

THE RELATIONSHIP BETWEEN THE LAWS OF UNJUST ENRICHMENT AND CONTRACT: UNPACKING *LUMBERS V COOK*

ABSTRACT

Although the High Court's recent decision in *Lumbers v W Cook Builders Pty Ltd (in liq)*¹ reinvigorated interest in the relationship between the laws of contract and unjust enrichment, reactions to the decision have largely centred around the Court's perceived reversion to the rigidity of the old forms of action. Putting that latter aspect of the decision largely to one side, this article seeks to identify more precisely the implications of *Lumbers* for the rights and obligations of contracting parties in unjust enrichment. Although the decision appears consistent with the view that liability in unjust enrichment cannot interfere with a contractual allocation of risk, the fact that this principle precluded restitutionary relief in *Lumbers* itself indicates that contractual relationships between the parties might be a greater bar to restitution than has been supposed. *Lumbers* also suggests that unjust enrichment's subsidiary status is based on the primacy of contract, rather than the inherent doctrinal nature of unjust enrichment. Finally, further observations on the relationship between the laws of unjust enrichment and contract are made, particularly in relation to unjust enrichment's status as an independent category of law.

I INTRODUCTION

A plaintiff may seek to establish that a defendant has been unjustly enriched in circumstances where there is, or has been, a contractual relationship between them. Where this occurs, issues arise concerning the 'notoriously difficult'² principles governing the relationship between the law of unjust enrichment and the law of contract. However difficult, the search for a principled doctrine governing the relationship between these laws is important since it is fundamental to the very boundaries within which they are permitted to operate.

On 18 June 2008, the High Court of Australia contributed to our understanding of the relationship between contract and unjust enrichment when it handed down its reasons in *Lumbers*. In this case, the High Court considered whether a

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¹ (2008) 232 CLR 635 (*'Lumbers'*).

² Andrew Burrows, 'Restitution from Assignees' [1994] *Restitution Law Review* 52.

subcontractor could recover payment on a *quantum meruit* basis from a landowner for work performed and money paid as part of the construction of a house where there were, at the time of performance, subsisting contracts between the subcontractor and the builder and between the builder and the landowner. In a unanimous decision, it held that it could not.

The High Court's judgment, particularly the joint judgment of Gummow, Hayne, Crennan and Kiefel JJ,³ has been criticised on several fronts, in particular for its attacks on restitution lawyers' 'top-down reasoning' and what is perceived as a regression to the formalism of the old forms of action.⁴ Nonetheless, the overwhelming reaction to the Court's reasons concerning the relationship between unjust enrichment and contract has been that the judgment is an application of orthodox principle 'perfectly in line with the law of unjust enrichment as understood by most commentators',⁵ the only surprise being 'how [the litigation] got so far'.⁶

Thus, despite calls that *Lumbers* 'clamours for scholars' measured attention⁷ there has been scant analysis of what exactly the decision may mean for the relationship

³ (*Joint Judgment*) (Gleeson CJ delivered separate reasons).

⁴ See James Edelman, 'Unjust Enrichment and Contract' [2008] *Lloyds Maritime and Commercial Law Quarterly* 444, 447–9; Joshua Getzler, 'Quantum Meruit, Estoppel, and the Primacy of Contract' (2009) 125 *Law Quarterly Review* 196, 208; Amy Goymour, 'Too Many Cooks: Three Parties, Contracts and Unjust Enrichment' (2008) 67 *Cambridge Law Journal* 469, 470; Michael Rush, 'The intersection between contract law and unjust enrichment', Unpublished, 21 October 2008, [42]; Kit Barker, 'Restitution Regional Digest—Australia' (2009) 17 *Restitution Law Review* 147, 162; Andrew Burrows, 'The Australian Law of Restitution: Has the High Court Lost Its Way?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 67, 84; Michael Bryan, 'Lumbers v W Cook Builders Pty Ltd (in liq): Restitution for Services and the Allocation of Risk' (2009) 33 *Melbourne University Law Review* 320, 328–30. See also Romauld Andrew and Suzanne Kirton, 'Quantum meruit and unjust enrichment: Changing jurisprudence in the High Court' (2008) 24 *Building and Construction Law Journal* 370. For a defence of the Joint Judgment in *Lumbers*, see Joachim Dietrich, 'Quantum Meruit for Services Rendered in a Three-Party Context: (Implied) Contract, Restitution, or Unjust Enrichment?' (2009) 17 *Restitution Law Review* 98.

⁵ Lionel Smith, 'Enrichment – Restitution & Unjust Enrichment Legal Issues' on Restitution Discussion Group (18 June 2008) <<http://lists.mcgill.ca/scripts/wa.exe?A2=ind0806&L=enrichment&T=0&F=&S=&P=387>>. See also Barker, above n 4, 162; Goymour, above n 4, 470; Burrows, above n 4, 82; Christian Jennings, 'Bottom's Up: An Examination of *Lumbers v W Cook Builders Pty Ltd*' (2008) 32 *Hearsay: Electronic Journal of the Bar Association of Queensland* <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=446&Itemid=48>; Dietrich, above n 4, 101–2.

⁶ Robert Stevens, 'High Court Decision in *Lumbers v Cook*' on Restitution Discussion Group (18 June 2008) <www.ucc.ie/law/restitution/rdg/kk0806004.htm>.

⁷ Doug Rendleman, 'Enrichment – Restitution & Unjust Enrichment Legal Issues' on Restitution Discussion Group (18 June 2008) <<http://lists.mcgill.ca/scripts/wa.exe?A2=ind0806&L=enrichment&T=0&F=&S=&P=472>>.

between unjust enrichment and contract. This article seeks to identify more precisely the significance of *Lumbers* on this issue. For present purposes *Lumbers*' references to 'top-down reasoning' and its alleged reversion to the old forms of action can largely, although, it will be seen, not entirely, be put aside.

The remainder of this article consists of three Parts. Part II provides an overview of the facts of *Lumbers* and the Court's reasons. Part III focuses on the consequences of the decision in *Lumbers* for arguments that the law of unjust enrichment is subsidiary to the law of contract. It will be argued that, on its face, the decision in *Lumbers* is consistent with the view that a claim in unjust enrichment cannot interfere with the contractual allocation of risk, but that such a claim is available between contracting parties where there is a 'gap' in that contractual risk allocation. However, the Court's finding that, on the facts in *Lumbers*, there was no such gap means that mere entry into a contract precludes a contracting party from pursuing restitutionary relief, not only against the other party to a contract but also against third parties.

It will also be argued that *Lumbers* is of consequence for the debate concerning the basis of the principle that unjust enrichment cannot interfere with a contractual allocation of risk. Whereas some commentators have argued that unjust enrichment's inherent doctrinal nature precludes it from operating where a contract governs the parties' relationship,⁸ others suggest that the principle is based on the primacy of the law of contract over that of unjust enrichment.⁹ Although the Court's reasons in *Lumbers* did not address this point explicitly, they are concerned with the particular rights and obligations voluntarily assumed by each party, and therefore suggest a preference for the latter view.

Part IV examines three other consequences of *Lumbers* for the relationship between contract and unjust enrichment. It will be argued that any claims that unjust enrichment no longer exists as an independent source of obligation alongside (or subsidiary to) the law of contract are exaggerated. It will also be argued that, although *Lumbers* can be seen as supporting some aspects of the 'implied contract theory', it does not resurrect this theory as the basis for restitutionary liability, as some commentators have feared. Finally, it is suggested that, somewhat ironically, the rejection of the notion of 'free acceptance' may mean that the 'enrichment' inquiry is more dependent than previously thought on the defendant's subjective valuation of the benefit.

II THE CASE

It is appropriate first to briefly describe the facts and the progress of the litigation, before turning to the Court's reasons.

⁸ See Ross Grantham and Charles Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 *Law Quarterly Review* 273, 291; Ross Grantham and Charles Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 *Cambridge Law Journal* 717, 742.

⁹ See, for example, Dietrich, above n 4, 102.

A *The Facts and the Litigation*

The Lumbers engaged W Cook & Sons Pty Ltd ('Sons'), a company of good repute, to construct an expensive house on their land. The contract was not written, and no price was agreed. During the course of construction, Sons entered into an arrangement with an associated company, W Cook Builders Pty Ltd ('Builders'), under which Builders was to perform much of the work under the original building contract between the Lumbers and Sons. There was some uncertainty as to the nature of the arrangement between Sons and Builders,¹⁰ but the basis on which the litigation was conducted in the High Court was that there was an oral contract between them.¹¹ Builders completed the work in accordance with its contract with Sons. The Lumbers were unaware that the contract between Sons and Builders had been made and it was accepted that at all relevant times they had no knowledge that Builders was involved in the construction. The Lumbers made certain payments to Sons, but Sons paid Builders less than the amount owed to it under the subcontract. The house was eventually completed to the satisfaction of the Lumbers, but Builders remained underpaid.

