Securities* is significant because firstly, the majority adopted the 'unjust' factor as the basis for the claim in restitution, further emphasising that due to the mistake of law there was no reason, such as a statutory or contractual right, to retain the payments. This co-requisite of there being no reason to retain the benefit has been subsequently affirmed and applied,<sup>141</sup> a test which aims to preserve the 'purity of the principle on which unjust enrichment is founded'.<sup>142</sup> Secondly, a mistake by itself is sufficient, as an unjust factor, to support prima facie claim for restitution of itself. Thirdly, the Court used the opportunity to define 'mistake' as not only signifying 'a positive belief in the existence of something which does not exist but also may include the sheer ignorance of something relevant to the transaction in hand',<sup>143</sup> holding there is no requirement

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<sup>138</sup> *Competition and Consumer Act 2010* (Cth)- Schedule 2, s 18.

<sup>139</sup> *David Securities* (n 26) [1] (Mason CJ, Deane, Toohey, Gaudron & McHugh JJ)

<sup>140</sup> *Ibid* [71] (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>141</sup> See, eg, *Baumgartner v Baumgartner* (1987) 164 CLR 137, [7]; *David Securities* (n 26) [7]; *Roxborough* (n 19) [20].

<sup>142</sup> *DMG* (n 104) [158].

<sup>143</sup> *David Securities* (n 26) 67 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) citing Percy Winfield 'Mistake of Law' (1943) 59 *Quarterly Review* 327, 327.

the mistake be ‘fundamental’.<sup>144</sup> Lastly, the decision held the existence of the change of position defence was necessary to ensure that restitution is denied only in circumstances where it would be unjust.<sup>145</sup> The defence applies where a good faith defendant has changed their position on the basis of the receipt so that they would suffer detriment if required to make restitution. The core requirement being that the ‘defendant has acted to his or her detriment on the faith of the receipt’.<sup>146</sup>

Apparently, both Stevens and unjust enrichment’s analysis would support the reasoning and the outcome of the decision. Applying Stevens’ performance acceptance thesis, all the requisite elements of performance are present, which ought to normatively justify restitution. What the plaintiff is seeking to reverse is their doing, the benefit of the loan agreements cannot be described as incidental because they are the core of the transaction. The defendant by entering into the agreement accepted the performance. The presence of performance, and the fact that both entities, being commercially sophisticated, were responsible for the mistake of law by including the invalid clause in the agreements means it cannot be argued the ordering of restitution unjustly required the defendant to ‘correct an injustice that was not their doing’.<sup>147</sup>

Accordingly, *David Securities* is distinguishable from the UK mistake of law case *Sempre*, because in *Sempre* the money was due and payable. In contrast, the mistake of law rendering the repayment provisions of the loan agreements void in *David Securities* meant the money was no longer due and payable. There was no contractual or statutory obligation between the parties to make the transfer. Therefore, the Court’s decision in *David Securities* is justifiable, applying Stevens’ analysis, with the caveat that Stevens would disagree with the Court’s adoption of the ‘unjust factor’ terminology. The claim for restitution was successful once no reason for the defendant to retain the benefit existed.

### *B Roxborough v Rothmans of Pall Mall Australia Ltd*

The situation involved licensed wholesalers of tobacco products (Rothmans) who sold the products to the retailers (Roxborough). There was a conditional sale agreement between the parties according to which Roxborough pays the tax component of the price, conditional on the states’ charge of that tax from the wholesalers, the Rothmans. It turn out that the tax was found unconstitutional as negating the prerogative of the federal government to impose taxes.<sup>148</sup>

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<sup>144</sup> *David Securities* (n 26) 74 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 87 (Brennan J).

<sup>145</sup> The concept of change of position was not entirely foreign to Australian law and existed, albeit in a more limited form, under statute see, eg, *Property Law Act 1969* (WA) s 125; *Trustees Act 1962* (WA) s 65(8).

<sup>146</sup> *David Securities* (n 26) [59] (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>147</sup> Stevens, ‘Disaster’ (n 29) 580.

