ANGLO AUSTRALASIAN LAWYERS SOCIETY

Quasi-contract: Roman Foundations of the Law of Unjust Enrichment and Restitution

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Contents

Introduction

1 There have been several remarkable attempts in the past 60 years to deduce, from a vast accretion of cases, principles concerning the circumstances in which one person, who has received, at the expense of another, some benefit that it would be unjust to retain, will be required to disgorge that benefit to that other person. In 1966, *The Law of Restitution,* by Robert Goff and Gareth Jones, signalled the beginning of academic interest in the topic. The topic was then developed in 1985 by Peter Birks, with *An Introduction to the Law of*

Restitution. In 1995 Keith Mason and John Carter took up the burden in Australia with *Restitution Law in Australia*. In 2002, David Johnston and Reinhardt Zimmerman produced *Unjustified Enrichment: Key Issues in Comparative Perspective*. Then, in 2006, James Edelman and Professor Elise Bant published *Unjust Enrichment.*

2 It is not entirely coincidental that several of those authors were Civil lawyers, skilled in Roman law. Thus, Peter Birks was Regius Professor of Civil Law at Oxford and the translator, with Grant McLeod, of Justinian's *Institutes*. David Johnstone KC, who now practises at the English and Scottish Bars, was Regius Professor of Civil Law at Cambridge. Reinhard Zimmermann is a German academic and the author of the majestic *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Justice James Edelman took up Roman law while an Oxford don.

3 Each of those works deals with the notion of unjustified or unjust enrichment and restitution of that enrichment to the person at whose expense the enrichment occurred. That is the notion underlying the sophisticated scheme of "Quasi-Contract" of the Roman law that finds expression in the law of modern Australia.

4 Our knowledge of Roman Law is derived, for the most part, from compilation, codification and restatement of Roman civil law, which was completed on the orders of the Eastern Roman Emperor, **Justinian I** given shortly after he ascended the throne in AD 527.

Those orders resulted in the publication in AD 533 and AD 534 of what has become to be known as the ***Corpus Iuris Civilis,*** or the Body of the Civil Law, comprising ***the Code***, a collection of imperial statutes still in force, ***the Digest***, a collection of extracts from the writings of the classical Roman jurists equivalent to judicial decisions of our common law system, and ***the Institutes***, a textbook for students, which also constitutes a map of the law to enable lawyers to find their way through the Code and the Digest.

5 In the middle of the 2nd Century AD, a Roman jurist, whom we know only as **Gaius**, explained that Roman law recognises not only obligations that arise either from Contract or from Delict, the Roman equivalent of tort or wrongdoing, but also *obligatio quasi ex contractu,* or obligation arising as if out of contract. They were obligations imposed by the law that behaved as though they were contractual, even though they did not arise out of a consensual promise. The Latin word *quasi* means 'as if' or 'as though'. Thus, quasi-contract was the category of obligations imposed by Roman law that did not arise out of wrongdoing or out of consensual promise, either implied or express.

6 For example, someone who receive, from a person who pays in error, a payment that was not due was bound to repay as though a loan had been made to him. The recipient had a liability under the same action as that by which a borrower was liable to a lender. However, as the Digest tells us, a person who was liable on such a ground could not be considered to be liable in contract because the person who made the

payment in error was intending to make the payment, with the intent of discharging an obligation, rather than to contract an obligation with the recipient.[1]

Reception of Roman Law in England

7 After AD 476, the Western, Latin-speaking, Roman Empire had been overrun by barbarian tribes such as the Vandals, the Goths and the Visigoths. Accordingly, while Justinian's *Corpus Juris Civilis* continued to apply in Greek translation in the Eastern, Greek-speaking, Roman Empire, which came to be known as the Byzantine Empire, centred in Constantinople, it was almost completely forgotten in the West shortly after the reign of Justinian. However, at the end of the 11th Century, the *Corpus Iuris* was rediscovered in Bologna, in Northern Italy, and began to be taught at the University of Bologna, the first law school of the modern era. From there, the teaching of Roman law spread throughout Western Europe in the succeeding centuries.

8 From 1066, during the reign of King William I, the Conqueror, and during the reigns of his immediate successors, a local common law developed in England and some of the fundamental principles of that law began to emerge. However, while it is doubtful that the Norman Conquest brought any Roman elements into English jurisprudence, it brought England into close touch with the main currents of intellectual life on continental Europe and Englishmen began to study at foreign

1 See Digest 44.7.5.3.

universities, including those in northern Italy. Englishmen regularly went to Bologna and works on the *Corpus Iuris Civilis* found their way into monastic libraries in England. Accordingly, from the 12th century onwards, the law of the *Corpus Iuris Civilis*, was studied in England.

9 The first teacher, and the real founder, of the study of civil law in England was ***Magister Vacarius***, who was born in Lombardy and studied at Bologna. In the late 1140s, he travelled to England to work in the household of Theobald, Archbishop of Canterbury, and subsequently began teaching at the University of Oxford. He published a book called *Liber Pauperum*, or 'Book for the Poor', for students who could not afford copies of the *Corpus Iuris Civilis.* In due course, degrees in Civil L, namely, Roman Law, came to be conferred at both Oxford and Cambridge Universities.

10 The first systematic treatise on the laws of England, *Concerning the Laws and Customs of the Kingdom of England*, is attributed **Geoffrey de Glanvil**, Chief Justiciar during the reign of Henry II, which lasted from 1155 to 1189. Glanvil's treatise long remained a standard textbook of English law. The author was clearly acquainted with the *Corpus Iuris Civilis*. Thus, the preface of the treatise was modelled on the introduction to Justinian's Institutes. Further, much of Glanvil's terminology was borrowed from Roman law and, in many places, there are statements of legal principle that bear remarkable similarities to rules of Roman law.

11 Between 1256 and 1259, another *Treatise Concerning the Laws and Customs of England*, attributed to **Henry de Bracton**, was published. That treatise also became a leading textbook on the law of England and its influence on the history of English law was considerable. There is ample evidence of the authors' intimate acquaintance with the *Corpus Iuris Civilis*. Thus, Bracton's treatise expressly cites the Digest and the Code of Justinian many times and also refers to Justinian's Institutes. Further, large numbers of passages from Roman law are incorporated in the text without any acknowledgment of their origin. Throughout the treatise, Roman doctrine was used to illustrate and explain the principles of the law or was worked into its substance in a modified form.

12 An interesting observation in Bracton is that the law is called **the art of what is fair and just**, of which lawyers are deservedly called the priests, for they worship justice[2]. That observation was borrowed directly from the Roman jurist, Ulpian,[3] who was referring to the profession of jurists at the beginning of the 3rd Century AD. I shall return shortly to the concept of what is fair and just, as expounded by Lord Mansfield in the 18th Century.

13 In his work entitled *Institutes of the Law of England*, published between 1628 and 1644, **Sir Edward Coke**, who had been Attorney General under Elizabeth I and was subsequently Chief Justice of the

2 See Thomas J McSweeney, *Priests of the* Law (Oxford University Press, 2019), p 6.

3 See Digest 1.1.1.

Court of Kings Bench, regularly referred to Roman law, albeit sometimes without great accuracy. While the publication of Coke's *Institutes of the Law of England* lessened the influence of earlier treatises such as Glanvil and Bracton, Coke often cited Bracton's work without questioning its authority.

