
Restitution and Equity

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The acceptance and potential growth in Australia of the law of restitution, based upon the concept of unjust enrichment, raises some questions about its place within our legal framework. In particular there has been some concern about its effect on and its relationship with equity. It is suggested that there are areas of overlap between the two. That is, where restitution in equity would fit within the unjust enrichment framework. In this article, three examples of such potential overlap are analysed to compare the respective principles at work in equity and unjust enrichment in a more detailed manner than has been previously attempted. It has been suggested that the integration of the relevant equitable principles is still one of the greatest challenges facing the law of restitution. This paper is an endeavour to better understand the real nature of any relationship and the conflicts that apparently exist between these two areas of law.

Introduction

In theory, restitution is that area of law which describes all claims based upon the concept of unjust enrichment.¹ To make out unjust enrichment, as the conceptual framework has developed, one is required to establish the following four elements:

- The enrichment of the defendant
- That the enrichment was at the expense of the plaintiff
- That the enrichment was unjust
- That there are no defences

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1 R Goff and G Jones *The Law of Restitution* 4th ed. London Sweet and Maxwell 1993 at 3.

Although in practice unjust enrichment has not been accepted yet as providing a generalised right to restitution in Australia, it has been given expression through particular categories of unjust factors.² That is, the unjust element in the above framework has been tied to certain recognised concepts. The High Court has confirmed that unjust enrichment, as determined by these accepted unjust factors, can be the basis of restitution. It has accepted for example that an action for restitution of a benefit conferred under a mistake of fact³ or law⁴ properly lies in unjust enrichment. More recently it has recognised such principles as the basis for restitution where a total failure of consideration can be established as the unjust element.⁵

The manner in which the law of restitution has been developing creates some interesting questions about how this area of the law fits within our current legal framework. Some attention, for example, has been given to its effect on the law of contract and the fact that it can independently support restitution of benefits unjustly retained.⁶ A more difficult issue it seems is the nature of its relationship with equity. At least in theory it is claimed unjust enrichment draws on existing principles from various sources⁷ and is to be found in equity as well as at common law.⁸ If restitution in the manner described is evidenced in equitable cases there is the potential for the one remedy to be explained upon apparently different grounds. Given the growing acceptance of unjust enrichment in this country the relationship between the two needs to be explored in more depth than has previously been considered in order to resolve such fundamental matters. This is particularly so if one is to accept the proposition that all examples of restitution should be explainable on the basis of unjust enrichment.

It is suggested that despite the many circumstances where the approaches in equity and the law of restitution are wholly independent there are some occasions where they have the potential to overlap. That is, where restitution in equity would fit within the unjust enrichment framework as suggested. This overlap has previously been identified, particularly as between restitution and the doctrine of unconscionability. Commentators have shown how critical conduct which has given rise to restitutionary relief in equity involves the unjust enrichment of the defendant.⁹ The relationship between the two has been described as uncertain and controversial and despite some more recent guidance as to the manner in

2 *David Securities Pty Ltd v Commonwealth Bank* (1992) 66 ALJR 768; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Baltic Shipping Co v Dillon* (1993) 111 ALR 289.

3 *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662.

4 *David Securities Pty Ltd v Commonwealth Bank* (1992) 66 ALJR 768

5 *Baltic Shipping Co. v Dillon* (1993) 111 ALR 289

6 *Ibid.*

7 P Birks *Restitution — The Future* Sydney The Federation Press 1992 ix,x.

8 R Goff and G Jones *supra* n.1 at 3.

9 K Mason, 'Restitution in Australian Law' in P Finn (ed) *Essays on Restitution* Sydney Law Book Company 1990 at 20.

which we should consider unjust enrichment as the basis of restitution, there is little to make one reconsider or doubt this description. Confusion has been fuelled by general associations between the two areas of law. One commonly cited example comes from the comments of Toohey J. in *Baumgartner v Baumgartner*¹⁰. In this case Toohey J. questioned whether one approach was any more principled than the other and thought that in the manner in which he qualified them each was as much at ease with the authorities and capable of ready and certain application. It is particularly difficult to see how the principles relate when looking at the way various jurisdictions have used them. Consider the question of the proprietary rights of unmarried partners, the case before Toohey J. English courts have used the doctrine of estoppel, Canada relies on unjust enrichment and in Australia the courts have relied upon unconscionability as the basis for restitutionary relief. Each applies different causes of action to similar fact situations to come up with what appears to be similar results.