<sup>148</sup> *Business Franchises Licences (Tobacco) Act 1987* (NSW).

Roxborough argued, and the majority of the High Court accepted,<sup>149</sup> that because the money was paid to Rothmans solely for the purpose of meeting the requirements under the tax, and because this basis for paying the tax no longer existed, they were entitled to restitution for the tax component of their purchases. In reaching this decision the majority explained that the tax component was severable and not merely part of the total cost paid to Rothmans, holding to treat the tax component ‘as nothing more than an agreed part of the price’ would ‘ignore an important aspect of the facts’,<sup>150</sup> that the tax was externally imposed and to permit recovery of the tax component would not subvert the contractual allocation of risk between the parties.<sup>151</sup> Accordingly, as the ‘contemplated state of affairs’ had failed due to the tax’s invalidity, a claim in restitution was available on the unjust ground of total failure of basis.

This decision marked a significant expansion in the law of unjust enrichment for the following reasons. Firstly, the majority explicitly affirmed ‘failure of consideration is not limited to non-performance of a contractual obligation’<sup>152</sup> applying the total failure of basis analysis to the decisions of *Muschinski*,<sup>153</sup> *David Securities* and *Baltic Shipping*<sup>154</sup> in effect ‘integrated law and equity as part of the law of unjust enrichment’.<sup>155</sup> Secondly, the decision resulted in an increase in unjust enrichment claims being pleaded with the case law developing and expanding rapidly until the High Court’s firm decision in *Farah* that held lower courts were not to develop or recognise novel forms of claim based on unjust enrichment reasoning, which might render established equitable doctrine otiose.<sup>156</sup> Each of the majority judgements<sup>157</sup> endorsed the proposition that unjust enrichment can operate in the context of an effective contract.<sup>158</sup> Lastly, the Court rejected the application of the passing on defence according to which the retailers did not suffer any loss due to their ability to ‘pass on’ the tax component on the consumers.<sup>159</sup>

*Roxborough* faced significant criticism, primarily on the grounds that the majority failed to apply its analytical framework in sufficient detail to the facts of the case.<sup>160</sup> Further, the majority did not address the defendant’s primary

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<sup>149</sup> *Roxborough* (n 19) (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

<sup>150</sup> *Ibid* [16] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>151</sup> *Ibid* [16] (Gleeson CH, Gaudron and Hayne JJ), [95] (Gummow J).

<sup>152</sup> *Ibid* [16]-[17] (Gleeson CJ, Gaudron and Hayne JJ).

<sup>153</sup> *Muschinski v Dodds* (1985) 160 CLR 583.

<sup>154</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

<sup>155</sup> Bant, ‘Evolution’ (n 19) 125.

<sup>156</sup> *Farah* (n 20) [134].

<sup>157</sup> *Roxborough* (n 19) [173] (Kirby J).

<sup>158</sup> Eli Ball ‘The Contraction of Restitution in the 21<sup>st</sup> Century’ in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21<sup>st</sup> Century* (The Federation Press, 2021) 84.

<sup>159</sup> See text to nn 166-171 below.

<sup>160</sup> Bant, ‘Evolution’ (n 19) 126.

argument that the payments were made in discharge of contractual obligations, and Kirby J who considered this dissented on this basis.<sup>161</sup> Additionally ‘serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract’.<sup>162</sup> In allowing a claim for restitution in circumstances where the contract remained effective, the Court had expanded the scope of unjust enrichment yet had still failed to firmly outline the broader framework justifying the imposition of liability.