14 In the second half of the 18th Century, **Sir William Blackstone** published a treatise entitled *Commentaries on the Law of England,* which was designed to provide a complete overview of English law[4]. Blackstone made considerable use of Roman law as a standard of comparison and regularly attributed the origin of English rules to Roman law. He accepted that the origins of English law included the rules of Roman law and recognised that large portions of Roman law had been incorporated into the law of England by Bracton and later authorities.

15 Blackstone's treatise was of great influence on colonial judges in Australia, since a copy of Blackstone's *Commentaries* was brought to New South Wales with the First Fleet in 1788. Early colonial judges had recourse to the work in matters of land law and criminal, family and taxation law. It was cited profusely by the High Court of Australia in *Mabo v Queensland (No 2)*[5] and has subsequently often been cited in native title cases.

4 *Commentaries on Laws of England* (Clarendon Press, 1765).

5 Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1.

Quasi-Contract Generally

16 Several categories of quasi-contractual obligation are described in the *Corpus Iuris Civilis*. While it is not easy to discern an underlying principle to which they can be reduced, they all involved circumstances where it was perceived that one person has received a benefit at the expense of another that it would be unconscionable for the first person to retain. Further, most have analogies in the common law, which can be traced to Roman law. The most significant, and that which inspired common law concepts of Unjust or Unjustifiable Enrichment, was the *Condictio Indebiti*. However, before explaining the *Condictio*, I will briefly mention some other Roman quasi-contractual causes of action.

Negotiorum Gestio

17 ***Negotiorum gestio***[6], literally meaning management of business affairs, was a significant quasi-contractual claim for the Romans, although it has only limited equivalence under the Common law. It is sometimes referred to as mandate without authority, namely, sticking your nose into other people's affairs without being asked to do so. If one person purports to render a service to another person without being asked to do so, a question arises as to whether the first person is entitled to be reimbursed by the second person for any expense incurred in providing that service. A question also arises as to whether the actor is under a duty to perform the service competently.

6 Institutes 3.27.1

18 The Romans considered that, if one person performs a service for another, which is for the benefit of that second person, it would be unjust if the first person were not compensated for any cost incurred in doing so. The rationale for such a cause of action was that where someone was called away by a sudden event of pressing importance, without having the opportunity of asking someone else to look after and manage his or her affairs, no one would be likely to attend to such neglected affairs if no action was available for the recovery of any expenses that might be incurred in doing so, with the consequence that the affairs of the absent person would be entirely neglected.

19 The services that could be the subject of such a claim could be of any kind. However, the intermeddler had to show that his conduct was reasonable and that, in the circumstances, it was reasonable for him to intervene rather than leave the matter to the principal. A direct action was available to the person whose affairs were managed and a contrary action was available to the intermeddler for negligence in carrying out the task undertaken. The intermeddler was answerable to the absent principal to give an account of his management of the affairs of the absent principal. While there was no obligation to act, if an intermeddler elected to act, the intermeddler was required to act with diligence.

20 Thus, once the intermeddler undertook the task of providing a service to the absent person, the intermeddler would be liable for any *culpa* in the way that he carried out the task. It was not enough for the

intermeddler to display only the standard of care that he or she observed in relation his or her own affairs. Rather, having taken on the task, the intermeddler was required to act as a bonus paterfamilias would act and was therefore liable for culpa levis or mere negligence. On the other hand, if the matter was urgent, the intermeddler was only liable for dolus, deliberate misconduct or gross negligence.[7]

21 The absent principal was required to indemnify the intermeddler in respect of any liabilities properly incurred by the intermeddler in providing the service. In the absence of culpa on the part of the intermeddler, the risk lay with the principal unless the intermeddler did something that the principal would not have done, in which case the consequences were at the intermeddler's risk who was liable even for casus, or pure accident. In such a case, the intermeddler was entitled to set off any profit arising from the intervention against the liability incurred by him.

22 The action did not arise where there the absent person had expressly prohibited any interference in his or her affairs. Further, if the intermeddler had either a moral or a legal duty to act, the cause of action did not arise. In addition, it must be clear that the intermeddler was acting solely for the benefit of the absent person and not in his or her own interest. For example, if I see my neighbour's house on fire and I incur expense in putting the fire out, the question will arise as to whether I have done that to save my neighbour's house or to save my

7 Digest 3.5 2.

own house from catching fire. If I could show that there was no risk of my house catching fire then the costs that I incur in putting out the neighbour's house fire can be recovered as a quasi-contractual claim. However, if I acquired any benefit, there would be an obligation to account for that benefit to the neighbour.

23 If it was shown that the intervention was solely for the benefit of the intermeddler, then the intermeddler would have no right to recover at all. To the extent that it could be shown that both the absent person and the intermeddler benefited, then the intermeddler could recover any expense that was incurred for the benefit of the absent person over and above the expense that would have been incurred if done only for the benefit of the intermeddler. The death of the principal did not affect the position of the intermeddler in respect of action taken up to that time.

24 This is one area where the Roman law of quasi-contract differs from the Common law. Most civil law systems follow Roman law but the common law is much less comfortable about people incurring legal liabilities without knowing it. Subject to some exceptions, the common law has always declined to give a cause of action to an 'officious intermeddler', a person who interferes in the affairs of someone else without being asked to do so[8]. That is to say, the common law does not compensate the Good Samaritan.

8 See *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 238.

25 One exception is where an agent in a pre-existing relationship of principal and agent exceeds his authority in the course of intervening on behalf of the principal in an emergency. In those circumstances, the agent is treated as though he had the relevant authority and would be entitled to reasonable reimbursement. Similarly, the master of a ship has extensive powers in the event of an emergency and can make a decision binding the owner to jettison cargo or to enter into a salvage agreement.

26 A stranger may use necessity to defend an action in trespass. Similarly, in the case of involuntary bailment, the involuntary bailee can deal with the goods if it is necessary to do so to avoid tortious liability in an emergency. If necessities are supplied in an emergency in the absence of a request, a claim may lie. Thus, one can generally recover for the supply of necessities to persons suffering from a legal incapacity. If necessities are supplied pursuant to a request, a restitutionary claim may be available on the basis of the request even if the request does not amount to a contractual arrangement. If a child is in need of food and you provide food for the child, then you will have a right to recover the reasonable cost of doing so. The extent to which you can recover is the lower of the benefit to the child and the cost that you have incurred.

27 **Maritime salvage** is the most significant exception to the principle of the common law that voluntary intervention is not compensable. The principles of maritime salvage are derived from

maritime law which is in turn derived from principles of Roman law. In 1686 Sir William Wiseman, a judge of the Court of Admiralty, citing Digest 3.5.2,[9] said that it would be unreasonable that a man should 'reap a prejudice for his courtesy and goodness'. Thus, if a ship set upon by pirates or by enemies shall be rescued by another ship coming to her rescue, equity would charge the ship thus redeemed with salvage money payable to the rescue ship that so endangered herself. Such salvage money would not only recompense the rescuer for all damages sustained but would stand as future encouragement to others to fight in the defence of those that they see attacked. While those observations have been doubted,[10] they have been cited with approval, in 1828[11] and 1965.[12]

28 To permit recovery, the salvage services must be shown to have been rendered on the high seas. The thing saved must be a recognised subject of salvage, such as a ship, ship's apparel, cargo, freight, aircraft and even life salvage from aircraft and ships in some circumstances. The claimant must be the owner of the salving vessel or one who personally rendered salvage services, usually the master and crew of a salving vessel. The services must be shown to have been rendered

[9] R Wiseman, *The Law of Laws, or the Excellence of the Civil Law, Above All Other Humane Laws Whatsoever Showing of How Great Use and Necessity the Civil Law is to this Nation* (R Rostyon, 1686), p 154.
[10] G Hutchinson, *The Admiralty Jurisdiction and Practice of the High Court of Justice* (Stevens, 1931).
[11] *The Calypso* (1828) 166 ER 221 at 224.
[12] *The Cythera* [1965] NSWR 146 at 153-4; see also LJW Aitken, *Negotiorum Gestio and the Common Law* (1988) 11 Sydney L Rev 566.

voluntarily. That is to say, they must not be within the scope of a pre-existing duty to the owner of the salved property.