In 1990, unconscionability, which has been undergoing great expansion, was seen as having 'the potential to widen, if not remove, the boundaries of the law of restitution in Australia'.¹¹ In the same year Getzler¹² compared the approaches as grounds for judicial intervention and expressed considerable reservations in the adoption and use of unjust enrichment in Australia. He argued equity was giving appropriate expression to the evolving notions of justice and was clearly superior to unjust enrichment. In his view unjust enrichment is a 'naked concept'.

On the other hand proponents of unjust enrichment argue the concept is founded upon a complex system of rules which are evident within the framework discussed and cannot be, nor should be, compared with unconscionability. Jones accuses unconscionability as being unprincipled and is extremely concerned about the 'yoking' of the two concepts by the Australian High Court.¹³ In Birks' view unjust enrichment simply draws on existing principles from various sources and is not in conflict with them. He does not believe there is any battle to be fought between the two but rather that equity is simply a valuable source of the principles.

These few examples of the conflicting views and arguments about the role of restitution and its relationship with equity highlight the general nature of the criticisms. That is, one doctrine is argued to be more principled than the other in a competitive sense. However, areas of overlap between the two provide an opportunity to undertake some analysis of the respective principles at work in specific areas to obtain a more precise comparison. And perhaps even more importantly

10 (1987) 62 ALJR 29.

11 K Mason, *supra* n.9 at 37.

12 J Getzler 'Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention' (1990) 16 MULR 283.

13 G Jones 'The Law of Restitution: The Past and the Future' in A Burrows (ed) *Essays on the Law of Restitution* Oxford, Oxford University Press 1991 at 10.

for the law of restitution, if unjust enrichment indeed draws on equity as well as the common law, then it is important for it to be able to integrate and explain those cases in equity which are examples of restitution. This article identifies examples where equity requires a defendant to give up an enrichment obtained at the expense of the plaintiff in a manner which would equate with restitution. This approach necessarily indicates an accent on the remedial aspect of the law of restitution, however, it is the method by which one can identify the common ground. Once those areas are identified one can compare the basis of the decision in equity with the framework of unjust enrichment. It is hoped that analysing the disputed principles on a common basis would identify the real nature of any conflict and assist in a better understanding of each set of principles and how they might improve a total approach to the cases of restitution.

The inspiration for this article came from the work of Beatson and Dawson.¹⁴ Beatson identifies the necessity of an integration of the principles of equity into the law of restitution as being 'still the greatest challenge of the law of restitution'.¹⁵ He refers to the original challenge of Dawson to tie together all resources for the prevention of unjust enrichment despite their diversity of origins. Beatson however goes further and suggests the appropriate approach.¹⁶ The first step is the identification of those underlying doctrines and remedies of equity that may be based on restitutionary grounds. This is the focus of this article which examines cases in the following three areas evidencing the potential overlap:

- Relief against forfeiture;
- Proprietary estoppel and acquiescence; and
- Property disputes of spouses.

Upon a comparison of the respective principles at play in each of these areas it is discovered that, unlike unjust enrichment, equity has not overtly found it necessary to establish the enrichment of the defendant (from the defendant's perspective) prior to ordering restitution. It is argued that this is perhaps explainable within the doctrine of unconscionability itself that equity relies upon in each of these examples. It is also apparent that although equity, in theory, has a broad range of remedies available to it, there is the appearance in these areas that the doctrine of unconscionability is tied to particular relief. This may be seen as limiting the doctrine itself. Perhaps greater use of personal remedies would improve the flexibility in the way in which the doctrine is applied. Finally it is suggested that in many respects the two areas are complementary and that they should be seen as providing useful alternative causes of action.

14 J Beatson *The Use and Abuse of Unjust Enrichment* Oxford, Oxford University Press 1991 at 244–58.

15 *Ibid.* at 245.

16 *Ibid.* at 257–258.