Applying Stevens’ argument to *Roxborough* would perhaps support the majority of the High Court decision. The construction of the expressive terms of the contractual provisions provides the ultimate framework for adjudicating the parties’ rights and duties under the conditional performance category. What justifies the restitution to the retailers is the conditional nature of their performance under the contract. The payment of the itemised tax item was subject to the validity of such a tax. Once the tax was found unconstitutional, the foundational basis of the performance condition failed. From this perspective, it does not matter whether the wholesalers (i.e. Rothmans) had actually paid the tax to the states. Their enrichment (or disenrichment) is simply irrelevant to the Stevens’ conditional performance liability category.<sup>163</sup>

Stevens would also perhaps support the Court’s rejection of the passing on defence. However, this rejection would not relate to the justificatory reasons provided by the Court, such as economic rationales,<sup>164</sup> the focus of the unjust enrichment’s formula on the defendant’s enrichment rather than the plaintiff’s loss,<sup>165</sup> equitable principles<sup>166</sup> or limiting the defence to constitutional context.<sup>167</sup> Rather, as we have seen,<sup>168</sup> the distributive foundations of the passing on defence would make it inoperative in cases of a valid contract between the parties. Otherwise, that would amount to restructuring of the contractual obligations between the parties.<sup>169</sup>

### *C Equuscorp Pty Ltd v Haxton*

<sup>161</sup> Jackman (n 22) 98; *Roxborough* (n 19) [165]-[170] (Kirby J).

<sup>162</sup> *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 [166] (Lord Goff) (“*The Trident Beauty*”).

<sup>163</sup> Stevens, *The Laws of Restitution* (n 1) 125, 360.

<sup>164</sup> From the market economy perspective, it could be argued that the retailers did suffer a loss due to the economic rationale under which an increase in a product’s price would likely lead to drop in sales. *Roxborough* (n 19) [3] (Gleeson, Gaudron, Hayne)

<sup>165</sup> *Ibid*, [24-34] (Gleeson, Gaudron, Hayne).

<sup>166</sup> *Ibid*, [68-69] (Gummow J).

<sup>167</sup> *Ibid* [125-143] (Kirby J).

<sup>168</sup> See text to nn 83-84.

<sup>169</sup> Stevens, *The Laws of Restitution* (n 1) 375.

The plaintiff, Equuscorp, was the assignee of the loans made to a group of defendant investors. However, the relevant loan agreements were unenforceable because they failed to comply with consumer protection-oriented prospectus requirements prescribed by the *Companies Code*. Consequently, the basis of entering the loan, which was to facilitate entry into a blueberry farm investment scheme, had failed and the plaintiff sought to recover the money lent to the defendants. The primary issue before the Court was whether permitting restitution in these circumstances would undermine or stultify the policy or purpose of the law.

The majority held the plaintiff's claim had failed based on the illegal purpose of the investment which created a reason for the defendants to retain the benefit, because to permit restitution in these circumstances would undermine the scheme's purpose which was to protect investors entering into investment schemes.<sup>170</sup> In support of this conclusion, the majority emphasised the statutory scheme's extensive and onerous sanctions for breaches<sup>171</sup> and that the legislation expressly rendered the particular loan agreements unenforceable.<sup>172</sup> In contrast, Heydon J dissenting accepted the statute had the purpose of protecting investors but held that this protection was effected by rendering the loan agreement invalid and by imposing punitive sanctions<sup>173</sup> therefore, there was no need to deny the plaintiff's claim in unjust enrichment which existed independent of the impugned agreements.

*Equuscorp* is significant because firstly, the majority adopted and applied the Birks' formula when determining whether restitution was available;<sup>174</sup> describing unjust enrichment as a 'taxonomic framework referring to categories of cases in which the law allows recovery by one person of a benefit retained by another'.<sup>175</sup> Secondly, the majority sought to circumscribe unjust enrichment so that restitution will be denied on the grounds of public policy, namely illegality of purpose, a necessary step to maintain coherence in private law. Thirdly, the majority established the 'underlying principle in respect of statutory illegality lies in the construction of the terms and the underlying policy of the particular statute in question'.<sup>176</sup> Lastly, Gummow and Bell JJ sought to distinguish *Roxborough* and *Pavey* which both involved contracts voided by illegality due to the differing purposes of the impugned legislation and on the basis of 'fault',<sup>177</sup> with fault

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<sup>170</sup> *Equuscorp* (n 23) [45] (Black, Crennan, Keifel JJ), [109]-[111] (Gummow and Bell JJ).

<sup>171</sup> *Ibid* [130].

<sup>172</sup> *Ibid* [123], [130].

<sup>173</sup> *Ibid* [130], [133] (Heydon J).