29 A salvage claim will not be available if the salvage was undertaken for the salvor's own self-preservation. Further, the salvor must show that there was a danger at sea that gave rise to the need for salvage and the services provided must be shown to have achieved some degree of success. Thus, the salvor's rights of recovery arise only where it is clear that the salvor has achieved a measure of success and the actions of the salvor have saved the ship, the equipment or the cargo from destruction. A would-be salvor, whose attempts to salvage a ship fail completely, would not be entitled to any recovery. Further, the salvor must not be the cause of the damage to the ship, its equipment or cargo. Thus, if one ship negligently collides with another ship causing a threat to loss of the second ship, the proprietors of the first ship would not be entitled to recover anything under principles of salvage for saving the second ship, its equipment or cargo.

30 The general principle for fixing an award for salvage is not just the determination of reasonable remuneration for the work or service performed but an amount that will, in the interests of public policy, encourage others to act as salvors without bearing too harshly on the owners of the salved property. That is to say, the award will normally include an element of profit for the salvor.

Actio Funeraria

31 Related to the action for *negotiorum gestio* was the ***actio funeraria***, under which a person who undertook funeral arrangements without having a legal liability to do so could recover the cost from the person who had that liability. The rationale for such an action was to ensure that corpses were not left unburied and that nobody was buried at a stranger's expense. The person who had the liability was obliged to arrange the funeral but they incurred no penalty if they failed to do so unless they were left something by the deceased as a reward for arranging the funeral. A person who failed to comply with the wishes of the deceased was debarred from the reward. If the deceased made no provision for their funeral, the responsibility fell to the heirs named in the will of the deceased. If no heir was named, the responsibility fell to the heirs on intestacy.

32 Funeral expenses were assessed according to the wealth or rank of the deceased and the Praetor or municipal magistrate was required to determine what should be spent on the funeral. The amount spent could be recovered from the estate of the deceased.[13]

33 Under the common law, the personal representatives of a deceased person are primary responsible for the burial off the body. For that expenditure they are entitled to be reimbursed out of the estate before all other claims. Apart from that primary rule, there is a

13 See Digest 11.7.12.2-

suggestion that, at common law, any householder under whose roof a body lies is responsible for a decent burial of that body[14]. Where a person primary responsible has not the duty to bury the deceased and a stranger does so, the stranger is generally entitled to recover the reasonable expenses of the burial from the person primarily responsible. The stranger may be justified by the necessity of prompt action and the public interest of the disposal of a dead body, coupled with the impracticability of communicating with the person on whom primary responsibility lies. However, a stranger must not act officiously. That is to say, one must not intervene knowing that a more suitable person is ready willing and able to act. This may be an exception to the principle outlined above in relation to *negotiorum gestio*[15].

Jointly Owned Property

34 Assume Titus makes a will and appoints Aulus and Brutus as his heirs in equal shares, and then Titus dies. Aulus and Brutus in effect become tenants in common, in common law terms, of the whole of the estate of Titus. Alternatively, if Titus dies intestate and Aulus and Brutus succeed as *sui heredes*, each of Aulus and Brutus would own the whole of the estate of Titus subject to the interest of the other, in that each has an undivided moiety in the estate, as the common law would describe it. If Aulus and Brutus get on together, they can work

14 *R v Stewart* (1840) 12 A & E 773 at 778.

15 See Buckland and McNair, *Roman Law and Common Law* CUP 1974 p 355.

out what they do with the jointly owned estate of Titus. They might agree to hold it jointly, they might agree to sell it and divide the proceeds or they might agree on a division of the estate between them.

35 However, if the joint heirs cannot agree on what they want to do with the estate, they could apply to the court for the division of the estate and the court would then divide up the estate according to what it regarded as equitable. If the court could not divide the estate equitably, it would assign some property to one heir, assign other property to another heir and make a balancing charge against the heir who received the more valuable property. The intent was that the court would divide the estate as fairly as possible into the shares in which the heirs were entitled under the will or on intestacy.

36 Under Roman law, the same principles as apply to division of a jointly held estate apply to jointly owned property generally. For example, where two people are joint owners of property otherwise than by inheritance who were not partners and they find they cannot agree what to do with the property, the court could divide the property between them with a balancing charge to ensure an equitable division[16]. Questions could arise in relation to income from, use of, and outgoings in relation to, the joint property.[17] A quasi-contractual obligation to account arose where one of the joint owners of jointly owned property received more than his or her fair share of the income from the property,

16 See Institutes 4.17.5.

17 See Institutes 4.17.4, 5.

had more than his or her fair share of use of the property or had borne more than his or her fair share of the outgoings in respect of the property.[18] In such a case, a joint owner was entitled to an account from another joint owner or other joint owners. The defendant could not properly be said to be bound by contract, since there was no contract between the parties and, since the obligation was not based on delict, it was characterised as quasi-contractual.

37 In New South Wales, as a general rule, a co-owner of property who exercises his or her right to occupy the property is not liable to be charged with an occupation fee. However, there is an exception to that general rule where one co-owner has excluded the other co-owner from occupation or one owner claims an allowance for expenditure in respect of the property. Further, if an allowance for expenditure is claimed by one party, the principle that a seeker of equity must do equity would require that the claimant be charged with an occupation fee up to the amount allowed for the expenditure.[19] Once an occupier is required to do equity, because he or she is seeking equity, there is no distinction to be drawn between improvements or repairs effected to the property, on the one hand, and the reduction of a charge on the property through repayment of monies secured on the property, on the other.[20] Accordingly, at least to some extent, each would be required to make

18 See Institutes 3.27.3, 4.

19 See *Luke v Luke* (1936) 36 SR(NSW) 310 and *Ryan v Dries* [2002] NSWCA 3 at [61].

20 See *Luke v Luke* (1936) 36 SR(NSW) 310 at [317] and *Ryan v Dries* [2002] NSWCA 3 at [71].

an allowance for the benefit of occupation against any claim for contribution.