Relief Against Forfeiture

The scenario which formed the crux of the equitable cases in question involved the purchase of land by deposit and one or more subsequent payments. The purchaser defaults before the final payment and, as allowed for under the contract, the vendor seeks to forfeit the purchaser's interest in the property, the deposit and perhaps also instalments that may have been made prior to the breach. To complicate matters, the vendor's conduct itself may have in some way contributed to the purchaser's breach or put into question the innocence of that party in enforcing the legal rights attributable to them under the contract. The injustice which equity appears to be trying to undo revolves around the following three consequences, if forfeiture were to be allowed:

- The windfall gain which the vendor is perceived to obtain in circumstances where the purchaser may have improved the property in anticipation of ownership;
- The gain of the non-deposit instalments paid, which may bear no relationship to the damages that may have been suffered by the vendor as a result of the purchaser's breach; and
- Less significantly, the potential for a gain in the value of the property due to the natural increment of its worth in the market.

There is the perceived need to adjust the benefits and losses of the parties in a more appropriate manner than is provided for under the contract. One basis upon which equity has intervened is through the doctrine of unconscionability. The unconscionable conduct is identified as the insistence by the vendor upon the contractual legal right of forfeiture in circumstances where the conduct of the vendor would make that forfeiture inequitable. Where such unconscionability has been made out the courts have awarded the remedy of specific performance to the purchaser despite the fact that the contract has been breached by that party. The consequence of this, of course, is that the purchaser's ability to proceed with the contract and obtain the legal interest in the property is restored. *Legione v Hately*¹⁷ is the classic example. In this case the purchasers of land under an instalment contract, after making the deposit, went into possession of the property and erected a house. The purchasers failed to make the payment of the balance of the monies at the appropriate time and the vendor gave notice of the default and required completion within a stipulated time frame. By the conduct of a clerk at the offices of the vendor's solicitors the purchaser was lead to believe a later settlement than allowed for under the notice might have been acceptable. The vendor instead, sought to forfeit the purchaser's interest in the property pursuant to the

17 (1983) 57 ALJR 292.

notice refusing to allow the later settlement. The majority of the Court found that the conduct of the vendor through the solicitors, in relation to the notice of default and the timing of enforcement of the forfeiture, was such as to make the insistence upon their rights under the contract and notice unconscionable. The equitable relief granted in this case was the specific performance of the contract to enable the purchasers to acquire the land on which they had constructed their house.

In the broad sense, because equity's conscience seems to be raised by the unjust retention of benefits and not the damages to the plaintiff, the approach may be argued to be restitutionary. However, these are not examples of restitution. Although the order of specific performance appears to require the handing up of the benefit to the vendor it goes much further than that in creating an obligation to perform the contract. The purchaser is not being awarded the value of any benefit retained by the vendor (restitution) but the ability to perform the contract to acquire a legal right in the whole of the subject matter of the contract. In doing so equity looks at a wide range of factors similar to the issues within unjust enrichment including the conduct of the vendor and the resultant benefit to them if specific performance was not allowed. However, at least on the face of it there is a slightly different purpose.

Equity has still given relief against forfeiture, in a form other than specific performance, where unconscionability has not been established. Its jurisdiction to do so stems from a general authority to grant relief from penalties. In such cases the court has not awarded a proprietary interest but required the vendor to hand up the value of the improvements. These are examples of restitution. The principles at work in this area are most clearly evident in the judgement of McPherson J. in *Lexane Pty Ltd v Highfern Pty Ltd*.¹⁸ When specific performance is not appropriate equity will still 'consider the extent to which a defaulting purchaser is entitled to relief from forfeiture of money paid under the contract and of benefits conferred. As was recognised by the High Court in *Petrie v Dwyer*¹⁹ ... the rules of equity are generous to such a purchaser.'²⁰

The rules described through the judgement may be summarised as follows:

- As to the sums paid by the purchaser over and above the deposit, equity will grant relief in restitution of those sums and interest paid thereon pending completion. At law it is recognised that the money would be recoverable as money had and received upon a total failure of consideration. Of course equity may still intervene to relieve against the forfeiture of an unreasonable deposit.
- As to the improvements to the forfeited property, it is claimed 'the purchaser is entitled to restitution in respect of permanent improvements made to the land

18 *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd. R. 446.

19 (1954) 91 CLR 99 at 106.

20 *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd. R. 446, 454.

while in his possession to be measured by the extent to which the value of that land has been enhanced'.²¹ This is subject to reasonable rent to be paid by the purchaser.