<sup>174</sup> *Ibid* [30].

<sup>175</sup> *Ibid* .

<sup>176</sup> Jackman (n 22) 214.

<sup>177</sup> *Equuscorp* (n 23) [112] (Gummow and Bell JJ)

perhaps being more adeptly described as ‘stultification’.<sup>178</sup> Given fault and wrongdoing are not independent elements of the unjust factor<sup>179</sup> and only applies in cases of gross conduct ‘involving criminality or similarly reprehensible behaviour’.<sup>180</sup>

Considering Stevens’ thesis, the Court’s decision to deny restitution seems to be justifiable.<sup>181</sup> The argument on the point of statutory illegality becomes relevant. A review of the relevant consumer protection inspired provisions of the prospectus’ requirements provisions suggests that there is no reason to support a restrictive approach according to which the statute’s silence indicates the irrelevancy of its underlying goals.<sup>182</sup> The restitution in this case must be ordered as it serves those goals, irrespective of the fact that the statute is silent on the point of restitution.

#### *D Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*

In *AFSL* the plaintiff, a financier, was induced by a fraudster to make payments to several businesses, including the defendants Hills and Bosch, for the purchase of non-existent equipment. The payments, once received, were treated by Hills and Bosch as reducing their indebtedness to the fraudster’s companies (TCP). In reliance on these receipts, Hills and Bosch changed their positions by discharging their debts, continuing to trade with TCP, deciding not to pursue remedies in enforcement proceedings against TCP and by not pursuing alternative financial arrangements to better their position, such as seeking financial security from third parties. Having discovered the fraud and that TCP was insolvent, AFSL brought an action against the suppliers, Hills and Bosch, to recover the money paid to them. In denying restitution on the ground the defendants had successfully established the change of position defence, the majority not only sought to clarify the role of unjust enrichment in Australia, but significantly developed and clarified the operation of the change of position defence.

Firstly, the majority expressly affirmed the ‘concept of unjust enrichment is not a definitive legal principle of direct application and is not the basis of restitutionary relief in Australian law’.<sup>183</sup> Secondly, the principle of disenrichment was deemed inconsistent with the law of restitution in Australia, in contrast to UK

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<sup>178</sup> Edelman and Bant, *Unjust Enrichment* (n 27) 259

<sup>179</sup> *David Securities* (n 26); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 307 ALR 512 (‘AFSL’) [83] (Hayne, Crennan, Kiefel, Bell and Keane JJ) [145]-[146] (Gageler J); *Benedetti v Sawaris* [2014] AC 938 [175].

<sup>180</sup> *Bennett v Horgan* (New South Wales Supreme Court, 3 June 1994), Bryson J approved by Burchett AJ in *Kriezis v Kriezis* [2004] NSWSC 167 [23] and *Hill v Hill* [2005] NSWSC 863 [35] (Campbell JA) and *McKay v McKay* [2008] NSWSC 177 [16] (Brereton J).

<sup>181</sup> Stevens, *The Laws of Restitution* (n 1) 400.

<sup>182</sup> *Ibid*, 401.

<sup>183</sup> *AFSL* (n 181) [73]-[74] (Hayne, Crennan, Kiefel, Bell and Keane JJ).



law,<sup>184</sup> consequently, ‘a mathematical assessment of enduring economic benefit does not determine the availability of restitutionary remedies’;<sup>185</sup> instead each judgment held the defendant should be protected where the change in position would make it ‘inequitable’ for restitution to be ordered. In assessing this normative standard of inequity French CJ held ‘guiding criteria’ such as good faith and irreversible change, ‘are indispensable to judicial decision-making in the application of broad normative standards to particular classes of case’.<sup>186</sup> Similarly, Hayne, Crennan, Kiefel, Bell and Keane JJ spoke interchangeably in terms of ‘inequity’ and ‘unconscionability’<sup>187</sup> and Gageler J referred to circumstances which would render an order for restitution ‘unjust or inequitable’. Thirdly, the requirement of irreversibility was endorsed by the majority,<sup>188</sup> with irreversibility meaning ‘the change must be legally or practically irreversible or there must be significant difficulties in reversing the change’.<sup>189</sup> Lastly, the Court favoured an analytical framework to assist in revealing the common features and operation of the law of unjust enrichment which states that when assessing the unjust factor courts must also assess ‘the circumstances, which if proved by the defendant, will show that his or her receipt (or retention) of the payment is not unjust and in which the law will therefore recognise a defence’.<sup>190</sup> It remains unclear whether this alternate two-stage test endorsed in *AFSL* will result in different outcomes to the Birks’ formula.<sup>191</sup>