When Builders eventually went into insolvent liquidation, its liquidator commenced proceedings in the District Court of South Australia against both Sons and Lumbers. Prior to trial, its claim against Sons was stayed following a failure to comply with an order that it provide security for costs.¹² At trial, its claim against Lumbers, which at that stage was based on there being an assignment of Sons' contract with Lumbers to Builders, was dismissed.¹³ On appeal to the Full Court of the Supreme Court of South Australia, Builders changed tack and instead pursued a restitutionary *quantum meruit* for work or labour done or money paid. A majority (Sulan and Layton JJ; Vanstone J dissenting) upheld the claim.¹⁴ The Lumbers appealed.

B *The High Court's Reasons*

As foreshadowed, the Lumbers' appeal to the High Court was successful. In the Joint Judgment's view, there were two alternative, but interrelated, reasons why Builders' claim failed.¹⁵

First, Builders failed to establish that the facts yielded a *quantum meruit* claim for work and labour done or money paid,¹⁶ as Sons, not the Lumbers, had requested

¹⁰ The Joint Judgment left open whether there was a contract between Sons and Builders, finding that whilst there may have been a concluded agreement, Builders at least had a claim against Sons for work done and money paid since it was acting at Sons' request: see *Lumbers* (2008) 232 CLR 635, 670–1 (Joint Judgment).

¹¹ *Lumbers* (2008) 232 CLR 635, 654 (Gleeson CJ).

¹² *Ibid* 660 (Joint Judgment).

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid* 662–4.

¹⁶ *Ibid* 664.

that Builders complete the relevant work.¹⁷ In their Honours' view, the existing authorities establish that a request by the defendant of the plaintiff was an essential element of a claim for reasonable remuneration for work and labour done.¹⁸ Acceptance of Builders' argument that the identity of the party to whom the request was made was of no consequence would have required an extension of the law and raised questions which it was not necessary to answer.¹⁹

It was unnecessary because, secondly, Builders' restitutionary claim, if allowed, 'would redistribute not only the risks but also the rights and obligations for which provision was made by the contract the Lumbers made with Sons'.²⁰ Their Honours rejected the approach of the Full Court, which had as its first step put to one side the contract between Sons and the Lumbers.²¹ However, whilst it is clear that the Joint Judgment (and the reasons of Gleeson CJ) saw the contractual regime between the Lumbers and Sons and between Sons and Builders as being of utmost importance, it is difficult to identify precisely where this importance stems from.²² It is suggested that there are two reasons contained in the judgments for the importance of the contractual regime.²³ Although the judgments themselves do not neatly distinguish between them, and although they are interrelated, each reason could have been an independent basis for the claim's failure.

First, the restitutionary claim was unavailable to Builders as allowing it would interfere with the contractual allocations of risk between the parties. On the last page, under a separate heading, 'The relevance of the contract between the Lumbers and Sons', the Joint Judgment stated that if any of the Lumbers, Sons or Builders had not performed their obligations under the contract(s) to which they were privy, that was a matter for the other party to the contract.²⁴ Thus, '[t]o now impose on the Lumbers an obligation to pay Builders would constitute a radical alteration of the bargains the parties struck and of the rights and obligations which each party thus assumed.'²⁵ That this is an independent ground for dismissing the claim also appears from the passage that immediately precedes it: 'Reference to whether the Lumbers "accepted" any work that Builders did or "accepted" the benefit of any money paid it is irrelevant ...'.²⁶ In his separate reasons, Gleeson CJ also held that, '[t]he contractual arrangements that were made effected a certain allocation of risk; and there is no occasion to disturb or interfere with that allocation. On the contrary, there is every reason to respect it.'²⁷

¹⁷ Ibid 671.

¹⁸ Ibid 664–7.

¹⁹ Ibid 667.

²⁰ Ibid 664.

²¹ Ibid 667.

²² Cf *Goymour*, above n 4, 471.

²³ Ibid.

²⁴ *Lumbers* (2008) 232 CLR 635, 674.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid 654.

It evidently did not matter that Builders' claim against Sons had been stayed due to its failure to provide security for costs.²⁸ This makes sense, at the very least because a stay of proceedings for failure to provide security for costs does not create a *res judicata*.²⁹

Secondly, the restitutionary claim was unavailable to Builders as the contractual regime between the parties meant that Builders was unable to make out the elements of a claim in unjust enrichment. On this point, some treatments of *Lumbers* suggest that the Joint Judgment and Gleeson CJ's emphasis are substantially similar.³⁰ However, there is arguably a divergence between them. The Joint Judgment appears to focus on the first element of the unjust enrichment framework, finding that the Lumbers were not enriched as either they had paid Sons or, if they had not, they were liable on their contract with Sons.³¹ The Lumbers' contract with Sons meant that, whether they had paid in full for the house or had not paid and therefore remained liable to Sons in contract, they could not be said to have received a windfall.³² In contrast, Gleeson CJ appeared to focus on the third 'at the plaintiff's expense' element; the contractual matrix between the parties meant that Builders were conferring a benefit on and at the request of Sons, not the Lumbers. The Lumbers had not requested or accepted any benefit from Builders.³³ If the Lumbers had been enriched, it was at the expense of Sons because Sons remained liable to Builders in contract.³⁴

Although the view of both the Joint Judgment³⁵ and Gleeson CJ³⁶ are supported by pre-*Lumbers* commentary, it has been said that Gleeson CJ's view is preferable

²⁸ See Getzler, above n 4, 208.

²⁹ See *Clout v Klein* [1985] 2 NSWLR 729.

³⁰ See, for example, Getzler, above n 4, 207.

³¹ It should be noted that the Joint Judgment does not use the language of 'enrichment' in this context, preferring to talk of a 'windfall' (*Lumbers* (2008) 232 CLR 635, 673). This would appear to be either to emphasise that the unjust enrichment conceptual framework does not apply due to the contractual allocation of risk and/or to avoid legitimising it if it did apply. However, as this article puts the broader normative issues about unjust enrichment to one side, the language of 'enrichment' may for present purposes be appropriately used in this context.

³² *Lumbers* (2008) 232 CLR 635, 673.

³³ *Ibid* 656–7.

³⁴ *Ibid* 657.

³⁵ Lionel Smith, 'Property, Subsidiarity, and Unjust Enrichment' in Johnston and Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002) 588, 602; Dawson, 'The Self-Serving Intermeddler' (1974) 87 *Harvard Law Review* 1409, 1446–7; Burrows, above n 2, 55. See also Kit Barker, 'Restitution and Third Parties: The Trident Beauty' [1994] *Lloyd's Maritime and Commercial Law Quarterly* 305, 309.

³⁶ Peter Watts, 'Does a subcontractor have restitutionary rights against the employer?' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 398, 401; Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: an Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 247, 274;

as it focuses on the sub-contract between Builders and Sons, rather than the head contract between Sons and the Lumbers.³⁷ It is probably true that, if the contract between the Lumbers and Sons had been the sole basis for dismissing the claim on the first ground mentioned above, namely, that restitution would interfere with the contractual allocation of risk, an emphasis on the contract between Builders and Sons would be preferred as it was that pursuant to which Builders transferred the wealth to the Lumbers. However, at this stage of the Joint Judgment, the focus is on the second ground identified above, that the Lumbers were not enriched. It is therefore not to the point to criticise the Joint Judgment for focussing on the wrong distribution of risk. Further, and in any event, the approaches of Gleeson CJ and the Joint Judgment are not logically mutually exclusive.

III THE SUBSIDIARITY OF UNJUST ENRICHMENT

This Part analyses the implications of *Lumbers* for suggestions that the law of unjust enrichment is ‘subsidiary’ to the law of contract. First, the concept of subsidiarity will be explained. In sections B and C of this Part, the implications of *Lumbers* are analysed.

A *The Concept of Subsidiarity*

The term ‘subsidiarity’ describes,

the relationship between two claims or doctrines where the scope and operation of one claim are constrained by another claim, even where all the elements of the former claim are made out. At its weakest, subsidiarity denotes the subordination of one claim where another claim in fact offers the plaintiff a basis of recovery. At its strongest, subsidiarity denies the availability of a claim because another claim is in principle available, even though on the facts it does not avail the plaintiff.³⁸

Smith, above n 35, 601; Peter Birks, ‘“At the expense of the claimant”: direct and indirect enrichment in English law’ in Johnston and Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002) 493.

³⁷ See Burrows, above n 4, 82–4. In reply, see David Jackson, ‘The Australian Law of Restitution: Is Andrew Burrows Rights that the High Court Has Lost Its Way?’ Speech delivered at Seminar Series, Brisbane, 30 April 2009 <<http://www.law.uq.edu.au/documents/cli-sem-series/commentary/Restitution-Law-Paper-21-04-09.pdf>>. Note also that Burrows’ concern with the contract between the sub-contractor and the head contractor does not appear to be as evident in Burrows, above n 2, 55. See also Barker, above n 35, 309; Graham Virgo, ‘Demolishing the Pyramid — the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment’ in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 477, 507–8.