- The purchaser also must submit, in order to achieve his restitution, to the common law damages suffered by the vendor.

These equitable principles were analysed against the framework of unjust enrichment. The unjust factor for the purposes of that framework could be satisfied on the basis of a total failure of consideration. That is, there was a total failure to provide what was bargained for (the title to the property) regardless of any enjoyment gained from the short period of use by the plaintiff. More fundamental however is the question as to whether or not the defendant had been enriched in the first place?

(a) Was the defendant enriched?

A review of the decisions reveals that although equity requires the vendor to give up monies equivalent to the alleged benefit of the improvements to the property it does not appear to adequately consider the question of whether that vendor has indeed benefited from the improvements at all. That is, equity is requiring the vendor to give up benefits which it assumes to exist but which on the principles of unjust enrichment could not adequately be established. There will be no enrichment within those principles where the defendant could 'subjectively devalue' the alleged benefit.

Subjective devaluation is based on the argument that a defendant will not be benefited if he or she does not personally value the goods or services in question.²² It is a matter of personal and economic freedom. Regardless of whether there may be a market for the item, it is argued that the particular good or service may not be of any value to the recipient because it is not desired by them personally. Further, even if it could be said that the recipient does value the item it is claimed that recipient should have the economic freedom as to how they choose to spend their money. They may, had they the choice, given preference to some other item they valued more highly or simply chosen not to incur that expenditure at that time. Thus, where the defendant has not received money or realised the alleged benefit he or she will not be taken to have been enriched unless one can overcome this ability to subjectively devalue. One may overcome any attempt to subjectively devalue if it could be established that the defendant has been incon-

21 *Ibid.* at 455.

22 Where the benefit is money or the item in question has been realised the defendant will be accepted as being enriched.

trovertibly or objectively benefited or that the alleged benefit had been 'freely accepted'.²³

In *Lexane Pty Ltd v Highfern Pty Ltd* it seems there was no reason why the defendant should not have been able to subjectively devalue the alleged benefit. The contract contemplated possession and the preparation and registration of a building units plan but not the improvements which were made. The vendor did not act unconscionably in bringing about the breaches and in fact seemed to act quite generously in the circumstances. It could not be said on those facts that the vendor contemplated the receipt of the benefit nor accepted it. Yet, restitution to the purchasers for fixtures and fittings to the value of \$900,000 was ordered. This was the sum claimed to be spent by the purchasers and as far as is evident in the case these improvements were not realised. It is submitted this cannot be an accurate assessment of the benefit to the vendor.

In *Stern v McArthur*,²⁴ Brennan J. agreed with the approach taken in the above case and would have made a similar order. That case again involved the situation where, under an instalment contract for the purchase of land, purchasers took possession and made improvements (erected a house) before all payments were made. Subsequently, there were several defaults in respect the instalments. It was conceded that there was no wrong doing or fault on the part of the vendor yet the majority of Deane, Dawson and Gaudron JJ. still granted relief in the form of specific performance upon the doctrine of unconscionability given the circumstances surrounding the exercise of the legal right. The purchasers were allowed into possession with the knowledge of the vendor but it is not clear if they knew of the erection of the house. In any event, at worst, they acquiesced in the construction but with the belief they would gain no interest in it. They could not have 'accepted' the benefit.

It is interesting to wonder what order may have been made in *Legione v Hateley*²⁵ if unconscionability was not found and specific performance not ordered. It is anticipated that the vendor would have regained the property subject to restitution of the improvements. If that was the case this would have been an example of a more serious injustice at least in the terms of unjust enrichment. In that case it was clear the vendor did not even know of the improvement.²⁶ Accordingly there would be no just reason for forcing the vendor to pay for the purchaser's poor judgement.

23 P Birks *An Introduction to the Law of Restitution* Oxford, Oxford University Press 1989 at 114-28 where Birks discusses his 'Three Tests of Enrichment'. Though the tests are common others may classify them differently. The controversial concept of free acceptance is not discussed in this article in depth but is important to the analysis undertaken.

24 (1988) 1 LR (NSW) Eq. 1.

25 *Supra* n.17.

26 (1983) 152 CLR 406, 414 per Gibbs C.J. and Murphy J.