In light of Stevens’ argument, *AFSL* is arguably wrongly reasoned but correctly decided. Applying Stevens’ performance acceptance category, performance has arguably occurred between Hills and TCP, though not between Hills and *AFSL*. *AFSL* have erred by bringing the action against Hills and not TCP. Further, applying Stevens’ argument, the fact the defendant has changed their position by discharging their debts is irrelevant, the enrichment, which cannot be lost, occurred when the plaintiff made the payments, these payments were conditional on future repayment and the defence is wholly inconsistent with the agreement for the plaintiff to provide finance. In denying restitution the Court has erroneously imported notions of disenrichment into Australian law, the relevant enrichment is the performance, the consequences are irrelevant.<sup>192</sup> Whilst

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<sup>184</sup> See, eg, *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50.

<sup>185</sup> *AFSL* (n 181) [78], [84] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>186</sup> *Ibid* [25], [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>187</sup> Edelman and Bant, *Unjust Enrichment* (n 27) 333.

<sup>188</sup> *AFSL* (n 181) [23]-[31] (French CJ), [95] (Hayne, Crennan, Kiefel, Bell and Keane JJ), [150] (Gageler J).

<sup>189</sup> *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 [202] (Buss JA).

<sup>190</sup> *AFSL* (n 181) [136] (Gageler J).

<sup>191</sup> Bant, ‘Evolution’ (n 19) 124.

<sup>192</sup> Robert Stevens, ‘Private Law and the Form of Reasons’ in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart, 2019) 119, 132.

Stevens argues the change of position defence ought only to apply in the limited circumstances<sup>193</sup> arguably, even under the Birks' formula the application of the defence was highly doubtful because Hills merely reversed a book entry on their accounts and suffered no actual change in position.

Comparisons can be drawn from the analogous UK case of *Aikin*<sup>194</sup> where a bank acquired property from a third party believing the property was subject to a charge in favour of the defendant. The bank discharged the third party's debt removing the charge. The issue however was the third party did not have good title to the acquired property, meaning the bank had discharged a debt to remove a charge which did not actually exist. The bank sought to recover the money paid to remove the non-existent charge based on the unjust factor of mistake, the majority held the defendant had 'nothing to do with their mistake'<sup>195</sup> and had given good consideration for the payment by discharging the debt owed by the third party.<sup>196</sup> Applying the performance acceptance formula, *Aiken* reflects what the law ought to be.<sup>197</sup>

#### *E Mann v Paterson Constructions Pty Ltd*

The High Court's decision in *Mann*<sup>198</sup> represents a further expansion and entrenchment of unjust enrichment in Australian law, further obscuring the delineation between the law of contract and the law of restitution. In *Mann* the plaintiff, Peter Mann, contracted with Paterson Constructions to build two houses, the contract required Mann to make progress payments, including an original deposit, as the works progressed until ultimately final payment was due. However, these progress payments did not differentiate between work on the two houses, treating the works as a single project. After the first house was completed, a dispute arose resulting in Paterson Constructions repudiating the contract, rendering it unenforceable.

This resulted in three core issues for the Court's determination. Firstly, if the non-repudiating party possesses an unconditional right to enforce payment through an action in debt are they barred from an action in unjust enrichment? The Court unanimously held that Paterson Constructions had no restitutionary *quantum meruit* claim for work done under the contract where a right to payment had accrued prior to the contract's termination. Instead, Paterson Constructions was limited to an action in debt for the accrued amount or alternatively

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<sup>193</sup> See text to nn 84-87 below.