³⁸ Grantham and Rickett, ‘On the Subsidiarity of Unjust Enrichment’, above n 8, 273. See also Smith, above n 35, who makes the same distinction between strong and weak subsidiarity, but then distinguishes further between two forms of weak subsidiarity.

The rule that the law of unjust enrichment is in some respect subsidiary to the law of contract is well-established in Australian, as well as English, law. In *Pavey & Matthews Pty Ltd v Paul*,³⁹ Deane J held that,

if there was a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration.⁴⁰

This principle is supported by numerous Australian decisions,⁴¹ to say nothing of the wealth of similar English authority⁴² and academic commentary.⁴³ Consequently, it is generally accepted that a claim in unjust enrichment is available only where any relevant contract is void, rescinded *ab initio*, or discharged for breach or frustration.⁴⁴

³⁹ (1987) 162 CLR 221 (*Pavey & Matthews*'s).

⁴⁰ *Pavey & Matthews* (1987) 162 CLR 221, 256. See also Brennan J, 238.

⁴¹ See, for example, *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40, 59; *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251, 275; *Ansett Transport Industries (Operations) Pty Ltd v Alenia Aeritalia & Selenia SpA* (1991) 105 FLR 169, 174; *Adamson v Williams* [2001] QCA 38, [4]; *Issitch v Worrell* (2000) 172 ALR 586, 592; *Foran v Wight* (1989) 168 CLR 385, 413–2; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 356, 385.

⁴² See Lord Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 7th ed, 2007) 54, 496. Principal among these are *Goodman v Pocock* (1850) 15 QB 576; *Thomas v Brown* (1876) 1 QBD 714; *Dimskal Shipping Co Ltd v International Transport Workers Federation* [1992] 2 AC 152; *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 (*'The Trident Beauty'*).

⁴³ See, for example, Goff and Jones, above n 42, 54, 496; Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd ed, 2002), 323–4; Burrows, above n 2, 54; Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, 1985) 46–7; Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 90; Lionel Smith, 'The Mystery of "Juristic Reason"' (2000) 12 *Supreme Court Law Review* 237; Smith, above n 35, 598; Graham Virgo, 'Failure of Consideration: Myth and Meaning in the English Law of Restitution' in Johnston and Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 103, 109; Friedmann, above n 36, 247–8; Stephen Smith, 'Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement' (1999) 115 *Law Quarterly Review* 245, 245; Carmel McLure, 'Failure of Consideration and the Boundaries of Restitution and Contract' in Degeling and Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co, 2008) 209, 233; Jack Beatson, 'The Temptation of Elegance: Concurrence of Restitutionary and Contractual Claims' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999) 143, 161; Jack Beatson, 'Restitution and Contract: Non-Cumul?' (2000) 1 *Theoretical Inquiries in Law* 83. For a contrary opinion, see Andrew Tettenborn, 'Subsisting Contract and Failure of Consideration — A Little Scepticism' [2002] *Restitution Law Review* 1.

⁴⁴ See, for example, Goff and Jones, above n 42, 58, 496; McLure, above n 43, 210; Virgo, above n 37, 489–90. It is noted that the position in relation to discharge for breach is subject to some lingering controversy: see Rachel Mulheron, 'Quantum

However, despite the axiomatic status of these broad principles, prior to *Lumbers* the authorities contained at least two points of tension concerning unjust enrichment's status as subsidiary to the law of contract, each of which may be considered in turn.

First, the precise formulation of when an unjust enrichment claim would be available had not been settled.⁴⁵ Very strict formulations suggested that the mere existence of a contract between the parties automatically excludes any restitutionary claim.⁴⁶ Others suggested that restitution is excluded wherever the benefit is conferred in fulfilment of a contractual obligation, there being a need to, 'break the circularity of holding a party contractually liable to confer a benefit which the law of restitution requires the other to return'.⁴⁷ Others again were more flexible, suggesting the claim in unjust enrichment is precluded only where the contract governs the issue in dispute so that awarding restitutionary relief would in fact upset the contractual distribution of risks and benefits. On this view, a claim in unjust enrichment is permissible in a contractual context, but only where there is a 'gap' in the contract so that the contract does not govern the subject of the dispute.⁴⁸ Pre-*Lumbers*, it appeared that this latter view gained dominance both as a matter of principle and authority, especially since Birks and Smith, who had previously formulated the rule strictly,⁴⁹ later preferred it.⁵⁰ Any other view would also be difficult to reconcile with the High Court's decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*,⁵¹ a point which will be returned to shortly.

Meruit upon Discharge for Repudiation' (1997) 16 *Australian Bar Review* 150, particularly at 154; Bryan, above n 3, 327–8.

⁴⁵ Stephen Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 167, 169–70; Stephen Waddams, 'The Relation Between Contract and Unjust Enrichment' in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment* (Martinus Nijhoff Publishers, 2007) 15, 17–8.

⁴⁶ Birks, *An Introduction to the Law of Restitution*, above n 43, 46–7; Lionel Smith, above n 43; Graham Virgo, *The Principles of the Law of Restitution* (Clarendon Press, 2nd ed, 2006) 40; Kit Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 *Oxford Journal of Legal Studies* 457, 459–60.

⁴⁷ Burrows, above n 2, 54. See also Burrows, *The Law of Restitution*, above n 42, 323–4; Friedmann, above n 36, 247–8; Virgo, above n 43, 109.

⁴⁸ Beatson, 'The Temptation of Elegance', above n 43, 153–4; Beatson, 'Restitution and Contract', above n 43, 94–6; Peter Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 *Oxford University Commonwealth Law Journal* 1, 5; Peter Maddaugh and John McCamus, *The Law of Restitution* (Canada Law Book, 2nd ed, 2004) [3.200.30]; Waddams, 'Contract and Unjust Enrichment', above n 45, 172; Smith, above n 35, 609; Geoffrey Mead, 'Restitution with contract?' (1991) 11 *Legal Studies* 172; Ralph Cunningham, 'Failure of Basis' [2004] *Lloyd's Maritime and Commercial Law Quarterly* 234, 250; Tettenborn, above n 43, 1–2.

⁴⁹ Birks, *An Introduction to the Law of Restitution*, above n 43, 46–7; Lionel Smith, above n 43.

⁵⁰ Birks, above n 48, 5; Smith, above n 35, 609.

⁵¹ (2001) 208 CLR 516 ('*Roxborough*'). Indeed, this was the context for Birks' change of heart: see Birks, above n 48, 5. See also Jack Beatson and Graham Virgo, 'Contract,

Secondly, the basis for unjust enrichment's subsidiary status had been little explored. In most of the above formulations, the reason for unjust enrichment's subsidiary status appears to be assumed to lie in primacy of contract, that is, a hierarchical prioritisation of the outcome the law of contract produces over that which the law of unjust enrichment would produce. Dietrich has said that,

At least two related principles are at work as to why existing contracts limit recovery, including recovery outside of contract. First, where obligations are freely entered into, by agreement, the parties' rights should be determined by such express or implied agreement; and, secondly and corollary to this, where parties have not agreed to accept an obligation that is normally only voluntarily assumed (e.g. to have a house built), then such obligation ought not to be imposed.⁵²

If this is the basis for unjust enrichment's subsidiary status, it would not be surprising given the primacy the Western legal tradition gives to the general principle of freedom of contract.⁵³

However, Professors Grantham and Rickett reject the view that the subsidiary status of unjust enrichment is a consequence of the priority the common law affords to the notion of primacy of contract. Grantham and Rickett's argument that unjust enrichment is subsidiary to contract advances from the premise that restitution is concerned with no purpose other than restoration of the *status quo ante* in situations where the plaintiff did not subjectively consent to the enrichment of the defendant.⁵⁴ In their view, this fact means that the law of unjust enrichment has no role to play where the restoration of the *status quo ante* is already provided for, for example by the law of contract. The reasons are doctrinal:

This conclusion ... does not turn merely on some ill-defined notion of the primacy of contract, but rather on the simple fact that, since the parties have already provided for the possibility of the restoration if the plaintiff's subjective consent was defective, there is no longer any call for the intervention of the law of unjust enrichment. The agreement means it is no longer the case that, but for the imposition of a restitutionary obligation, the

Unjust Enrichment and Unconscionability' (2002) 118 *Law Quarterly Review* 352, 356; Cunningham, above n 48, 250–1; Michael Bryan and M.P. Ellinghaus, 'Fault lines in the law of obligations: *Roxborough v Rothman's of Pall Mall Australia Ltd*' (2000) 22 *Sydney Law Review* 636, 661–3.

⁵² See also Dietrich, above n 4, 102.

⁵³ See Hugh G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2008) [1-011]-[1-012]. See also Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 293–6.