Unjust Enrichment and *Condictio Indebiti*

38 According to a recent pronouncement of the High Court, in 2024, "unjust Enrichment" has a taxonomical function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another. Today, as causes of action, those categories include unjustified payments of money or performance of services that benefit another in circumstances where the benefit was the result of mistake, undue influence, duress, or an absence or failure of consideration.[21]

39 Because unjust enrichment expresses only the conclusion that follows the exposed process of reasoning within those categories of case, "unjust enrichment" is not a premise that is capable of direct application. At a high level of generality, it can sometimes assist to structure a common law enquiry into whether a recipient has been unjustly enriched by enquiring as to whether the recipient has received a benefit and if so, what benefit, whether the benefit is at the expense of another person, whether the circumstances render the provision of that benefit unjust, and whether the recipient has a defence.[22]

21 See *Redland City Council V John Michael Kozik & Ors* [2024] HCA 7, 281 CLR 202, 179

22 See *Redland City Council V John Michael Kozik & Ors* [2024] HCA 7, 281 CLR 202, 180

40 A claim for restitution of unjust enrichment requires the recipient to have received some benefit for which restitution must be given. Unlike compensation or loss, and unlike the principle of accounting for and disgorging a defendant's net profits, restitution of unjust enrichment focuses upon the benefit of the transaction between the giver and the recipient. Where a claim for restitution is based on money received by one person from another, the relevant prima facie benefit is the value of the money paid rather than any profit generated by the recipient from the money, Where the claim is based upon a service performed at the request of, or freely accepted by, a recipient, the relevant prima facie benefit to the recipient is generally the value of the service performed rather than the loss to the claimant or the enhancement of the recipient's wealth that the service generates for the recipient.[23]

41 Against that background, I now propose to say something about the Roman law of *Condictio indebiti* [24] and the corresponding common law of Restitution by reason of Unjustified Enrichment. The word *condictio* originally signified the formal notice given by the plaintiff to the defendant requiring the defendant to appear to answer the case against him or her. That general use of the term fell into disuse but the term remained to describe a claim that the defendant should give

23 See *Redland City Council V John Michael Kozik & Ors* [2024] HCA 7, 281 CLR 202, 181

24 See Digest 12.6 Code 4.5.

something to the plaintiff that did not arise under Contract and did not arise by reason of Delict.

42 That use of *condictio* developed out of the recognition by the Roman jurists of the conceptual difference between a promise and the performance of the promise[25]. For example, the law recognised the clear distinction between a promise to convey ownership, as on sale, and performance of the obligation by the actual conveyance or transfer of ownership. The Roman jurists said that the mere fact that a contractual promise to transfer ownership to another was ineffective or void or voidable did not undermine the validity or effectiveness of a transfer pursuant to that ineffective or void promise.[26] However, in such a case, it would be unconscionable for the transferee to retain the benefit of the property conveyed. Thus, Papinian, whom the ancients regarded as the greatest Roman jurist, explained that the *Condictio* was grounded in the idea of **what is *ex aequo et bono*, what is just and fair**. According to Papinian, it was the means of reclaiming something belonging to one person that, without good cause, was found in the hands of another person.[27]

43 The foundations of the modern law of Restitution in respect of unjust enrichment lie in such principles of natural justice and fairness, which, as Derek Ibbotson, Regius Professor of Civil Law in Cambridge put it, were present when, in the 18th Century, Lord Mansfield used an

25 See Reinhard Zimmermann, The Law of Obligations, (Juta 1990), p 834

26 See *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 in William Swadling,121 *Law Quarterly Review* 123

27 Digest 12.6.66.

"idea plucked from the supermarket shelf of Roman law".[28] The Roman notion that a person might have an enforceable obligation that did not arise under contract and did not arise by reason of delict was taken up by Lord Mansfield, in the seminal case of *Moses v McFerlen*, which is the foundation of the modern law of Unjust Enrichment. Lord Mansfield, then Lord Chief Justice of the Court of Kings Bench, said that such an action would lie for money that, *ex aequo et bono*, out of justice and fairness, a recipient "ought to refund".[29] That was the general principle that underlay the notion of the *condictio*, as explained by Papinian.

44 In order to enable the common law courts of England to deal more appropriately with trade and commerce, Lord Mansfield expanded that general principle massively and imported into the common law large swathes of the law merchant, which, of course, was derived from the Roman law of the *Corpus Iuris Civilis*. The general principle expounded by Lord Mansfield has been carried forward into the Common law so that the categories of claims of unjust enrichment in the Common law today are generally similar to those of the *Condictio* as described in the *Corpus Iuris*. The result is that the common law recognises causes of action and remedies that sound in neither Contract nor Tort.

28 See *Redland City Council V John Michael Kozik & Ors* [2024] HCA 7, 281 CLR 202, 222

29 See *Moses v Macferlan* (1760) 97 ER 676.

45 The *condictio indebiti* of Roman law is very similar to the old common law action for money had and received or *indebitatus assumpsit*, as it was called. *Indebitatus assumpsit* grew out of the action on the case, being the writ issued for recovery of damages for various types of tortious conduct, such as negligence by a bailee. The point of the action was that the defendant had taken on an obligation and should be held to it. *Indebitatus assumpsit* literally meant an obligation assumed even though it was not owed. That notion was gradually extended to include implied promises, and then fictitious promises.

46 Lord Mansfield said that *indebitatus assumpsit* should lie whenever one person received money or property that, *ex aequo et bono*, in justice and fairness, belonged to another person. His Lordship said that the gist of such an action was that the recipient, in the circumstances of the particular case, was obliged "by ties of natural justice and equity" to refund money or return property. In the hands of Lord Mansfield, Papinian's proposition became the core of the action for money had and received. The result was that *indebitatus assumpsit* developed as a common law writ that behaved like an equitable remedy. One could claim various things under the writ of money had and received, under either *quantum meruit* or *quantum valebat*. *Quantum meruit* means whatever someone deserved and *quantum valebat* means whatever value something might have.

47 Lord Mansfield characterised the action designed to recover back money that ought not in justice to be retained as "very beneficial and

therefore much encouraged" in the Common law. His Lordship explained that the action lay for money paid by mistake, upon a consideration that happened to fail, for money obtained through imposition, extortion or oppression, and by reason of undue advantage taken of the plaintiff's situation. Each of those Unjust Enrichment claims in the modern common law had a counterpart in the Roman law *Condictio indebiti*. I propose to say something about the way in which the High Court has dealt with such claims, despite my efforts to the contrary, both at the Bar and on the Bench.

Mistake

48 Perhaps the most significant type of *condictio* claim described by the Roman jurists was where a payment was made or something was given ***per errorem***, under a mistake[30]. The Digest stated that it was "totally unfair for one person to be prejudiced by another's knowledge or to be benefited by another's ignorance"[31].

49 However, before there would be restitution under Roman law, it was necessary to demonstrate that there had been a real error and that the error was reasonable. The mistake of a slipshod and careless man was not sufficient to justify restitution[32], nor was gross negligence or indolent ignorance. Thus, mistake did not avail a person if the person was guilty of gross negligence. The knowledge that was relevant for

30 Institutes 3.27.6.

31 Digest 22.6.5.

32 Digest 22.6.3.

that purpose was neither the knowledge of a very inquisitive person nor that of a very negligent one but the knowledge of a person who had made careful inquiry as to the matters with which he was concerned.[33] On the other hand, scrupulous inquiry was not required.[34]

50 The recipient must have received the payment in good faith or it would amount to *furtum*, or theft, and there would be no need to rely on a *Condictio*. Where the payer was in doubt, the payment could not be recovered unless the payment was made on the understanding that it was to be repaid if it was shown not to be due[35]. An interesting exception was in the case where denial resulted in double damages. For example, a Roman statute, the *Lex Aquilia*, provided for the recovery of loss suffered as the result of damage caused by wrongful conduct. If the defendant unsuccessfully denied liability under the *Lex Aquilia*, the plaintiff was entitled to damages equal to twice the amount of the loss. Thus, one could not avoid double damages by paying and then seeking to recover on the basis that the payment was made under a mistake.