<sup>194</sup> *Aikin v Short* (1856) 156 ER 1180.

<sup>195</sup> *Ibid*, 1182 (Pollock CB).

<sup>196</sup> *Ibid*, 1181-82 (Pollock CB and Platt B).

<sup>197</sup> Stevens, 'Disaster' (n 185) 133. See also Stevens, *The Laws of Restitution* (n 1) 365-366.

<sup>198</sup> *Mann* (n 23)

compensatory damages for breach of contract.<sup>199</sup> To allow a claim in these circumstances would render the law of contract incoherent because it would ‘subvert the contractual allocation risk’,<sup>200</sup> undermining the principle of freedom of contract. Nettle, Gordon and Edelman JJ reached the same conclusion reasoning that because the contractual obligation for payment remained ‘enforceable, open and capable of performance’,<sup>201</sup> meaning there was no failure of consideration or other unjust factor and consequently, there was no principled basis supporting a *quantum meruit* claim.

The second issue was whether in relation to work where no unconditional right to payment exists, can the non-repudiating party recover restitution, under the guise of a *quantum meruit* claim, as an alternative to damages? This topic divided the Court with the majority of Nettle, Gordon and Edelman JJ and Gageler J holding a *quantum meruit* claim was available to Paterson Constructions for work done where no right to payment had accrued under the contract. In reaching this conclusion Nettle Gordon and Edelman JJ rejected any application of a ‘general all-embracing theory about the contractual allocation of risk’<sup>202</sup> citing *Roxborough*,<sup>203</sup> *Lumbers*<sup>204</sup> and *Equuscorp*<sup>205</sup> instead, reasoning that the contract’s termination for repudiation by the recipient of partially performed works results in a ‘failure of consideration’<sup>206</sup> in effect ‘extending the scope of failure of consideration from its application to claims to recover money paid to claims to recover the value of partially performed work’.<sup>207</sup> Gageler J rejected this expansion as both unnecessary and undesirable<sup>208</sup> instead adopting a ‘judicial minimalism’ approach<sup>209</sup> relying on a narrow doctrine enunciated by Jordan CJ<sup>210</sup> which states that in circumstances such as the facts of *Mann* the law imposes an obligation to pay reasonable remuneration for the executed consideration ‘independently of any genuine agreement between the parties’.<sup>211</sup>

The final issue was assuming a *quantum meruit* claim is available, what role does the contractually agreed price play in assessing the value of the

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<sup>199</sup> Ibid [19] (Kiefel CJ, Bell and Keane JJ), [62]-[64] (Gageler J), [173], [176] (Nettle, Gordon and Edelman JJ).

<sup>200</sup> Ibid [19] (Kiefel CJ, Bell and Keane JJ), [62]-[63] (Gageler J).

<sup>201</sup> Ibid [169], [176] (Nettle, Gordon and Edelman JJ).

<sup>202</sup> Ball (n 160) 91.

<sup>203</sup> *Roxborough* (n 19).

<sup>204</sup> *Lumbers* (n 18).

<sup>205</sup> *Equuscorp* (n 23).

<sup>206</sup> *Mann* (n 23) [168]-[170], [175]-[176] (Nettle, Gordon and Edelman JJ).

<sup>207</sup> David Winterton and Timothy Pilkington, ‘*The Intersection of Debt, Damages and Quantum Meruit*’ (2020) *Melbourne University Law Review* 44(2) 679, 681.

<sup>208</sup> *Mann* (n 23).

<sup>209</sup> Ibid.

<sup>210</sup> *Segur v Franklin* (1934) 34 SR (NSW) 67, 72 (Jordan CJ); *Horton v Jones [No 2]* 34 SR (NSW) 305, 317-319 (Jordan CJ) cited in *Mann* (n 76) [71]-[74].