⁵⁴ Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 275–82; Grantham and Rickett, 'Property Rights as a Legally Significant Event', above n 8, 741.

defendant would be able to retain an enrichment in circumstances that make it unjust to do so.⁵⁵

Although Grantham and Rickett's view that unjust enrichment is subsidiary to the law of *property* has been the subject of intense scholarly debate,⁵⁶ there has been little, if any, engagement with their argument that the reasons for unjust enrichment's status as subsidiary to *contract* are not based in policy, but are doctrinal. The resolution of this debate may be important to the development of the principles which limit unjust enrichment's potential to overlap with and consume other doctrines; whereas some writers have urged that such principles should develop by reference to unjust enrichment's own characteristics,⁵⁷ the present tendency is to fetter unjust enrichment not according to its own characteristics, but by reference to those doctrines which compete with it.

In section B of this Part, the implications of *Lumbers* for these two points of tension are explored. It is argued, first, that *Lumbers* is consistent with the view that unjust enrichment can come to a plaintiff's aid where there is a gap in the contractual allocation of risk between the parties, although the findings in *Lumbers* suggest that the High Court will be quick to close any such gap. Secondly, it is argued that the Court's reasons in *Lumbers* are more consistent with the view that accords primacy to the law of contract over that of unjust enrichment, rather than the view that unjust enrichment is, by virtue of its inherent doctrinal requirements, redundant where there is a contract between the parties.

In section C of this Part, the implications of *Lumbers* for the ability of contracting parties to make out the elements of a claim in unjust enrichment will be explored.

B *Lumbers and the Contractual Allocation of Risk*

1 *The 'Gap Filling' Capacity of Unjust Enrichment*

In coming to its decision in *Lumbers*, the Court did not refer to or distinguish between the various formulations identified above concerning when the application

⁵⁵ Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 291. See also Grantham and Rickett, 'Property Rights as a Legally Significant Event', above n 8, 742.

⁵⁶ See Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623; Ross Grantham and Charles Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' [1997] *New Zealand Law Review* 668; Peter Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 *Current Legal Problems* 231; Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 *Law Quarterly Review* 412; Ross Grantham and Charles Rickett, 'Tracing and Property Rights: the Categorical Truth' (2000) 63 *Modern Law Review* 905; Grantham and Rickett, 'Property Rights as a Legally Significant Event', above n 8; Virgo, above n 46, 11–17.

⁵⁷ See Barker, above n 46, 463; Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 299.

of law of contract will preclude that of unjust enrichment. However, it is submitted that the reasons in *Lumbers* are consistent with the view that a claim in unjust enrichment is permissible in a contractual context where there is a 'gap' in the contract so that it does not govern the subject of the dispute. The reference in the Joint Judgment to the 'rights and obligations which each party thus assumed'⁵⁸ under the contracts between them reflects a concern with those aspects of the parties' rights and obligations which were actually affected by the contracts. The same is true of Gleeson CJ's statement that, 'The contractual arrangements that were made effected a certain allocation of risk'.⁵⁹ Further, this interpretation of the reasons is the best means of reconciling *Lumbers* with the High Court's previous decision in *Roxborough*.⁶⁰

In *Roxborough*, a tobacco retailer purchased cigarettes from a wholesaler. The retailer paid just one lump sum for the cigarettes, but the contract itemised the total price in a way which distinguished between the wholesale price of the cigarettes and a 'tobacco licence fee' which was payable by the wholesaler under the *Business Franchise Licence (Tobacco) Act 1987* (NSW). In *Ha v New South Wales*,⁶¹ the High Court held that what was cloaked as a 'tobacco licence fee' was in fact an excise tax which was unconstitutional under s 90 of the *Constitution*. At the time the decision was handed down, the wholesaler had not yet paid the tax to the relevant NSW authority. Although the retailer had not suffered any loss, having recouped the tax through increasing the price to consumers, it sued the wholesaler for restitution of the moneys representing the payment of the tax on the grounds that there had been a total failure of consideration. By a 5:1 majority (Kirby J dissenting), the High Court allowed the claim.

The decision in *Roxborough* has been variously praised and criticised, and has importance for issues beyond the scope of this article. For present purposes, the relevant point is that the restitutionary claim for a total failure of consideration succeeded notwithstanding the retailer had paid the amount to the wholesaler under a valid contract of sale. At the time the action was commenced the contract had been discharged by performance, but it had never been suggested that discharge by performance obviated a conflict between restitutionary and contractual obligations.⁶²

Explaining this aspect of the decision in *Roxborough* is made difficult by the fact that the majority judges themselves do not do so. The majority must have turned

⁵⁸ *Lumbers* (2008) 232 CLR 635, 674.

⁵⁹ *Ibid* 654.

⁶⁰ *Roxborough* (2001) 208 CLR 516.

⁶¹ (1997) 189 CLR 465.

⁶² See Keith Mason and JW Carter, *Restitution Law in Australia* (Butterworths, 1995) 460; McLure, above n 43, 225; *Haxton v Equuscorp Pty Ltd* [2010] VSCA 1 ('*Haxton*'), [128], [144]. In the most recent edition of their work, the learned authors of *Restitution Law in Australia* appear to regard *Roxborough* as an anomalous exception to this principle: see Keith Mason, JW Carter and GJ Tolhurst, *Restitution Law in Australia* (Lexis Nexis Butterworths, 2nd ed, 2008) 486–7.

their mind to the issue as Kirby J dissented on this ground.⁶³ However, Callinan J was the only majority judge to consider it explicitly and his Honour's treatment of it is limited as his decision was based on the implication of a term in the contract, rather than a failure of consideration. The treatment he did give this issue has been criticised as unconvincing.⁶⁴

If this aspect of the decision is explicable (and this has been doubted⁶⁵), it must be because restitution did not disturb the 'legitimate hopes and fears in the bargain'.⁶⁶ In Birks' view, the crucial fact is that neither the payment of the tax itself nor its quantum was viewed as negotiable.⁶⁷ Or, in Bryan and Ellinghaus' view, the contract did not allocate the risk that the licence fees would be found to be unconstitutional.⁶⁸

It is submitted that Birks' view is strained as the retailer and wholesaler had clearly negotiated and then contracted to the effect that the retailer would pay to the wholesaler an amount representing the tax. Although the payment of the tax by *someone* was non-negotiable, as between themselves the retailer and wholesaler had clearly engaged in negotiation ending in an agreement that the retailer in effect pay the tax. However, Bryan and Ellinghaus' view is more persuasive. It would surely be far-fetched to suggest (at least in the absence of strong evidence to the contrary) that a contracting party agreed to pay to another an amount as consideration for an obligation which that other would later have to discharge knowing that that other would in fact never have to discharge it.

In summary, it is therefore suggested that *Lumbers* is consistent with the view that a claim in unjust enrichment is permissible between contracting parties where there is a 'gap' in the contract so that it does not govern the subject of the dispute, for two reasons. First, the reasoning in both the Joint Judgment and the reasons of Gleeson CJ is concerned with the particular allocation(s) of risk between the parties. Secondly, this reading of *Lumbers* is the only method of reconciling it with *Roxborough*. An interpretation which saw *Lumbers* forbidding an unjust enrichment claim wherever there is a contract involved would cause *Lumbers* to impliedly overrule *Roxborough*. It is not likely that Gleeson CJ, Gummow and Hayne JJ, who delivered majority judgments in both *Lumbers* and *Roxborough*, intended in the former to overrule their own decision in the latter.

⁶³ *Roxborough* (2001) 208 CLR 516, 577–8.

⁶⁴ Beatson and Virgo, above n 51, 356.

⁶⁵ *Ibid*; McLure, above n 43, 234; Virgo, above n 37, 490–1. See also *Haxton* [2010] VSCA 1, [128], [144]; Tang Hang Wu, 'Unjust Enrichment within a Valid Contract: a Close Look at *Roxborough v Rothmans of Pall Mall Australia Ltd*' (2007) 23 *Journal of Contract Law* 201.

⁶⁶ Birks, above n 48, 5.

⁶⁷ *Ibid*. See also Cunningham, above n 48, 250–1.

⁶⁸ Bryan and Ellinghaus, above n 51, 661–3.

2 *When is there a 'Gap' to Fill?*

If the true position is that a claim in unjust enrichment is permissible where there is a 'gap' in the contract, it is necessary to embark upon an analysis of whether such a 'gap' in fact exists. The Court in *Lumbers* was of the view that there was no such gap. It is submitted that the facts in *Lumbers* bore two characteristics which required the Court, in order to reach this conclusion, to 'read' the contractual risk allocation(s) 'into' the facts. First, there was in fact no contract between Builders and the Lumbers. The only contract to which Builders may have been privy was the subcontract with Sons.⁶⁹ Secondly, neither the contract between Builders and Sons nor that between Sons and the Lumbers made any precise stipulation as to price nor the available remedies in the event of a breach.