(b) Unconscionability as an aid to establishing the enrichment

This criticism raises further issues as to the difference in these grounds for relief. It begs the question as to what would be the situation if equity sought to grant restitution of the improvements (and not specific performance) on the basis of unconscionability. Where unconscionability can be established perhaps equity can not be said to have inappropriately ignored the question of whether the vendor has been benefited. Although the unconscionability cases have not expressly considered the matter it seems to be consistent with their findings to suggest unconscionability on the part of the vendor would assist in determining whether that party has been benefited for the purposes of unjust enrichment. It may be appropriate in such cases that the vendors be required to accept there has been an enrichment through the improvements because of their own conduct in bringing about that result for themselves. The unconscionability may remove any ability in the defendant to subjectively devalue the benefit.²⁷ In theory therefore there may be a close relationship between equitable notions of unconscionability and the restitutionary concept of unjust enrichment however in this type of case it is unlikely the two can overlap in practice. The reason is that the unconscionability on the part of the vendor has been clearly expressed to lie in the assertion of the legal interest resulting from the forfeiture. Thus, although the range of relief against forfeiture may appear to be flexible, the remedy is most likely to take the form of specific performance and not restitution. The minimum required of equity when the conduct of the vendor has taken away the purchaser's ability to perform the contract is to restore that right (specific performance).

(c) Inconsistency?

This theoretical relationship between the two doctrines does raise a further issue for debate. In these forfeiture cases it is likely specific performance (and through it the ability to obtain the whole of the improved property) would be valued more highly than restitution (requiring the giving up of just the value of the improvements) by the plaintiff. It would appear inconsistent therefore to find that specific performance may be more easily obtained. It is submitted that one case in particular evidences this inconsistency. *Stern v McArthur*²⁸ is an example where the grounds to support restitution of the improvements on the basis of unjust enrichment would not appear to be satisfied yet equity was quite prepared to grant specific performance of the contract. Arguably, in this case, the conduct of the vendor was not such as to suggest there was any acceptance of the improvements²⁹ making it difficult to establish the necessary element of enrichment.

27 This is consistent with Birks' view of free acceptance as establishing the necessary enrichment as explained in: P Birks, 'In Defence of Free Acceptance' in A Burrows (ed) *Essays on the Law of Restitution* Oxford, Oxford University Press 1991 at 105.

28 (1988) 81 ALR 463.

29 Through the concept of free acceptance or otherwise.

Proprietary Estoppel and Acquiescence

Proprietary estoppel refers to those cases where one party improved the property of another and the real owner acted in such a way that equity was called upon to prevent that owner obtaining the legal benefit of the improvements. It included circumstances where the owner merely stood by and permitted another to grant him or her that benefit (passive encouragement). It is only in particular cases of proprietary estoppel or acquiescence where restitution is in evidence. Typically in this type of case a plaintiff has mistakenly improved the property of the defendant who, at least suspecting such mistake and knowing his or her own rights to the property, allowed the benefit to be conferred. Equity has on occasion, provided relief in such circumstances, by requiring the owner of the property to pay for the value of the improvements made by the plaintiff. This has been secured by a charge over the property. It is argued the court is granting restitution on such occasions. It is restitution because this remedy focuses on the value of the improvements which at law would be seen as belonging to the owner of the property. Equity is requiring the giving up of a benefit in the hands of the defendant which has been unjustly retained.

On reviewing these decisions in terms of unjust enrichment it is submitted that the two approaches can be seen as being complementary. Each lends support to the other and in some ways may even serve to explain aspects of the other. Considering both sets of principles together could provide a better overall approach to these types of cases.

These conclusions are evidenced in the following findings:

- Both approaches would rely upon the mistake by the plaintiff as being fundamental to the action. This is more overt in unjust enrichment principles where a mistake can easily be relied upon as the necessary unjust factor.³⁰ Correspondingly, when the particular elements of unconscionability are unravelled it is also clear that, from the perspective of the defendant, at least being suspicious of a plaintiff's mistake is the key.³¹
- Again, one of the major difficulties with the application of unjust enrichment principles to this type of case lies in establishing that the owner of the property has indeed been enriched by the improvements made by the plaintiff. The difficulty is that where the defendant has been passive in allowing the improvement it will be argued that such defendant may still be able to subjectively devalue any alleged benefit. As in the view of Birks it is consistent to suggest that if the defendant has acted unconscionably that it would be inappropriate to still allow subjective devaluation. The unconscionability itself should prevent the defendant from denying any enrichment.