51 Where money was paid in error, the same sum must be repaid. Where a specific thing was given in error, the thing must be returned[36]. Where fungibles were given in error, the receiver must return the same quality and quantity, as under the contract of *Mutuum.*[37] *Mutuum* was

33 See Digest 22.6.9.pr, 2.

34 Digest 22.6.6

35 Digest 12.6.2

36 Digest 12.6.15.1

37 Digest 12.6.1

the contract of loan for consumption of fungibles, whereby the "borrower" became the owner of the subject of the loan and was obliged to repay the same quantity and quality.

52 The Roman jurists explained that the *condictio* is based on natural reason. Consequently, it extended to include accessions to the subject matter of the mistaken transfer. For example, offspring born to a slave-girl or alluvial accretions to land would be subject to restitution if the slave or the land had been transferred pursuant to a mistake. While fruits taken in good faith by the recipient were also covered by the *condictio*[38], the recipient was entitled to make a deduction for expenses incurred in relation to the subject matter.[39]

53 An important Roman difference between Roman law and the common law is the distinction between mistake of law and mistake of fact. The Roman jurists held that mistake of law should not in any branch of the law be treated like mistake of fact, since the law can and should be definite, while the interpretation of facts often baffles even very careful people.[40] The Roman jurist Paul said that mistake of law prejudices the payer but mistake of fact does not.[41] However, those under twenty-five are allowed to be ignorant of the law. Twenty-five was the age of majority under Roman law, not eighteen as under New South Wales law. In some cases, women were allowed to be ignorant

38 Digest 12.6.15.pr.

39 Digest 12.6.65.5

40 Digest 22.6.2.

41 Digest 22.6.9.pr.

of the law, owing to the weakness or feebleness of their sex. So, if a man under twenty-five or a woman made a payment under a mistake of law, a remedy was available.[42]

54 Before the 19th Century, the distinction between mistake of fact and mistake of law does not appear to have existed in the Common law. However, in 1802, Lord Ellenborough CJ refused recovery of moneys paid under a mistake of law on the basis of the maxim *ignorantia iuris non excusat*, that is to say, ignorance of the law is no excuse.[43] That rule applied for nearly 200 years until 1992, since when, despite my efforts, it has been clear in Australia that, in the context of unjust enrichment, no distinction should be drawn between mistake of fact and mistake of law.[44]

55 The rule in Australia now is that, if the ground for ordering recovery is that a recipient has been unjustly enriched, there is no justification for drawing distinctions on the basis of how the enrichment was gained, except in so far as the manner of gaining the enrichment bears upon the justice of the case.[45] On the other hand, since payments made under a mistake of law should *prima facie* be recoverable, in the same way as payments made under a mistake of fact, a defence of change of position is available to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be

42 Digest 22.6.9 pr.

43 *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448.

44 See *David Securities Pty Limited and Others v Commonwealth Bank of Australia* (1992) 175 CLR 353.

45 See *David Securities Pty Limited and Others v Commonwealth Bank of Australia* (1992) 175 CLR 353 at [39].

unjust to retain the enrichment. From the point of view of the person who makes the payment, it is irrelevant what happens after the money has been mistakenly paid over, since it is at that moment that the defendant is unjustly enriched. However, the defence of change of position is relevant to the enrichment of the recipient because its central element is that the recipient has acted to his or her detriment on the faith of the receipt.[46]

56 The decision of the High Court in 1992 concerning the distinction between mistake of fact and mistake of law is an interesting example of judicial activism. At first instance, the case involved no question of mistake of either fact or law but a question of whether the Commonwealth Bank had provided adequate warning to the claimants (**the Borrowers**) of the risks of fluctuation in rates of exchange when borrowing in a foreign currency, namely, Swiss francs, from the Singapore branch of the Bank. The allegation by the Borrowers in their pleading was that the Bank had failed to give an adequate warning was soundly rejected by the trial judge, Grahame Hill, my former partner in a firm of solicitors and subsequently my colleague on the Federal Court. The Full Court of the Federal Court also unanimously rejected the contention on appeal.

57 However, in their appeal to the Full Court, the question of mistake of law in relation to the payment to the Bank of withholding tax was

46 See *David Securities Pty Limited and Others v Commonwealth Bank of Australia* (1992) 175 CLR 353 at [59].

raised for the first time. The Borrowers sought to rely on s 261 of the *Income Tax Assessment Act 1936* (Cth), which provided that a covenant or stipulation in a mortgage that has or purports to have the purpose or effect of imposing on the mortgagor the obligation of paying income tax on the interest to be paid under the mortgage is absolutely void. The Borrowers asserted before the Full Court that they made grossed-up payments of interest to cover withholding tax in ignorance of the law in that regard and were therefore entitled to recover the amounts from the Bank on the basis that the Bank had been unjustly enriched as a consequence of their mistake. That claim was unanimously rejected by the Full Court on the basis of the distinction between mistake of fact and mistake of law.

58 The Borrowers then sought leave to appeal to the High Court from the decision of the Full Court. Because the Bank wanted to have the *imprimatur* of the High Court on the question of the adequacy of its warning about the risks of borrowing in a foreign currency, the Bank did not oppose the grant of leave on that question. However, the High Court refused leave on that question but granted leave to appeal on the question of whether a payment made under a mistake of law was recoverable, notwithstanding that that question had not been raised in the pleadings or at first instance.

59 Ultimately, the High Court rejected my submissions on behalf of the Bank, which drew on Roman law and nearly 200 years of common law authority, that a payment made under a mistake of law was not

recoverable. On the other hand, the Court accepted the contention that a defence of change of position was available in answer to such a claim. Because, the question of mistake had not been raised in the pleadings or in the course of the trial at first instance, the High Court remitted the proceeding to the Federal Court in order to determine whether the Borrowers should be permitted to call evidence on the issue of mistake, whether the Borrowers made relevant payments because of their mistaken belief that their contractual arrangements with the Bank required the payments and whether the Bank changed its position on the faith of receipt of the payments made by the Borrowers. In the events that happened, the Borrowers ultimately abandoned their claim to recover the allegedly mistaken payments of some tens of thousands of dollars, since the Bank had a judgment against them for several million dollars.

60 In 2014, the High Court explained how the defence of change of position could operate.[47] A fraudster presented, to a finance company (**the Financier**), invoices purportedly issued by various suppliers (**the Suppliers**) for specified goods. In fact, the goods did not exist. However, the Financier paid the amount of the invoices to the Suppliers and entered into leaseback agreements with companies owned by the fraudster relating to the non-existent goods, believing it owned goods purportedly bought from the Suppliers. The payments made by the Financier were applied by the Suppliers in payment of debts owing to

47 See *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560.

the Suppliers by other companies related to the fraudster (the Debtors). After receiving those payments, one of the Suppliers refrained from taking proceedings against the Debtors, and another of the Suppliers consented to the setting aside of default judgments that it had already obtained against the Debtors. When the Financier discovered the fraud, it sought to recover the payments from the Suppliers as having been paid under a mistake of fact, namely, that the goods existed. Among other defences to restitution, the Suppliers successfully invoked the defence of change of position.