<sup>211</sup> *Mann* (n 23) [73] (Gageler J).

restitution awarded, and ultimately whether the value of a restitutionary claim can ever exceed the contract price? Unfortunately, *Mann* displays no clear majority view. Kiefel CJ, Bell and Keane JJ held that as no *quantum meruit* claim was available on the facts, the issue did not need to be addressed.<sup>212</sup> However, their Honours observed as a matter of policy allowing for restitutionary claims greater than the contract may undermine ‘honesty and efficiency in trade and commerce’ because it would promote a ‘rule that allows the recovery of a windfall by a party who has extracted himself from a losing contract’.<sup>213</sup> Gageler J took a much firmer view imposing a ‘contractual ceiling’<sup>214</sup> capping restitution to the contract price, to mitigate any substantial distortion or inversion of contractual arrangements.<sup>215</sup> However, given Gageler J emphasised the ‘need to avoid the pitfalls of overgeneralisation’ there remains scope in future decisions for exceptions to the contractual ceiling to arise. Lastly, Nettle Gordon and Edelman JJ, who recognised the potential consequences of allowing such an award on the contractual bargain and allocation of risk,<sup>216</sup> held that the value of the restitution recoverable ‘should *prima facie* not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price’, but there may be future circumstances where ‘it would be unconscionable to confine the plaintiff to the contractual measure’.<sup>217</sup> Accordingly, whilst the ramifications of the *Mann* decision are yet to be fully realised, it demonstrates the increasing significance of unjust enrichment in Australian law, highlighting the intersectionality of private law and blurring the boundaries between the law of contract and restitution.

In relation to the work done by the plaintiff where no unconditional right to payment existed, restitution on the ground of unjust enrichment was warranted applying Stevens’ analysis on the basis there was performance between the parties for which there was no justifying reason. With the justifying reason of the contract ceasing to apply once the contract was terminated on the ground of repudiation. Performance can be established as the enrichment the plaintiff is seeking to reverse, namely the construction of the works was their doing; the plaintiff clearly intended the action to have been for the defendant and would benefit from the construction of the works. Lastly, it can be inferred that the defendant accepted the performance as it constitutes an incontrovertible benefit, which the defendant is seeking to retain. Judicially recognised incontrovertible benefits include the receipt of money, the saving of a necessary expense or the

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<sup>212</sup> Ibid [4] (Kiefel CJ, Bell and Keane JJ).

<sup>213</sup> Ibid [52] (Kiefel CJ, Bell and Keane JJ).

<sup>214</sup> Ball (n 160) 95-96

<sup>215</sup> Ibid [89]-[91] (Gageler J).

<sup>216</sup> Ibid [205] (Nettle, Gordon and Edelman JJ).

<sup>217</sup> Ibid [216] (Nettle, Gordon and Edelman JJ).

discharge of a liability,<sup>218</sup> once a defendant seeks to retain an incontrovertible benefit, acceptance itself becomes incontrovertible. Accordingly, the performance of the construction works is an incontrovertible benefit as it has saved the defendant the necessary expense of engaging an alternate contractor to complete the works.

Because the contract is unenforceable it cannot serve as a reason for the defendant to retain the benefit, the contract's termination does not of itself mean there was no basis for the performance. The plaintiff's consent to the performance was qualified on the basis of the contract, with the contracting functioning as a contractual ceiling capping the amount of recovery ensuring 'the amount recoverable on a non-contractual *quantum meruit* as remuneration for services rendered in performance of a contract prior to its termination by acceptance of a repudiation cannot exceed that portion of the contract price as is attributable to those services.'<sup>219</sup> The contractually ceiling limit endorsed by Gageler J is consistent with Stevens' analysis as the contract price represents the parties agreed value of the performance, any exceedance of which would alter the allocation of risk between the parties under the contract. As stated by Gageler J the contractual ceiling limit is consistent in practical effect with the position in US law<sup>220</sup> and the position outlined by Connolly J in *Slowey v Lodder*,<sup>221</sup> accordingly, once this limit is imposed there is no reason to depart from the common law principle of recovery expounded by Jordan CJ in *Segur v Franklin*.<sup>222</sup> The contract's unenforceability constitutes a 'failure of basis' as the contract's existence and enforceability was objectively shared and therefore could not be characterised as uncommunicated conditions in the minds of plaintiffs.<sup>223</sup> The contract's repudiation cannot be characterised as a wholly unexpected future event. Therefore, the failure of basis effectively meant there was no justifying reason for the plaintiff's performance consequently, the majority were correct to order restitution.