30 Although it has been argued that something less than an actual mistake may be adequate for the purposes of unjust enrichment it is suggested that such a view is not supportable by the cases.

31 PD Finn 'Equitable Estoppel' in Finn (ed) *Essays in Equity* Sydney Law Book Company 1985 at 81.

- Apart from the issue of the plaintiff's mistake the other indicia considered in establishing unconscionable conduct in these cases focus on the knowledge the defendant has as to their own interest in the property and the conduct of the plaintiff. Arguably, restitutionary principles can further explain the reasons for the attention to such matters which are not articulated in the cases. All such indicia assist in establishing that the defendant is working towards (albeit passively) the enrichment of himself or herself. They evidence the very reason why equity has found that the disgorging of the benefit has been the most appropriate response out of the broad range of remedies that may have otherwise been available.

Property Disputes of Spouses

Principles of equity and restitution have been used, in various jurisdictions, in the resolution of property disputes between spouses. This is outside of course, the operation of relevant legislation dealing with married couples or de facto relationships. The cases have predominantly involved unmarried couples however there have been examples of actions between married spouses.³² The dispute arises when the personal relationship between these parties comes to an end. Common to these cases is that one of the parties has retained legal ownership of property to the exclusion of the other and it is claimed that this exclusive ownership is inappropriate given the contributions of the other party. The contributions could be financial or cover a wide range of non-financial services and those contributions may relate directly or indirectly to the acquisition, maintenance or improvement of the property in question. The remedy being sought has usually been the recognition of a proprietary interest in the relevant assets in the name of the other party by way of the imposition of a trust.

In Australia and England, equity sought to expand the rules relating to resulting trusts, constructive trusts and proprietary estoppel as a means of dealing with this type of action.³³ The approach was based upon a process of finding a common intention (actual or inferred) between the parties that an interest in the property, held entirely at law by one of the parties, would be conferred to the other. This approach has been criticised as an artificial process because it is unlikely parties

32 The Canadian decision of *Rawluk v Rawluk* (1990) 65 DLR (4th) 161 considered the potential of general law principles to apply concurrently with the relevant legislation and found this was not appropriate. The Supreme Court of New South Wales decision of *Bryson v Bryant* (1992) 29 NSWLR 188 considered a claim for a trust in favour of a wife (since deceased) in circumstances where the husband had left property by will to a third party upon his death. The action was brought by the sole beneficiary of the wife's estate.

33 M Neave, 'Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability' in Youdan (ed) *Equity Fiduciaries and Trusts* Sydney Law Book Company 1989 at 250.

to the relationship ever make clear arrangements about their property interests. It is said not to reflect the reality that parties may not ever spell out or evidence any understandings about how any property is to be treated among themselves particularly in the circumstance of a premature end to their relationship.³⁴ The Australian High Court, through the decisions of *Muschinki v Dodds*³⁵ and *Baumgartner v Baumgartner*³⁶, arguably liberated³⁷ the courts in this country from this artificiality by awarding the remedy of a constructive trust in this type of case on the grounds of unconscionability. The unconscionability is identifiable in the legal owner of the property denying the beneficial interest of the other.³⁸

The area of overlap between equity and restitution in respect of such family property disputes is perhaps a little more narrow than may be first apparent. Where there is a clear common intention or agreement between the parties equity is appropriately in a position to enforce the arrangement despite the extent of benefit to the defendant or loss to the plaintiff. This is not restitution. The area of concern is the common situation where the parties have not contemplated the demise of the relationship and the consequences of the manner in which the property has been held. This is where unconscionability and unjust enrichment have been employed to resolve the same issue. Despite clear difference in the basis of these doctrines the cases have moved towards an analysis of the contributions of the plaintiff in determining the result. Both approaches have evidenced the desire to move away from artificially finding appropriate intentions for the parties.