The first characteristic is not novel. Indeed, a case bearing a similar characteristic was decided by the House of Lords in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 (*The Trident Beauty*). In this case, the charterer of a vessel, Pan Ocean, paid moneys in advance to the assignee of a shipowner in accordance with its contract with the shipowner, Trident. As it turned out, Pan Ocean paid more than was owing as there were some periods when no freight had been carried. The contract between Pan Ocean and Trident expressly imposed an obligation on Trident to return moneys so overpaid to Pan Ocean. As Trident was insolvent, Pan Ocean preferred not to rely on its contractual right and instead sued the assignee, Creditcorp, for restitution for total failure of consideration. In a unanimous decision, the House of Lords dismissed the claim. Although Lord Woolf (with whom Lords Keith of Kinkel and Slynn of Hadley agreed) made comments which arguably touched upon the relationship between contract and unjust enrichment,⁷⁰ his Lordship in essence dismissed the claim because Pan Ocean's position should not be improved simply because Trident had assigned its rights to a third party.⁷¹ However, in a separate speech, Lord Goff held that,

[a]s between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.⁷²

The reaction to this decision has been mixed. On the one hand, certain commentators consider the preclusion of restitutionary claims in a three-party context as orthodox parity of reasoning when compared to a two-party context.⁷³

⁶⁹ It is recalled that there was some uncertainty concerning the precise nature of the relationship between Sons and Builders: see the discussion at nn 10–11 above.

⁷⁰ See Burrows, above n 2, 53; Beatson, 'The Temptation of Elegance', above n 43, 165. See also Beatson, 'Restitution and Contract', above n 43.

⁷¹ *The Trident Beauty* [1994] 1 WLR 161, 171–2.

⁷² *Ibid* 192.

⁷³ Birks, *Unjust Enrichment*, above n 43, 92; Rush, above n 4, [40].

Others reject it outright.⁷⁴ Others again accept the outcome, but question the path taken to reach it. In particular, Burrows has argued that Lord Goff's reasons reflect an unduly 'pro-contract view' where restitution was rendered 'unnecessary and inappropriate' simply, apparently, because of the inclusion of the repayment clause. He notes that, 'Lord Goff's view produced the odd result that the payor is legally worse off by having provided for repayment'.⁷⁵ Barker makes the same point thus:

Certainly they contracted into a regime of recoupment with Trident, but does this really mean that they were thereby abandoning all other rights provided by the law of unjust enrichment? If I insure my goods against theft, does this show that I am thereby abandoning my rights to reclaim them from the thief? Surely not. The more natural inference is not that I am a 'risk taker' *vis-à-vis* the thief, but simply that I am prudent ...⁷⁶

This article is not the forum for a detailed analysis of Lord Goff's judgment in *The Trident Beauty*. The important point is simply that construing the contractual arrangements in a manner which closes the gap is made more complicated where there is in fact no contract between the parties to the claim in unjust enrichment.⁷⁷ In *The Trident Beauty*, Lord Goff did not see this obstacle as insurmountable, but his Lordship's speech is not without difficulty.

In *Lumbers*, identifying a contractual risk allocation is also made more difficult by the second of its characteristics mentioned above: namely, that neither the contract between Builders and Sons nor that between Sons and the Lumbers made any precise stipulation as to price nor the available remedies in the event of a breach. To the contrary, as the Court noted, there were significant procedural and evidentiary deficiencies. The Joint Judgment went so far as to find that the pleadings were embarrassing in the technical sense.⁷⁸ This is a significant point of distinction *vis-à-vis* *The Trident Beauty*, where there was a written contract which clearly provided Pan Ocean with a remedy in the event of overpayment. Yet the Court in *Lumbers* found that the evidence established a contractual arrangement which allocated risk in a manner which precluded the restitutionary claim.

It is difficult to identify why precisely this was so. One possibility is that the premise from which this analysis is operating is wrong—that their Honours considered that the mere fact that there are contract(s) between the parties precludes a restitutionary claim. However, for the reasons given above, this interpretation is not preferred.

⁷⁴ Tettenborn, above n 43.

⁷⁵ Burrows, above n 2, 55.

⁷⁶ Barker, above n 35, 310.

⁷⁷ The assignment by Trident to Creditcorp did not make Creditcorp a party to Trident's contract with Pan Ocean. There was therefore no privity of contract between Pan Ocean and Creditcorp: see JW Carter, *Carter on Contract* (19 September 2010) Lexis Nexis, [17-080].

⁷⁸ *Lumbers* (2008) 232 CLR 635, 659 (Joint Judgment), 648 (Gleeson CJ).

A second possibility is that the decision in effect makes freedom of choice a bar to restitution. In one commentator's view, 'Even if there were no contracts binding the respective parties, the Lumbers' freedom of choice would not be respected if a claim for restitution succeeded against them.'⁷⁹ However, this is strained as an interpretation of the reasons, and indeed the learned commentator does not explain how he arrives at this conclusion. If freedom of choice were accepted as a bar to a restitutionary claim, surely this would give rise to the possibility of almost all restitutionary claims being barred since restitution by its nature operates at law and few defendants would voluntarily restore a gain made if they could get away with it.

A third possibility is arguably suggested by Birks. In discussing 'leapfrogging' out of valid contracts, Birks states that,

[o]ne reason for not allowing [the subcontractor] to sue the [owner] is precisely that the [subcontractor] must not wriggle round the risk of insolvency inherent in its contract with the [builder]. Contracts entail the risk of insolvency.⁸⁰

However, it does not appear that Birks intended for this to operate as the exclusive exegetical principle for cases such as *Lumbers*. Further, in *Lumbers*, it was not Sons, but Builders, who was insolvent.

A final possibility is that *Lumbers* endorses the view that contracting parties are taken to be risk-takers not only vis-à-vis each other but also vis-à-vis third parties with whom the other has contracted because, by entering into a contract, they impliedly limit themselves to their rights under it. On this view, Builders were risk takers vis-à-vis Lumbers because they had completed the work expecting to be paid by Sons, thereby taking the risk that Sons would not pay.⁸¹ It has been suggested that analogies to the tort of negligence would provide a sound basis for the conclusion that the existence of a contractual matrix between the parties may restrict obligations so that they operate in accordance with that matrix even where there is no privity of contract between the parties.⁸² Although their Honours did not rely on these analogies, they may be the best way of understanding *Lumbers*.

It is immediately apparent that, if this explanation of *Lumbers* is accepted, the argument advanced in this article is torn in two directions. On the one hand, it was suggested above that, on its face, *Lumbers* was not authority for the proposition that the mere existence of a contract between the parties to litigation precludes

⁷⁹ Rush, above n 4, [27].

⁸⁰ Birks, *Unjust Enrichment*, above n 44, 90.

⁸¹ See Goymour, above n 4, 471; Virgo, above n 37, 507–8. See also Daniel Friedmann, 'Valid, Voidable, Qualified, and Non-Existing Obligations: an Alternative Perspective on the Law of Restitution' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 247, 274.

⁸² Edelman, above n 4, 445; Barker, above n 4, 161; Barker, above n 46, 462. See also Daniel Friedmann, 'Restitution from an Assignee' (1994) 110 *Law Quarterly Review* 521, 523–4.

a claim in unjust enrichment. However, if the reason why there was no gap in the contractual allocation of risk is that contracting parties are taken to be risk-takers vis-à-vis each other, and also vis-à-vis third parties with whom the other has contracted, unjust enrichment may have an even smaller scope within which to operate than if the principle were that the mere existence of a valid contract precluded the unjust enrichment claim. There is therefore tension between the reasoning that *Lumbers* discloses on its face and one possible logical extension of it.

3 *Implications for the Basis of Unjust Enrichment's Subsidiary Status*

It remains to assess the implications of this aspect of the decision in *Lumbers* for the dispute concerning the basis of unjust enrichment's subsidiarity to the law of contract.

It is suggested that the Court's reasoning in *Lumbers* is not support for Grantham and Rickett's view that the reason why unjust enrichment is subsidiary to the law of contract is that unjust enrichment is redundant where the subject of the dispute is contractually provided for. Rather, the Court's concern in *Lumbers* was that unjust enrichment not disturb the 'operative distribution of risks and benefits'⁸³ inherent in the contracts between the parties. This appears plain from the above review of the Court's reasons; the reference in the Joint Judgment to the 'rights and obligations which each party thus assumed'⁸⁴ and Gleeson CJ's statement that, '[t]he contractual arrangements that were made effected a certain allocation of risk'⁸⁵ reflect a concern with giving effect to the rights and obligations assumed by the parties, not the doctrinal boundaries of the law of unjust enrichment. That is not to suggest that *Lumbers* is fatal to Grantham and Rickett's argument. The point is simply that there is a distinction between the mere status of unjust enrichment as subsidiary to contract and the reasons for that status. *Lumbers* could not be said to support those authors' reasons for the latter. What *Lumbers* does support is the principle that the outcomes afforded by contract law, which holds as a central concept the notion of freedom of contract, are not to be disturbed by the law of unjust enrichment.

