

BOOK REVIEW

Restitution - The Future by Peter Birks

reviewed by ALISTAIR WYVILL*

Few practitioners have heard of Professor Peter Birks, although all now are probably aware of terms like "restitution" and "unjust enrichment". Certainly, a number of recent decisions of the High Court (1) has made it imperative that any lawyer practising commercial law become familiar with them. For Australia has now an additional head of civil liability, namely restitution for unjust enrichment. That it does is due in no small part to the pioneering work of Professor Birks in giving an order and structure to a number of areas that previously were tainted with confusion, fiction and inconsistency.

For years, recovery of mistaken payments was founded upon the implication of a contractual term. Often quite contradicted by the facts, this term was imposed by the Courts on the parties in an attempt to do justice between them (2). Similarly with respect to taxes illegally demanded, although requiring that they be paid after a threat *ex colore officii*, the Courts have gone to extraordinary lengths to infer the requisite duress (3). Birks' research, culminating in the prodigious *Introduction to the Law of Restitution* (4) has allowed us to reconsider the principles recognized by these and other categories of cases as examples of claims for the restitution by a party who alleges that the other has been unjustly enriched at the former's expense. The reference to "unjust" does not mean that the remedy is awarded in accordance with a judicial discretion in an undefined category of cases. The impressive aspects of Birks' analysis is that he has done just that - he has located the principles upon which the Courts have acted in the past and fixed them into a precise structure, putting "like with like". As a result, we see restitution operating in all kinds of familiar categories; claims arising out of frustrated, rescinded or ineffective contracts, for breach of confidence, pass-

ing-off or trespass and in equity for breach of fiduciary duty. Restitution operates as both a remedy whose availability is dependent upon a proven wrong and, through unjust enrichment, a cause of action independent of the other recognized categories of claims. Hence, where a contract is rescinded, whilst only one may sue for the breach, both may have causes of action (independent of any action in contract) for restitution of an enrichment unjustly enjoyed by the other (5).

It is this ubiquity that makes an understanding of this newly recognized area a prerequisite for any person conducting or adjudicating commercial litigation. However, because of its newness, the usual research methods may prove inadequate. One must treat all decided cases with great care for fear that they may require re-interpretation in the light of the recent decisions of the high Court and, unlike many of the established and relatively uncontroversial areas of the law, a knowledge of the relevant academic literature is indispensable. It must be remembered that, at least for the moment, restitution and unjust enrichment find their definition and delimitation more in the text books and academic journals than in the law reports.

Professor Birks is now widely recognized, alongside Lord Goff and Professor Jones, as one of the leading English common law exponents of the law of restitution. The great attraction of *Restitution - The Future* is that, unlike perhaps his text book, it provides a brief, accessible and highly readable summary of the definition and structure of restitution as set out in his text as well as discussing some of the more important current issues in the law of restitution.

Particularly, Birks focuses on problem areas like: strict liability and fault-based liability in the recovery of monies paid and the apparent inconsistencies between the decisions in *In re Montagu's Settlement Trusts* (6) and

Re Diplock (7); the recovery of monies paid as a consequence of ultra vires demands by public authorities, where Birks anticipates the reasoning of the majority of the House of Lords in *Woolwich Building Society v IRC* (No 2) (8); the difficulty of enrichment from the provision of goods and services, where he discusses the well-known decision of Sheppard J in *Sabemo Pty Ltd v North Sydney Municipal Council* (9); the vexed question of tracing at common law and in equity; the many complexions and complications of the "change of position" defence to restitutionary claims.

Birks' discussions of these issues are clear, precise and thorough, with the reader being left in no doubt as to Birks' views on what the law ought to be. As the recent decision of the highest courts in Australia and England indicate (10), one ignores his views at one's peril.

For those who have read *An Introduction to the Law of Restitution, Restitution - The Future* provides an important addendum, in which some of what Birks has said previously has been updated and/or qualified (11). For those who don't have the time to read *Introduction, Restitution - The Future* provides a useful and probably indispensable introduction to one of the most important, developing and least understood areas of the civil law today.

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