The most desirable approach in these cases is to be able to have proper regard to all contributions³⁹ of the parties with the flexibility to consider the broad possibilities with this type of relationship. An approach based upon identifying benefits to the defendant has particular merit in its ability to take into consideration non-financial contributions. A claim that a defendant has been incontrovertibly or objectively enriched by domestic services would be difficult to dispute in our current social environment. The Canadian decisions at least have had little difficulty in finding domestic contributions of one spouse enrich the other in the saving of an expense. Equity has no doubt developed a wider appreciation of the contributions of the plaintiff that may be taken into account under the doctrine of unconscionability and there may be a point where it can be said, if not so already, that any difference in this approach is in name only.

There is however at least one important distinction which is not readily apparent. Provided one can establish the appropriate unjust element, the enrichment principles can identify where there is a benefit which is required to be given up.

34 *Ibid.* at 262-3.

35 (1985) 160 CLR 583.

36 *Supra* n.10.

37 M Neave, *supra* n.33 at 270.

38 M Cope, *Constructive Trusts* Sydney Law Book Company 1992 at 859.

39 *Ibid.* at 893.

The appropriate remedy may not be proprietary in nature but the benefit can still be valued and disgorged. Equity however has not adequately shown how in these cases there may be remedies available other than the constructive trust. Arguably, because of the proprietary interest provided by this remedy the courts have been more reluctant to recognise contributions which do not have a proprietary flavour. This may be seen as limiting the flexibility of the unconscionability doctrine in this type of case. This is reflected in the unconscionability, being expressed as the denial of the other party's beneficial interest in the property. What of unconscionability in failing to compensate or recognise non-proprietary contributions?

Given the recognition of unjust enrichment in Australia there is the potential for it to be pleaded in such cases alongside unconscionability and this has been done.⁴⁰ The difficulty has been the necessity in the Australian context of fitting the case into an appropriate unjust factor. This may be achieved in theory by relying upon free acceptance or total failure of consideration however these options are unlikely to find favour in practice at this time. This need for categorisation can have the unfortunate result of the appearance of artificiality when this is just the evil which is meant to be avoided. In any event, given the history and development of the doctrine in Australia, unconscionability would be preferred to unjust enrichment, particularly where there may be no apparent difference in the result.

It would be unfortunate if the potential for the two doctrines to operate together were not further considered. If it is still true that the enrichment approach can afford the court a little more flexibility, with respect to non-financial contributions and personal remedies, it would prove a valuable option. To accept this option is not to rule out the operation of unconscionability particularly and most importantly where common intentions or arrangements are evident and enforceable at equity.

Conclusions

The first striking feature about the study undertaken is the degree of care that is necessary to correctly identify when equity has adopted a restitutionary approach. In the examples considered it has been shown that any area of overlap is likely to be quite narrow when compared with the very broad nature and operation of the relevant equitable grounds.

However, in the areas where it may truly be said that equity has required restitution there is the potential in theory for the same remedy on the same set of facts to be explained upon different grounds. This study suggests the courts should grasp the potential to consider both doctrines in an attempt to resolve inconsisten-

40 *Bryson v Bryant* (1992) 29 NSWLR 188.

cies and enhance the total approach in such areas of overlap for the ultimate benefit of deserving plaintiffs and the clarity of law and principle.

In the specific areas of overlap considered a comparison of the principles of equity and unjust enrichment has revealed a few significant issues.

(a) The issue of enrichment

Equity has not overtly found it necessary to consider whether or not a defendant has been enriched at the expense of the plaintiff before ordering that the defendant give up the value of what has been received. This is not in issue when the defendant has received money but it is a matter of concern when one considers the claim of a plaintiff who has provided goods or services which have not been or are not capable of being realised. Equity does not appear to recognise that a defendant should be capable of subjectively devaluing such goods or services in the appropriate circumstance. It must flow from this that equity does not consider it necessary to value what it is requiring to be disgorged from the perspective of the defendant. Whether or not the defendant has personally been enriched as a result of the plaintiff's actions appears to be irrelevant.

There may indeed be reasons for this which are inexplicable within the framework of unjust enrichment. It might be argued that equity is taking a compensatory view in awarding its remedy and coincidentally in these cases it is appropriate to compensate the plaintiff to the same degree to which a defendant may be seen to have been enriched. Although this is arguably the approach in some cases there are many others where this explanation is not sustainable. The value required to be given up by the defendant in equity has apparently been valued as the sum equal to the amount by which the wealth of the defendant has been increased. However, in these cases the level of this enrichment has been assumed by some objective test without any consideration as to whether or not the defendant actually values the item or service under consideration.