C *Contractual Relationships and the Elements of an Unjust Enrichment Claim*

As explained above, the second significance the Court assigned to the contractual relationships between Builders and Sons and Sons and the Lumbers was that Builders was unable to make out the elements of a claim in unjust enrichment. According to the Joint Judgment, the Lumbers had not been enriched.⁸⁶ According to Gleeson CJ, if they had been enriched, it was at Sons' expense.⁸⁷

⁸³ Hector MacQueen, 'Unjustified Enrichment in Mixed Legal Systems' [2005] *Restitution Law Review* 21, 33.

⁸⁴ *Lumbers* (2008) 232 CLR 635, 674.

⁸⁵ *Ibid* 654.

⁸⁶ *Ibid* 673 (Joint Judgment).

⁸⁷ *Ibid* 657 (Gleeson CJ).

These findings appear to be authority for two propositions. First, a defendant to an unjust enrichment claim cannot be enriched where he has paid a third party for the goods or services conferred on her by the plaintiff or remains contractually liable to so pay. Secondly, an enrichment is not at the plaintiff's expense if a third party remains contractually liable to pay the plaintiff for the enrichment conferred on the defendant.⁸⁸

On one view, these propositions could be seen to support Grantham and Rickett's argument as they go to the 'inherent doctrinal nature'⁸⁹ of unjust enrichment. Indeed, Grantham, in an earlier article to those co-authored with Rickett, uses the fact that a defendant's accrued contractual liability to make payment (which survives discharge) would prevent the defendant from being enriched in support of the argument for subsidiarity.⁹⁰ However, as Smith notes, the argument for subsidiarity proceeds on the assumption that the plaintiff can in fact prove all the elements of his claim in unjust enrichment and that the presence of the plaintiff's contract is the sole reason for the claim being barred.⁹¹ Consequently, although this aspect of the Court's reasoning indicates that the doctrinal requirements of unjust enrichment may preclude it from operating where there is a contractual allocation of risk between the parties, it is not proof of unjust enrichment's redundancy where the subject matter of the dispute between the parties is governed by contract.

IV *LUMBERS'* TREATMENT OF *PAVEY & MATTHEWS*

As explained above, the Joint Judgment dismissed Builders' claim for a reason which, at first glance, may seem unrelated to its findings concerning the relationship between unjust enrichment and contract: namely, that Builders' claim for remuneration on a *quantum meruit* basis failed as the Lumbers had not requested that it perform the work.⁹² The Joint Judgment held that,

if Builders did whatever work it did and paid whatever money it paid at the Lumbers' request, Builders' claim for a reasonable price for the work and for the money it paid would fall neatly within long-established principles.⁹³

But this was not so. Although we have thus far been able to put this aspect of the decision to one side, it is now necessary to engage with it, at least to a limited degree, to explain potential implications for the relationship between the law of contract and the law of unjust enrichment.

⁸⁸ For further discussion of the difficulty of establishing the elements of an unjust enrichment claim in a three-party context such as *Lumbers*, see Dietrich, above n 4, 103–5.

⁸⁹ Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 293.

⁹⁰ Ross Grantham, 'Security of Contract: the Challenge from Restitution' (2000) 16 *Journal of Contract Law* 102, 112–3.

⁹¹ Smith, above n 35, 601. Compare also Jackson, above n 37.

⁹² *Lumbers* (2008) 232 CLR 635, 671.

⁹³ *Ibid* 666.

In *Pavey & Matthews*, the High Court rejected the implied contract theory and held that the right to recover on a *quantum meruit* depends on the establishment of a claim based on unjust enrichment (in that case, a claim for work and labour done).⁹⁴ This confirmed a point that had been agitated since at least 1966,⁹⁵ and which the High Court⁹⁶ and the House of Lords⁹⁷ have endorsed subsequently. However, although the High Court adopted unjust enrichment as the explanatory principle for *quantum meruit* claims, it did not clearly identify the ‘unjust factor’ that, in that case, entitled the plaintiff to recover.⁹⁸ The reference by Deane J to an obligation, ‘to pay fair and just compensation for a benefit which has been accepted’,⁹⁹ amongst other judicial pronouncements,¹⁰⁰ has given rise to suggestions that a concept of ‘free acceptance’ may have two roles to play in the law of unjust enrichment.¹⁰¹ First, at the ‘enrichment’ stage of the inquiry, it may mean that a defendant is precluded from subjectively devaluing a benefit conferred on them which they have freely accepted. Secondly, it may be that ‘free acceptance’ operates as a stand-alone ‘unjust factor’.

In *Lumbers*, the Joint Judgment distinguished *Pavey & Matthews* in terms which have alarmed some commentators. It said:

First, there was no issue in that case about whether the plaintiff, a builder, had a claim for work and labour done and materials supplied ... the issue was whether the builder’s action on a *quantum meruit* was a direct or indirect enforcement of the oral contract the parties had made. The majority in *Pavey & Matthews* held that because ‘the true foundation of the right to recover on a *quantum meruit* does not depend on the existence of an implied contract’ the action was not ‘one by which the plaintiff seeks to enforce the oral contract’.

⁹⁴ *Pavey & Matthews* (1986) 162 CLR 221, 227 (Wilson and Mason JJ), 255–7 (Deane J).

⁹⁵ See Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1st ed, 1966) 3–5.

⁹⁶ *ANZ Banking Group Ltd v Westpac Banking Corporation* (1987) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

⁹⁷ See, eg, *Yeoman’s Row Management Ltd v Cobbe* [2008] 1 WLR 1752.

⁹⁸ Rush, above n 4, [33].

⁹⁹ *Pavey & Matthews* (1986) 162 CLR 221, 257.

¹⁰⁰ For a detailed review, see Peter Birks, ‘In Defence of Free Acceptance’ in Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 105. More recently, see, eg, *Brenner v First Artists’ Management Pty Ltd* [1993] 2 VR 221; *Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd* (2002) 5 VR 577.

¹⁰¹ Goff and Jones, above n 42; Birks, *Unjust Enrichment*, above n 43, 57; Birks, above n 100, 105; Greg Tolhurst and John Carter, ‘Acceptance of Benefit as a Basis for Restitution’ (2002) 18 *Journal of Contract Law* 52; John Carter, ‘Discharged Contracts: Claims for Restitution’ (1997) 11 *Journal of Contract Law* 130, 139–40. See also *Brenner v First Artists’ Management Pty Ltd* [1993] 2 VR 221, 261 (Byrne J); *Angelopoulos v Sabatino* (1995) 65 SASR 1. Cf Andrew Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 *Law Quarterly Review* 576.

The second point to be noted is that unjust enrichment was identified as a legal *concept* unifying ‘a variety of distinct categories of case’ ... *not* ... a principle which can be taken as a sufficient premise for direct application... Rather, as Deane J emphasised in *Pavey & Matthews*, it is necessary to proceed by ‘the ordinary processes of legal reasoning’ and by reference to existing categories of cases ...¹⁰²

The concerns about and implications of this passage can broadly be divided into three categories, each of which is dealt with below.

A *Unjust Enrichment as a Source of Obligation*

First, some commentators have argued that this passage, together with *Lumbers*' emphasis on the need for a request to make out a *quantum meruit*, has effectively ended a role for unjust enrichment in Australian law. Such assessments draw support from pre-*Lumbers* attacks on the unjust enrichment ‘principle’ in *Roxborough*¹⁰³ and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹⁰⁴ as well as the subsequent decisions of *Friend v Brooker*¹⁰⁵ and *Bofinger v Kingsway Group Ltd*.¹⁰⁶ Writing before *Brooker* and *Bofinger*, Andrew and Kirton, in what, anecdotally, is a common perception, describe the combined effect of the High Court's decisions as being that, ‘...unjust enrichment can no longer be regarded as a unifying concept in Australian law. The top-down reasoning of Deane J has been rejected.’¹⁰⁷ Similarly, in its recent decision in *Haxton v Equuscorp Pty Ltd*,¹⁰⁸ the Victorian Court of Appeal found that, ‘[t]he High Court's post-*Pavey* elaboration of unjust enrichment signals a caveat against loose applications of overly general principles and associated “idiosyncratic notions of unfairness”’ in a way which ‘appears inconsistent with unjust enrichment as the independent category of law advocated by jurists exemplified by Professor Birks’.¹⁰⁹

If this interpretation of these decisions is accurate, the effect would be to abolish unjust enrichment's role as an independent source of obligation alongside (or perhaps subsidiary to) contract and tort, a map of the private law which has been accepted in England.¹¹⁰ The relationship, then, between unjust enrichment and

¹⁰² *Lumbers* (2008) 232 CLR 635, 664–5 (emphasis in original).

¹⁰³ See particularly the judgment of Gummow J in *Roxborough*, 540–51.

¹⁰⁴ (2007) 230 CLR 89 (*Farah*). See particularly in *Farah*, 148–59 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁰⁵ (2009) 239 CLR 129 (*Brooker*).