61 The High Court observed that one category of case in which it would not be inequitable for a recipient to retain money paid under a mistake is where the recipient has so far altered its position in relation to the receipt that it would be a detriment to it if the recipient were subsequently required to repay the amount received. The enquiry that must be undertaken in relation to restitutionary relief is directed to who should properly bear the loss and why. That enquiry is to be conducted by reference to equitable principles. Thus, if receipt of a benefit has led a recipient without notice to change position in such manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient's liability in restitution will, to that extent, be reduced.[48]

62 In March 2024, the High Court took the question of Restitution a little further in a case dealing with payments made under mistake of

48 See *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560 at [77]-[79].

law and compulsion. The respondents owned rateable land in the Redland City local government area that was adjacent to waterways forming part of one of three reserves. The Council purported to levy special charges on the respondents to fund works on the reserves, which the Council was statutorily required to perform. The special charges were later found to have been levied pursuant to invalid resolutions. After becoming aware that the resolutions were invalid, the Council refunded the portion of the special charges that had not been spent on the relevant works, but it retained the amounts that it had spent on the works. The relevant question was whether the Council had a defence to the respondents' claim for restitution of the balance on the basis that the Council had used the money to conduct works that benefited the respondents.

63 By majority, the High Court found that the respondents were entitled to restitution of the money on the basis that it had been paid by mistake. The majority rejected the Council's defence of good consideration because the relevant works were performed by reason of statutory obligations to do so and the respondents did not benefit from the relevant works in the sense of requesting or freely accepting the works. It was therefore unconscionable for the Council to retain the moneys paid by respondents.[49]

49 See *Redland City Council V John Michael Kozik & Ors* [2024] HCA 7 281 CLR 202

Payment under Duress or Imposition

64 **Duress, or *Metus***, would nullify consent in relation to an executory obligation, such that an obligation incurred by reason of duress would not be enforced. However, Roman law also provided a complex machinery both for granting relief to a person who had been forced by threats to go through some legal transaction or other damaging act. Thus, Roman law allowed an *actio quod metus causa*, the action by reason of duress, which was available in default of restoration. *Restitutio in integrum* could be ordered, the nature of which varied with the nature of the harm caused. In such a case, if *restitutio* was not given by the wrongdoer, the wrongdoer was required to pay a fourfold penalty to the victim.[50] On the other hand, the action for the penalty could only be prosecuted if the wrongdoer failed to provide *restitutio* in respect of the benefit that had been obtained as a result of the duress[51].

65 Roman law gave no remedy for mere money or economic threats. Rather, the plaintiff must have been subjected to a threat of death or bodily harm or wrongful enslavement or an attack on chastity either of the plaintiff or a member of his family[52]. The remedy was also available, if a magistrate of the Roman people or a governor of a province committed a wrongful act, where, for example, such an

50 Digest 4.2.3.pr and 4.2.14.1..

51 Digest 4.2.14.4.

52 Digest 4.2.2-6, 4.2.8.3.

official extorted money or property from someone through terror of death or flogging[53].

66 The common law goes much further than Roman law in relation to duress and recognises the notion of economic duress. May I give you an example of economic duress in the 1980s in connection with refinery exchange agreements between oil companies. Ampol Petroleum Limited was then one of several companies that operated oil refineries in Australia, where crude oil was refined into petroleum products, including motor vehicle fuel. There were oil refineries in several capital cities of Australia. Thus, Ampol had an oil refinery in Brisbane and, relevantly, Shell and Caltex each had an oil refinery in Sydney. Neither Shell nor Caltex had a refinery in Brisbane and Ampol did not have a refinery in Sydney. In order to obviate the need for each oil refiner to transport its refined product to another city, the oil refiners entered into arrangements described as 'refinery exchange agreements'.

67 Thus, Ampol agreed with Shell and with Caltex to deliver to them in Brisbane all their requirements for refined products in Brisbane in consideration for which Shell and Caltex agreed to deliver to Ampol in Sydney Ampol's requirements for refined products in Sydney, on the basis that no payments would be made. Rather, the companies would simply exchange quantities of 'like products', with an account kept, of how much of one like product Ampol delivered to Shell or Caltex in Brisbane and how much of the same like product Shell or Caltex

53 Digest 4.2.3.1.

delivered to Ampol in Sydney. That arrangement worked very well for many years.

68 At the time when the refinery exchange agreement between Shell and Ampol was made, it was normal to increase the octane level of refined motor vehicle fuel with lead. However, the lead in fuel rendered the exhaust from motor vehicles toxic for humans who breathed the fumes. Accordingly, various state governments began to prohibit the sale of motor fuel containing lead. Specifically, New South Wales prohibited the sale in that state of fuel containing lead. That meant that the oil refiner of product for sale in New South Wales had to increase the octane level of its fuel by a different means. It was possible to do so, but the cost of doing so was significantly greater than the cost of adding lead to the fuel.

69 However, Queensland did not introduce such a prohibition at the same time as New South Wales. That meant that the cost of increasing octane level in New South Wales was significantly higher than the cost of increasing octane level in Queensland. Shell and Caltex each asserted, therefore, that the high-octane fuel produced in New South Wales and the high-octane fuel produced in Queensland were not like products and demanded that Ampol pay a surcharge rather than exchange quantities without any payment. Ampol refused to pay, asserting that, from a consumer's point of view and a performance point of view, the products in Queensland and New South Wales were like products. In response, just before the commencement of the Easter

holidays, Shell and Caltex told Ampol that they were not going to deliver any fuel in Sydney unless Ampol paid the surcharge that they demanded. It would have been commercially disastrous for Ampol if, over the Easter holidays, it could not supply high-octane fuel in New South Wales. Ampol therefore paid the surcharge under protest.

70 Subsequently, Ampol sued both Shell and Caltex to recover the amount of the surcharge that it had paid, on the basis that it had been paid under duress. Ampol was successful in the commercial list against Shell on the basis that the sum had been paid under economic duress.[54] That certainly would not have been allowed in ancient Rome because there was no threat of a physical nature to anybody. However, Caltex took the issue the High Court, which determined that lead free fuel and fuel containing lead were not like products.[55] Nevertheless, the High Court cast no doubt on the cause of action based on purely economic duress.

Total Failure of Consideration

71 Another type of quasi-contractual condictio recognised by the Roman jurists was the ***condictio causa data causa non secuta***, where something was given for a consideration that has failed completely[56]. This *condictio* derived special significance from the fact that not every agreement was enforceable in Roman law, unlike the Common law

54 *Shell Company of Australia Ltd v Ampol Refineries Ltd* (17 July 1981, unreported).

55 *Ampol Ltd v Caltex Oil (Australia) Pty Ltd* (1986) 160 CLR 392.

56 See Zimmermann pp 843-4.

where any promise made in a relevantly serious context will be enforced if supported by consideration. Roman law did not recognise any such general theory of contract. Under Roman law, there was only a limited number of truly consensual contracts that were enforceable while still fully executory, namely, sale, hire of property or services and partnership.

72 Thus, under Roman law, if I give money in order to get something, that is sale, as it is under the common law. But if I agree to give a thing or do something in order to get a thing or have something done in return, that is not sale but *permutatio***,** or barter. Under Roman law there is no enforceable obligation while the arrangement is still wholly executory. However, if I perform my side of the bargain, but you fail to reciprocate, an obligation will arise that you recompense me for my interest in getting the object we agreed on. On the other hand, if I should wish to recover my property, then what was given can be reclaimed under a *Condictio*, on the basis of a total failure of consideration.[57]

73 Thus, when I give something to you to get you to do something and you do not do it, ***restitutio*** would be granted on the basis of what is good and fair, *ex aequo et bono*[58]*,* the phrase adopted by Lord Mansfield. If Aulus agrees with Brutus to exchange Aulus's copy of Cicero's speeches for Brutus's copy of Vergil's Aeneid, there is

57 Digest 12.4, 19.5.5.1, 19.5.5.2.

58 Digest 12.6.65.6.

consideration on both sides. Under the common law, enforceable executory contractual obligations would arise on both sides, but not under Roman law. If Brutus has given Aulus his copy of the Aeneid in consideration of the promise to give a copy of Cicero's speeches in return, and Aulus refuses to give his copy of the Aeneid, it would be unjust that Aulus should keep the copy of The Aeneid. Brutus could sue Aulus for damages for breach of contract. Alternatively, Brutus might seek to recover the copy of the Aeneid under the *condictio causa data causa non secuta*.