#### IV CONCLUSION

The complexity of the restitutionary claims epitomises the complexity of commercial dealings. The classical four-stage Birks' formula of unjust enrichment

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<sup>218</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925, 942 (Goff J).

<sup>219</sup> *Mann* (n 23) [102] (Gageler J).

<sup>220</sup> *Ibid* [106] – [107] citing *Buccini* (1930) 253 NY 256 (Cardozo CJ); American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2010) §38(2)(b).

<sup>221</sup> *Slowey v Lodder* (1901) 20 NZLR 321, 366 (Connolly J) endorsed by the Privy Council in *Slowey v Lodder* [1904] AC 442.

<sup>222</sup> *Mann* (n 23) [104] (Gageler J) citing *Segur v Franklin* (1934) 34 SR (NSW) 67, 72 (Jordan CJ) and *Horton v Jones* (1939) 39 SR (NSW) 359.

<sup>223</sup> Stevens, 'Disaster' (n 29) 583.

is under a powerful attack. It has been argued that each one of the constitutive elements of the formula fails to epitomise the normative structure and the operational mechanics of restitutionary claims. This is unfortunate due to the paradigmatic significance of those claims in daily economic activities. Professor Stevens suggested that restitutionary claims should be perceived through a multiplicity of conceptual frameworks to provide the basis for understanding the key unjust enrichment decisions of the UK appellate courts in the last few decades. As Stevens shows, a careful assessment of the leading cases seriously undermines the coherency and internal rationality of the four-stage formula. Stevens' negative thesis is particularly appealing on the point of his criticism of the second element of the formula: the lack of directedness between the action of plaintiff and the defendant.

At the same time, Stevens' positive thesis is not free from deficiencies. It could be argued that this alternative (or more precisely the alternatives) overly blurs the classical private-public division. Some central aspects of the positive thesis may require further qualification and clarification, especially on the points of the improperly collected taxes, the defendant's acceptance of mistaken payments and the blunt rejection of the rights-based analysis. Furthermore, as we have seen, the unjust enrichment supporters have vehemently pointed out the remarkable similarity between some key aspects of Stevens' positive theory and the essentials of contract law and contractual liability. This challenges the doctrinal and conceptual purity of the positive thesis.

Assessing Australian jurisprudence in light of the current heated debate on the nature and doctrine of restitutionary claims is not an easy task. While much of Stevens' criticism sound, the positive dimensions of the argument are open to criticism. One crucial difference between the UK cases and their Australian counterparts is the divergence in their focal point. While the UK cases predominantly involve scenarios of lacking the directedness between the parties (cases such as *Lipkin Gorman, Menelaou, Banque*), the Australian cases predominantly presented situations of the existing contract between the parties (cases such as *David Securities, Roxborough & Mann*). This may suggest that Stevens' criticism may apply to a lesser degree to the Australian landscape, especially due the resemblance between his conditional performance category and the total failure of the basis factor under the unjust enrichment formula. Accordingly, Australian jurisprudence as it currently stands cannot be described as a 'disaster', even in Stevens' terms.

Unfortunately, both the unjust enrichment formula and Stevens' categories do not delineate the public law's dimensions in the cases of improperly collected taxes. Both accounts do not place those cases into an analytically distinctive category of restitutionary claims. Ironically, on this point a parallel

could be drawn between the key UK (such as *DMG & Sempra*) and Australian cases (such as *David Securities & Roxborough*) as those involved taxation issues to some degree. This conceptualisation exercise and the clear parallel between the systems would need to wait for another day.

Perhaps, Australian courts should extensively assess and review their vision of restitutionary claims in the wake of the growing criticism of the Birks' four-stage formula. . Continued judicial hesitancy of the courts to forge their own path with respect to restitutionary claims ultimately risks exposing Australian private law to the inadequacies exposed by the problematic UK appellate court decisions.