¹⁰⁶ (2009) 239 CLR 269 (*Bofinger*).

¹⁰⁷ Andrew and Kirton, above n 4, 374. See also Romauld Andrew, ‘The fabrication of unjust enrichment in Australian law: *Pavey & Matthews v Paul* revisited’ (2010) 26 *Building and Construction Law Journal* 324.

¹⁰⁸ [2010] VSCA 1.

¹⁰⁹ *Ibid* [127] (Dodds-Streeton JA, with whom Ashley and Neave JJA agreed).

¹¹⁰ *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn). This is similar to the taxonomy proposed by the late Peter Birks in *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005). For a recent useful review of

contract would arguably be non-existent. If anything, unjust enrichment would be no more than a classificatory unit or an extrinsic norm denuded of legal force.¹¹¹ Before assessing whether this interpretation is valid, it is useful to review the High Court's most recent findings on the role and place of unjust enrichment in *Brooker* and *Bofinger*.

In *Brooker*, the Court held that the plaintiff was correct to disavow any reliance on the concept of unjust enrichment in an appeal concerning the equitable doctrine of contribution. The joint judgment of French CJ, Gummow, Hayne and Bell JJ, with which Heydon J relevantly agreed, drew on *Lumbers* in support of the proposition that:

... while the concept of unjust enrichment may provide a link between what otherwise appears to be a variety of distinct categories of liability, and it may assist, by the ordinary processes of legal reasoning, in the development of legal principle, the concept of unjust enrichment itself is not a principle which can be taken as a sufficient premise for direct application in a particular case.¹¹²

In *Bofinger*, the Court, in a unanimous judgment, held that the equitable doctrine of subrogation did not fall within the rubric of claims associated with the law of unjust enrichment. Their Honours re-iterated that, '... the concept of unjust enrichment was not a principle supplying a sufficient premise for direct application in a particular case,'¹¹³ and considered that if the law of unjust enrichment were otherwise treated it may, '... conflict in a fundamental way with well-settled equitable doctrines and remedies'.¹¹⁴ Their Honours appeared to identify two roles for unjust enrichment. First, it may 'provide a means for comparing and contrasting various categories of liability'.¹¹⁵ Secondly, '[t]he concept of unjust enrichment may also assist in the determination by the ordinary processes of legal reasoning of the recognition of obligations in a new or developing category of case.'¹¹⁶ On this second role, their Honours gave the example of *David Securities Pty Ltd v Commonwealth Bank of Australia*,¹¹⁷ where the Court expanded the availability of the restitutionary action for money had and received to include mistakes of law, that

issues concerning the taxonomy of the private law, see Kelvin Low, 'The use and abuse of taxonomy' (2009) 29 *Legal Studies* 355.

¹¹¹ See Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004), 84–90.

¹¹² *Brooker* (2009) 239 CLR 129, 141.

¹¹³ *Bofinger* (2009) 239 CLR 269, 299 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹¹⁴ *Ibid* 300 (Gummow, Hayne, Heydon, Kiefel and Bell JJ). See also Hon. Justice WMC Gummow, 'Moses v Macferlan: 250 years on' (2010) 84 *Australian Law Journal* 756, 758–9.

¹¹⁵ *Bofinger* (2009) 239 CLR 269, 299 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹¹⁶ *Ibid* 300 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹¹⁷ (1992) 175 CLR 353 ('*David Securities*').

action having only previously been available for mistakes of fact.¹¹⁸ In *Bofinger*, unjust enrichment's assistance was not called for since '... the doctrinal basis of equitable subrogation in Australian law is not unsettled.'¹¹⁹

Where does this leave the Australian law of unjust enrichment? It is submitted, with respect, that interpretations of these decisions as rejecting any role for unjust enrichment are greatly exaggerated. All that the reasons in *Lumbers*, *Brooker* and *Bofinger* were doing was emphasising what Deane J said himself in *Pavey & Matthews*¹²⁰ and what has been accepted in England: that there is no, 'free-standing claim of unjust enrichment in the sense that a Claimant can get away with pleading facts which lead ... to an enrichment which he says is unjust'.¹²¹ The 'top down reasoning of Deane J'¹²² cannot be rejected as his Honour did not engage in any such reasoning. As Rush has pointed out, if there is any difference between the above-quoted passage from *Lumbers* and Deane J's own judgment in *Pavey & Matthews*, it is that Deane J did not expressly contrast a *concept* with a *principle*. But as he goes on to illustrate,¹²³ the same distinction had been made in *David Securities* to mean nothing more than that unjust enrichment is not itself a cause of action and that, in identifying an unjust factor, it is necessary to look down to the decided cases.¹²⁴ Even if there is some dispute as to whether unjust enrichment can be called a cause of action,¹²⁵ the view that it does not suffice to plead 'unjust enrichment' without identifying material facts giving rise to a particular 'unjust factor' is wholly orthodox.¹²⁶ It is also worth observing that the High Court's vitriol in *Farah* is unsurprising given that the restitutionary analysis was adopted by the NSW Court of Appeal without hearing any argument on it from the parties.¹²⁷

This is not to suggest that unjust enrichment currently or is likely in the future to play a similarly prominent role to that it currently enjoys and may continue to enjoy in English law. It is true that the High Court's reasons reflect a greater reluctance to develop the law by reference to unjust enrichment scholarship than those of the House of Lords and English Court of Appeal. In particular, the High Court has been particularly hesitant to develop equitable doctrines and remedies

¹¹⁸ See *Bilbie v Lumley* (1802) 2 East 469; *Brisbane v Dacres* (1813) 5 Taunt 143; *Dixon v Monkland Canal* (1831) 5 W & S 445; *Kelly v Solari* (1841) 9 M & W 54; *Aicken v Short* (1856) 1 H & N 210; *Morgan v Ashcroft* [1938] 1 KB 49.

¹¹⁹ *Bofinger* (2009) 239 CLR 269, 302 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹²⁰ See *Pavey & Matthews* (1987) 162 CLR 221, 256–7 (Deane J).

¹²¹ *Charles Uren v First National Home Finance Ltd* [2005] EWHC 2529, [16] (Mann J).

¹²² Andrew and Kirton, above n 4, 374.

¹²³ Rush, above n 4, [56]-[58].

¹²⁴ *David Securities* (1992) 175 CLR 353, 358 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

¹²⁵ See the discussion in Mason, Carter and Tolhurst, above n 62, 78–9 [207].

¹²⁶ Barker, above n 4, 162; Mason, Carter and Tolhurst, above n 62, [2904].

¹²⁷ See *Farah* (2007) 230 CLR 89, 156–7. See also *Friend v Brooker* (2009) 239 CLR 129, 161–74 (Heydon J) and J D Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1.

by reference to unjust enrichment and is insistent that equity operates according to its distinct conscience and has sufficient vitality to develop as appropriate without the intervention of the (traditionally common) law of unjust enrichment.¹²⁸ But that is not the same as sidelining unjust enrichment as, at worst, an academic fantasy or, at best, a mere classificatory unit or extrinsic norm with no legal force. Although unjust enrichment may be neither a cause of action nor a licence for the application of idiosyncratic notions of justice, it does not necessarily follow that unjust enrichment is not an independent category of law. It is entirely consistent with Professor Birks' original¹²⁹ conception that unjust enrichment exists as a category into which particular causes of action, particularly those listed by Lord Mansfield in *Moses v Macferlan*,¹³⁰ are grouped and thereafter consistently and coherently developed. Some English lawyers have sought to expand the role of unjust enrichment by adding further causes of action to that list of 'unjust factors' and/or altering the remedies available when an unjust enrichment is established. The High Court is unlikely to be sympathetic to submissions that Australia follow that example. However, as *David Securities* illustrates, litigants who plead within the territory marked out by Lord Mansfield in *Macferlan* and do not seek to interfere with established equitable remedies may turn to unjust enrichment in an appropriate 'new or developing category of case'.¹³¹

B *The Return of Implied Contract?*

Although the Court's emphasis on the point that unjust enrichment is not a cause of action does not strike unjust enrichment theory any great blow, the Joint Judgment's finding that a request by the recipient of services is both necessary and sufficient to establish a *quantum meruit* may. As noted above, it is this aspect of the Court's reasons which has been criticised as reverting to the formalism of the old forms of action.¹³²

¹²⁸ For a recent defence of preserving equity's distinct role and resisting the unifying tendencies of some unjust enrichment scholars, see Patrick A Keane, 'The 2009 WA Lee Lecture in Equity: The conscience of equity' (2010) 84 *Australian Law Journal* 92. See also Gummow, above n 114.

¹²⁹ In *Unjust Enrichment*, above n 43, Professor Birks called for his previous writings to be recalled and burnt and replaced by a new 'absence of basis' approach to restitutionary liability. The response to this new approach has been mixed, even in England. It was rejected in *Haxton* [2010] VSCA 1, [127].