74 Another example would be where Aulus agrees to sell to Brutus his copy of Cicero's speeches for a fixed price and agree that risk will not pass until delivery. That would give rise to an enforceable contract of sale. If, after Brutus has paid the price but before Aulus delivers Cicero's speeches, the copy of Cicero's speeches were destroyed without fault on the part of Aulus, Brutus would have paid money on a basis that later became falsified. In those circumstances, it would be unjust for Aulus to retain the price.

75 There is a similar principle in the common law, as the High Court confirmed in 2001, in a case that arose out of the attempt by the States to impose what was in substance an indirect tax upon tobacco products.[59] The form of the tax involved the imposition of periodic licence fees on wholesalers and retailers of tobacco products, such fees being calculated by reference to the value of tobacco sold by a licensee

59 See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

during a period preceding the period for which a licence was issued. In calculating the value of tobacco sold by a licensed retailer, the value of tobacco purchased from a licensed wholesaler was to be disregarded if the wholesaler had paid, or was liable to pay, a licence fee in respect of that tobacco. The burden of the tax was intended to be, and was, passed on to the consumers of those products. The High Court held that the tax was a duty of excise and was therefore invalid because, under s 90 of the Australian Constitution, the power of the Commonwealth Parliament to impose duties of excise is exclusive.[60]

76 Rothmans was a wholesaler of tobacco products and paid the tax. Roxborough was a retailer of tobacco products to whom Rothmans supplied tobacco products during July 1997. Rothmans sent to Roxborough invoices that showed the value of the tobacco products supplied by Rothmans and showed, separately, the tax that would be payable to the State by Rothmans for the licence fee for a subsequent period commencing on in August 1997. Roxborough paid the full amount of the invoices to Rothmans and, in turn, passed the tax on to its customers.

77 Had the *ad valorem* element of the licence fee not been held invalid by the High Court, the value of tobacco products sold during July would have been taken into account in calculating the licence fee payable by Rothmans for the licence period commencing in August 1997. That licence fee would ordinarily have been remitted prior to the

60 Ha v New South Wales (1997) 189 CLR 465.

end of August 1997. However, by reason of the determination by the High Court that the tax was invalid, it was not necessary for Roxborough or Rothmans to obtain renewal of their respective licences for the period commencing in August 1997 in order to carry on tobacco retailing and tobacco wholesaling respectively after that time. In particular, it was not necessary for Rothmans to pay a fee for a wholesaler's licence on that date and Rothmans made no payment.

78 Roxborough sued Rothmans in the Federal Court, seeking to recover from Rothmans the amount that it had paid to Rothmans in respect of the tax shown in the invoices and the case ended up in my docket. Stephen Gageler, as he then was, appeared for Roxborough and Bret Walker appeared for Rothmans. There was no suggestion that the poor hapless cigarette consumers, who bought the cigarettes from Roxborough and smoked them, were going to be able to recover anything from Roxborough. Accordingly, the question between Roxborough and Rothmans was who should have the benefit of a windfall. I held that, in the circumstances, the windfall should lie where it fell and dismissed the claim by Roxborough. While the Full Court of the Federal Court agreed with my conclusion, the High Court came to a different conclusion.

79 The High Court held that, in effect, Roxborough had paid moneys on a basis that later became falsified. That is to say, the state of affairs that existed when Roxborough paid the invoice for July ceased to exist, with the consequence that there was no longer an obligation imposed

upon Rothmans and Roxborough to pay a licence fee in order to continue their respective businesses. There was, therefore, a total failure of consideration for the amount shown in the invoice.

80 In a contract for the sale of goods, the total amount that the buyer is required to pay to the seller may be expressed as one indivisible sum, even though it is possible to identify components that were taken into account by the parties in arriving at the finally agreed sum. However, there are cases where it is possible both to identify the part of the final agreed sum that is attributable to a cost component and to conclude that an alteration in circumstances, perhaps involving a failure to incur an expense, results in a failure of a severable part of the consideration. The High Court considered that this was such a case, since Roxborough was required to bear, as a component of the total cost to them of the tobacco products, a part of the licence fees that Rothmans was expected to incur at a future time, which was referrable to the products being sold.

81 It was in the common interest of both Roxborough and Rothmans that the fees, when so incurred, would be paid to the State by Rothmans, and it was their common intention that the cost of the goods would include the fees. The High Court concluded that the alteration in the state of affairs that was within the contemplation of the parties as the basis of their dealings concerning tax liability occurred in circumstances that permitted, and required, severance of part of the total amount paid for the goods.

82 The High Court said that restitutionary relief does not provide compensation for loss but operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched. The defendant comes under an obligation to account to the plaintiff for money that the defendant has received to the use of the plaintiff. The subtraction from the plaintiff's wealth enables it to be said that the defendant's unjust enrichment has been at the expense of the plaintiff, notwithstanding that the plaintiff may recoup the outgoing by means of transactions with third parties. An action for money had and received is not defeated simply because the plaintiff has recouped the outgoing from others. That was important, given the dealings between Roxborough as a retailer and the consumers of the tobacco products.

Dishonourable or Illegal Purposes

83 Another important *condictio* was the ***condictio ob turpem vel iniustam causam***, which dealt with recovery of payments made or things given for dishonourable or illegal purposes.[61] Something might be given for some purpose envisaged by both the giver and the recipient. The purpose might be a worthy purpose or might be a dishonourable or illegal purpose. Under Roman law, as under the common law, something given for a worthy purpose could not be reclaimed unless the purpose envisaged failed to materialise, as where the *condictio causa data causa non secuta* applies, namely, for a total

61 See Digest 12.5.

failure of consideration. In the case of a dishonourable or illegal purpose, the giver may be in the wrong and not the recipient, or the recipient may be in the wrong and not the giver, or both may be in the wrong. In the case of a dishonourable or illegal purpose where the recipient is in the wrong, there can be recovery even if the purpose envisaged does materialise. By way of example, if I pay you not to commit sacrilege, not to steal, or not to kill a man, the *condictio* lies and I can recover. The *condictio* was available to recover a payment of money or transfer of property made for a dishonourable or illegal purpose even if the purpose was for which the money or property had been given was in fact accomplished.

84 When both giver and recipient are in the wrong, recovery is excluded, as where a thief pays to prevent his theft from being disclosed, or money is given to pervert the course of justice.[62] The maxim, as expressed by Papinian, is *in delicto pari potiorem esse possessorem*. That is to say, where two people are both at fault then the possessor has the stronger case, and the benefit lies where it falls. That maxim applies equally in the Common law.

85 There may be a difficulty where the dishonourable or illegal purpose is too remote. The example given by the Roman jurists is a contract to purchase a dagger where the object of the buyer was to kill someone with the dagger. The Roman jurists took the view that there was only a bar on recovery if the contract had no possible legitimate

62 See Digest 12.5.3,4.

purpose. A dagger could be used for a perfectly lawful purpose. On the other hand, poisonous medicine could be used for no purpose other than hurting someone. The price of the dagger could be recovered but the price for the medicine could not.