(b) Finding enrichment within the doctrine of unconscionability

It is accepted at least in terms of unjust enrichment that there will be circumstances when a defendant can be said to have been incontrovertibly or objectively benefited and the court can appropriately seek to value the extent of such benefit. It would be consistent with this approach to suggest a defendant should be denied the right to subjectively devalue any benefit and accept that they have been objectively enriched where their conduct is such as to bring about the receipt of the goods or services for themselves. Their conduct itself may evidence a form of acceptance which would support the type of objective approach taken in equity. The finding of unconscionability might on the face of it justify the lack of attention to this issue. This appears to neatly solve any inconsistency in the approaches. In this sense considering these principles together serves to further explain the importance of at least one aspect of this equitable doctrine.

However neat this appears in theory, for the purposes of completeness, one still needs to be sure that unconscionability in equity will always be able to identify when a defendant should be taken to have been enriched. There is some evidence this will not always be the case.

(c) The limitations of categorising 'unjustness'

The unjust element of unjust enrichment has been given expression through accepted factors. With the resolution of property disputes of spouses, this element is not so easily identified despite the fact that it is a clear example of restitution. This can lead to an artificial categorisation in order to fit the framework.

(d) The power of explanation

There have been competing claims from various sources suggesting that both unconscionability and unjust enrichment are concepts that are too general in nature and which have the potential to resort to undisciplined notions of fairness and justice. These claims have been made and defended by the respective supporters of each as though the two provide competing alternatives. Despite their differences however there are linkages and similarities which potentially explain and reinforce each other. These may be seen as providing some evidence that there is perhaps common underlying goals or principles. At the very least it suggests one discipline may complement the other to better provide for and explain the restitutionary result considered most appropriate in the circumstances.

(e) Flexible remedies

The equitable doctrine of unconscionability has been at the heart of each of the areas of overlap which have been considered. In theory there are a range of remedies available in equity to appropriately provide whatever relief is necessary for each form of unconscionable conduct. However, in at least two of the examples considered, the doctrine has the appearance of being tied to a particular remedy. Where protection has been sought against the forfeiture of interests in land since *Legione v Hately*⁴¹ the impression is clear that if unconscionability on the part of the vendor could be established specific performance of the contract would be appropriate. This is because the unconscionability lies in the insistence by the vendor upon the contractual right to forfeiture given the circumstances of the case.

Secondly, consider the claims of spouses resulting from failed relationships which are not protected by legislation. Such actions in this country since *Muschinki v Dodds*⁴² have been based upon the unconscionability of one party insisting upon

41 *Supra* n.17.

42 *Supra* n.35.

their sole legal right to property held in their name given the contributions of the other party. The unconscionability in this sense is tied to the property and is relieved by recognising the beneficial interest of the plaintiff in that property by way of a constructive trust. One seems to automatically lead to the other. A non-proprietary remedy to the plaintiff spouse, would seemingly not be available on the basis of unconscionability, even where this may be justified on the basis of the particular type of contributions of the plaintiff.

The fact that a particular remedy is likely to result from a finding of unconscionability can affect the way the doctrine itself is applied. In the cases involving spouses the fact that the remedy will be proprietary in nature may affect the extent to which non-proprietary contributions will be taken into account. It seems it can not be equally said a spouse has acted unconscionably in taking the benefit of contributions and not paying for them outside of proprietary considerations. Although equity may have a broad range of responses available to it there is reason to suggest more effective use could be made of personal remedies. Restitution however can easily take a personal as well as a proprietary form given that the focus is on any type of benefit to the defendant. This flexibility of remedy allows for greater flexibility in the cause of action.

(f) Competitors or Alternatives?

Increasingly there is the potential in Australia for unjust enrichment to be pleaded alongside causes of action in equity. It is not appropriate to suggest one should be preferred over the other. Depending upon the type of case, restitution based upon unjust enrichment will provide a legitimate alternative to the relief available in equity. In total it may mean there will be wider options to a plaintiff not only in respect of remedy but in the elements necessary to make out the grounds for relief.