¹³⁰ (1760) 2 Burr 1005 ('*Macferlan*'); '... money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.': *Macferlan* (1760) 2 Burr 1005, 1011–2 (Lord Mansfield).

¹³¹ *Bofinger* (2009) 239 CLR 269, 300 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹³² See Edelman, above n 4, 447–9; Getzler, above n 4, 208; Goymour, above n 4, 470; Rush, above n 4, [42]; Barker, above n 4, 162; Burrows, above n 4, 83–84; Bryan, above n 4, 328–30. For a defence of this aspect of the Joint Judgment in *Lumbers*, see Dietrich, above n 4.

The form of action for a claim to a *quantum meruit* required the plaintiff to plead that, ‘the defendant, in consideration of some service rendered [by] the plaintiff at [the defendant’s] request, promised to pay to the plaintiff the reasonable value of that service’.¹³³ This form of action, along with that of *indebitatus assumpsit* and its other nominate subcategories, came to be explained on the basis of the now rejected¹³⁴ implied contract theory. The implied contract theory had developed from the 15th and 16th centuries with the triumph of the action of *indebitatus assumpsit*, a claim made on the basis of a fictional promise implied by the court from the defendant’s conduct.¹³⁵ Although initially understood as an implication made at law, the promise the plaintiff was required to plead came to be regarded as a genuine inference from the facts and recovery was denied where the plaintiff could not establish a real promise.¹³⁶ Under this theory, what is now described as the law of restitution or the law of unjust enrichment¹³⁷ was known as the law of quasi-contract and treated as an aspect of contract law.¹³⁸

Despite the fears of some, *Lumbers* cannot reasonably be said to require plaintiffs to plead the requirements of the old forms of action for all those claims which unjust enrichment theorists have come to explain by that principle. However, it is possible to interpret the Joint Judgment as appearing to, ‘... support the notion that implied contract ideas have a role in some (near contractual) restitutionary contexts’.¹³⁹ The question has been asked, if a request by the recipient of services is both necessary and sufficient to establish a *quantum meruit* claim, ‘[a]t what point does a claim for *quantum meruit* ... start to encroach on the space hitherto reserved for promissory estoppel, itself a form of contract?’¹⁴⁰ However, this is not the same as resurrecting the ‘web of falsehood’¹⁴¹ that was the implied contract theory. This theory involved the fictitious implication of a contract, and came to be so misunderstood that plaintiffs were denied recovery because they could not establish the existence of an express contract.¹⁴² In *Lumbers*, the essence of the

¹³³ D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 269–72.

¹³⁴ *Pavey & Matthews* (1986) 162 CLR 221, 227 (Wilson and Mason JJ), 255–7 (Deane J); *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669. For a convenient collection of further authorities, see Graham Virgo, ‘Restitution’ in H G Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2008) [29-008].

¹³⁵ See *Slade’s Case* (1602) 4 Co Rep 92a.

¹³⁶ See *Sinclair v Brougham* [1914] AC 398.

¹³⁷ Whether it is more appropriate to refer to the law of restitution or the law of unjust enrichment is itself a current source of controversy: see, for example, Birks, *Unjust Enrichment*, above n 43, 279–80; Birks, ‘Property and Unjust Enrichment: Categorical Truths’ above n 56; Andrew Burrows, ‘Quadrating Restitution and Unjust Enrichment: A Matter of Principle?’ [2000] *Restitution Law Review* 257; M McInnes, ‘Restitution, Unjust Enrichment and the Perfect Quadrature Thesis’ [1999] *Restitution Law Review* 118.

¹³⁸ See Gummow, above n 114, 757.

¹³⁹ Dietrich, above n 4, 107.

¹⁴⁰ Rush, above n 4, [34].

¹⁴¹ Peter Birks, *Unjust Enrichment*, above n 43, 273.

¹⁴² See, for example, in *Sinclair v Brougham* [1914] AC 398.

requirement of a request appears to lie in the enforcement of legal obligations that have been voluntarily assumed. To those who take the view that the law gives effect to ‘almost contracts’ in order to fill the gap caused by the formalism of contract law, the identification of this overlap could warrant *quantum meruit* claims being categorised with other ‘almost contract’ doctrines such as estoppel and assumption of responsibility.¹⁴³

C *Free Acceptance*

Thirdly, the above-quoted passage from *Lumbers*¹⁴⁴ may have implications for the concept of free acceptance. It has been said that *Lumbers*’ treatment of *Pavey & Matthews* rejects any role for ‘free acceptance’ as either a stand-alone ‘unjust factor’ or a limitation on subjective devaluation.¹⁴⁵ In light of the above discussion, it is probably safe to assume that ‘free acceptance’ is not likely to be accepted by the High Court as a stand-alone unjust factor at any time in the near future. This has been said not to occasion any ‘great blow to restitutionary analysts’¹⁴⁶ since its proponents had already accepted a reduced role for it.¹⁴⁷ But if free acceptance cannot act as a limitation on subjective devaluation, there may be at least one minor implication for the relationship of unjust enrichment to contract. As explained above, in the context of the ‘enrichment’ inquiry, free acceptance operates alongside ‘incontrovertible benefit’ as a control mechanism on the defendant’s ability to argue that, subjectively, they did not benefit from the transfer of wealth or property to them.¹⁴⁸ Therefore, a rejection of this role for ‘free acceptance’ would mean that the ‘enrichment’ inquiry is more dependent than previously on the defendant’s subjective valuation of the benefit. This increased role for subjectivity juxtaposes with the law of contract, which focuses on objective standards. This could marginalise unjust enrichment’s role even further in the eyes of sceptics.¹⁴⁹

¹⁴³ See Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000) 258–61; Grantham and Rickett, ‘On the Subsidiarity of Unjust Enrichment’, above n 8, 273; See also Grantham, above n 90, 113–22.

¹⁴⁴ At n 102, above.

¹⁴⁵ Barker, above n 4, 161–2. Contrast Gleeson’s CJ’s reasons where his Honour appears to accept the concept of ‘free acceptance’ but finds that it was not applicable since the *Lumbers* did not know that the work was being performed by Builders and therefore never had the opportunity to reject the building work: *Lumbers* (2008) 232 CLR 635, 657.

¹⁴⁶ Barker, above n 4, 162.

¹⁴⁷ See also Getzler, above n 4, 207. Birks originally argued that free acceptance operated as both an unjust factor and a test of whether services constituted an enrichment, but later conceded that free acceptance was a test of enrichment only: see Birks, above n 99, 105.

¹⁴⁸ Rachel Mulheron, ‘Quantum Meruit upon Discharge for Repudiation’ (1997) 16 *Australian Bar Review* 150, 163.

¹⁴⁹ For an argument that the objective law of contract renders the subjective law of unjust enrichment redundant, see Hang Wu, above n 65.

V CONCLUSION

The 21st century judgments of the High Court concerning unjust enrichment certainly reflect a concern for 'containing the [unjust enrichment] beast'.¹⁵⁰ However, whilst unjust enrichment has received much shorter shrift in Australia than it has in England, calls that unjust enrichment has been wholly rejected reflect a (perhaps not so well-meaning) 'sloppiness of thought'.¹⁵¹ The precise role of unjust enrichment in Australian law can only be determined by a careful reading of the High Court's future judgments in the area, which will no doubt continue to be a source of great comment.

However, what can be taken from *Lumbers* is High Court authority for the principle that restitutionary liability will not be allowed to upset contractual liability. In itself, this is unremarkable since that principle was already well-established. However, a deeper look at the Court's reasons in *Lumbers* suggested two related, and possibly more consequential, findings. First, the High Court's finding that restitutionary relief would interfere with the contractual allocation of risk in *Lumbers* itself, even though there was no privity of contract between Lumbers and Builders nor detailed evidence about the terms of the contracts which did exist, provides good reason to believe that the Court will be quick to close any gap that might otherwise have appeared in the allocation of risk between contracting parties. In particular, *Lumbers* may be read to support the view that mere entry into a contract implicitly limits the contracting parties' rights to pursue a restitutionary remedy against third parties.

Secondly, and although this point was not explicitly addressed in the Court's reasons, it has been suggested that *Lumbers* reflects a fundamental concern to give effect to the particular allocation of risks between the relevant parties. It does not give expression to the view that unjust enrichment's inherent doctrinal requirements render it redundant where a benefit is conferred pursuant to a contract. This apparent emphasis on primacy of contract may have important implications for the continued development of principles designed to limit unjust enrichment's scope. Whereas some writers have urged such principles to develop by reference to unjust enrichment's own doctrinal characteristics,¹⁵² it seems likely that the law will continue to fetter unjust enrichment by reference to those doctrines which compete with it.

¹⁵⁰ See Barker, above n 46.

¹⁵¹ To borrow the phrase from *Holt v Markham* [1923] 1 KB 504, 573.

¹⁵² See Barker, above n 46, 463; Grantham and Rickett, 'On the Subsidiarity of Unjust Enrichment', above n 8, 299.