86 A similar distinction is drawn by the common law. Assume that a statute capped electricity prices and prohibited a contract to pay more than rates fixed under the statute. The South Australian Cold Stores and the Electricity Trust of South Australia, both in good faith, entered into a contract for the supply of electricity in excess of the fixed rate and the Cold Stores paid money pursuant to the contract. The Cold Storers then sought to recover the money that it had paid. However, since the object of the statute was not to protect the consumer but to curb a decline in the value of money, the High Court held that the Cold Stores could not rely on the exception.[63] On the other hand, assume that the object of a statute was to prevent landlords from taking advantage of their unfair bargaining positions. Where a tenant paid rent in excess of the maximum rent fixed for particular premises covered by the statute, the tenant was allowed to recover excess rent paid to the landlord, since the statute was passed for the protection of tenants.[64]

87 There appear to have been some exceptions where both parties were in the wrong but where one party was regarded as more reprehensible. Papinian discusses a case where a woman paid money

63 See *South Australia Cold Stores v Electricity Trust of South Australia* (1965) 115 CLR 247.

64 See *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192.

as a dowry in anticipation of marrying her uncle. Such a marriage was prohibited and the marriage never took place. Notwithstanding that the payment of the purported dowry was for an unlawful or immoral purpose, the woman was permitted to recover. A possible explanation is that the turpitude did not lie in the marriage but in the relations between uncle and niece. The money was given for marriage and not for an indecent purpose. Therefore, it was not an immoral purpose and the woman was entitled to recover under the ordinary rules for the *condictio causa data causa non secuta*.

88 In 1985, the High Court dealt with an analogous principle.[65] The *Builders Licensing Act 1971* (NSW) (**the Builders Act**) provided that a building contract under which the holder of a builder's licence undertook to carry out any building work was not enforceable against the other party to the contract unless the contract was in writing, signed by each of the parties and sufficiently described the building work the subject of the contract. The owners of a house entered into an oral contract with a builder to carry out renovations to their house and agreed to pay the builder a reasonable remuneration for the work. The contract did not comply with the formal requirements of the Builders Act. After the work had been completed and the owners had accepted the benefit of it and taken up occupation of the renovated house, the builder asked for payment for the balance of the sum payable for the work. The owners asserted that, because the building contract did not

65 See *Pavey & Matthews Pty Ltd v Paul* (1985) 162 CLR 221.

comply with the requirements of the Builders Act, they were not liable to pay the balance. The builder therefore instituted proceedings for what was claimed to be the balance owing to it in respect of the work. The claim was for money payable as on a *quantum meruit* and corresponded with the old common *indebitatus assumpsit* count for work done and materials provided.

89 The High Court held that, in such a case, there is no apparent reason in justice why a builder who was precluded from enforcing an agreement should also be deprived of the ordinary common law right to bring proceedings on a common *indebitatus assumpsit* count to recover fair and reasonable remuneration for work that he has actually done and that has been accepted by the building owner. The Builders Act did not make an agreement to which it applied illegal or void and did not disclose a legislative intent to penalise the builder beyond making the agreement itself unenforceable against the other party. Further, the survival of the ordinary common law right of the builder, in an action founded on restitution or unjust enrichment, to recover reasonable remuneration for work done and accepted under a contract that was unenforceable did not frustrate the purpose of the Act to provide protection for an owner.

90 An owner could not be forced to comply with the terms of a contract covered by the Builders Act. However, an owner could nevertheless be required to pay reasonable compensation for work done of which the owner has received the benefit and, to avoid injustice, the

owner was obligated to pay reasonable compensation by way of restitution. If the agreed remuneration exceeded what was reasonable in the circumstances, the owner could rely on the unenforceability of the contract with the result that the owner would be liable to pay no more than what was fair and reasonable.[66] The unlawful aspect of the transaction was that it was contrary to the Builders Act, which was passed for the protection of particular class of persons, namely, persons in the position of the owners. However, the Builders Act did not actually prohibit such contracts but simply said that they were unenforceable. It would have been unjust and unconscionable for an owner to retain the benefit of building work without paying for it.

No Fixed Cause

91 Finally, there was the ***condictio sine causa***, the *condictio* for no fixed cause.[67] This *condictio* was available to recover from someone something that he received on a basis that was not legally sufficient or subsequently came to be referrable to a basis that was not legally sufficient. For example, assume that a launderer who had received clothes for laundering could not produce the clothes for the owner because they had gone missing. The launderer is sued by the owner in an action on locatio conductio operis and pays their value to the owner. If the clothes are subsequently found and restored to their owner, the launderer could maintain this *condictio* against the owner since, once

66 See *Pavey & Matthews Pty Ltd v Paul* (1985) 162 CLR 221 at [62] per Deane J.

67 Digest 12.7.

the clothes were restored, the payment by the launderer to the owner had no basis.[68]

92 In this area of the common law, the number of unjust factors probably remains open ended and new causes of action are capable of recognition. Such causes of action can overlap with one another and one does not necessarily exclude another. Recognised causes of action sometimes have to be supplemented by new causes of action because facts arise in which there is no existing claim but it is thought that restitution should be allowed. Such causes of action under the common law do not cohere in the same way as the *condictiones* of Roman law, where new fact situations can give rise to a claim only if they conform to the principle that what is retained without a legal basis is recoverable, the *condictio sine causa*. The new claim is an ad hoc reaction to a novel fact situation. In the civil law, all claims arising from deliberately confirmed enrichment are united by the principle that what is retained without a legal basis, *sine causa*, is recoverable.[69]

Conclusion

93 All that leads to the conclusion that the study of Roman law is not a complete waste of time or merely historical furphy. It can assist in understanding many of the principles of the common law and is certainly of assistance for those who might become involved in

68 Digest 12.7.2.

69 See Johnstone and Zimmerman *Unjustified Enrichment*, p135.

international private law in jurisdictions where the modern European Codes base their substance and form on the *Corpus Iuris Civilis*.

94 The *Corpus Iuris Civilis* is not a source of binding authority in Australia. Nevertheless, there are many traces of Roman law in the law of 21st century Australia and awareness of the Roman tradition in Australian jurisprudence can only help in a better understanding of principles that are derived from that tradition. Where questions arise, for which there is no fixed answer, resort to the *Corpus Iuris Civilis* can be helpful, if not for authority, at least for guidance, even in relation to sophisticated technical areas of developing law.

95 In 1978, Lord Diplock said that there is no general doctrine of unjust enrichment recognised in English law. Rather, his Lordship said, English law provides specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law[70]. Such pronouncements may well be motivated by fear of indeterminate liability.

96 In the middle of the 2nd Century AD, the Roman jurist, *Sextus Pomponius*, said that, by the *ius naturale,* the law of nature, it is fair that no one should be enriched at the expense of another.[71] Lord Mansfield's observations in the 18th Century suggest that the Common law might be sufficiently mature, to recognise a generalised right to

70 *Orakpo v Manson Investments* [1978] AC 95 at 104.

71 Digest 50.17.206, 12.6.14.

Restitution in circumstances where one person has been unfairly enriched at the expense of another.[72] While that formulation may be somewhat too broad, it is a formulation that may acquire some traction in the common law of 21st Century Australia.

72 See Goff and Jones, 2nd Ed 1978 pp 13, 24.