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Preface

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The papers published in this Special Issue of the Bond Law Review focus on the role of two important though quite diverse areas of law, equity and restitution, which have a role in regulating the activities of those involved in the banking arena. The papers were presented at a conference held at Bond University on 23 July 1994. The conference, titled: 'Equity, Restitution and The Banking Lawyer', was convened by Kwai-Lian Liew and John Farrar, both of Bond University.

Cover Page Footnote
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PREFACE

The papers published in this Special Issue of the Bond Law Review focus on the role of two important though quite diverse areas of law, equity and restitution, which have a role in regulating the activities of those involved in the banking arena. The papers were presented at a conference held at Bond University on 23 July 1994. The conference, titled: 'Equity, Restitution and The Banking Lawyer', was convened by Kwai-Lian Liew and John Farrar, both of Bond University.

The conference brought together for the first time, judges, academics and practitioners from within Australia, New Zealand and the United Kingdom who have a particular interest in the areas of equity, restitution and banking. None of the papers involve all of these three topics. Rather, the purpose of the conference was to highlight contemporary issues of relevance to banking practice such as: the fiduciary duties, if any, of a bank or financial institution; trustees' responsibilities in trust administration; the bank's liability as a recipient or participant of money obtained via another's breach of fiduciary duties and the recoverability of money paid by or to a bank under mistake.

The infiltration of equitable principles in commercial dealings is no longer a new phenomenon. One only has to read the book of essays edited by Professor Finn in *Equity and Commercial Relationships* (Law Book Company, 1987) to see the impact of equitable principles and remedies in their application to those who engage in commercial activities. Some of these principles are still being developed today and they continue to have a significant impact on banking practice. For instance, it is well recognised that the character of today's modern banking goes beyond traditional consumer banking - where the relationship between banks and their customer is one of creditor and debtor relationship. Banks today operate as a multi-function business and fiduciary duties may be imposed on banks in their advisory function, portfolio management function and generally in the banker-customer relationship. Consequently, the circumstances in which the fiduciary principle will apply to banks and other financial institutions is an important issue to determine.

Another example of the influential role of equitable doctrines in the banking practice is where the enforcement of guarantees is vitiated by undue influence or unconscionable dealings. It is particularly interesting to note that in the recent decisions of *Barclays Bank plc v O'Brien* ([1993] 4 ALL ER 417) and *CIBC Mortgages plc v Pitt* ([1993] 4 ALL ER 433), the House of Lords relied on the doctrine of undue influence to avoid a guarantee given by the defendant to the bank as security in support of a loan application by the customer of the bank. These two cases therefore involved undue influence in a tripartite situation. In a bipartite situation, the present position seems to be that a person seeking to establish actual undue influence need not show a 'manifest disadvantage' suffered as a result of entering into the transaction before he or she succeeds in obtaining the equitable remedy of rescission. Where there is a

tripartite situation, however, the contract between the bank and the defendant guarantor can be set aside only if it can be shown that the bank had constructive notice of the undue influence exerted by a third party (the customer) which induced the defendant to consent to the guarantee.

One of the factors which must be taken into account in determining whether the bank has had constructive notice of the undue influence is to see if there is a 'manifest disadvantage' on the face of the transaction. In deciding that the requirement of a 'manifest disadvantage' is unnecessary in order to establish actual undue influence, the House's approach is, with respect, sound. However, it does seem rather odd that the concept of a 'manifest disadvantage' on the face of the transaction is revisited when a person in the position of a guarantor is seeking to show that the bank had constructive notice of the undue influence. This requirement is presumably included for the benefit of certainty of transactions and one might say that it would be unduly onerous on a party in the position of the bank if there is a requirement to investigate 'behind the scenes' to see if there have been any circumstances which may give rise to a claim of undue influence. What seems clear is that the House was trying to achieve a balance between protecting commercial certainty on the one hand and ensuring, on the other hand, that a person's personal or transactional disadvantage was not unreasonably exploited in the circumstances. One must also bear in mind that England does not have an accepted doctrine of unconscionable dealings as we do in Australia and facts which are similar to those raised in *O'Brien* and *Pitt* could well be solved by looking at that doctrine.

The topics covered in this Special Issue which look at the role of equity are the papers given by: Mr Derek Davies of St Catherine's College, Oxford who gave a paper on 'Trust Administration: Secrecy and Responsibilities'; Dr Robert Austin of Minter Ellison on 'Representatives and Fiduciaries Responsibilities - Notes on Nominee Directorships and Like Arrangements'; Mr John Glover of Monash University on 'Banks and Fiduciary Relationships'; Mr John R F Lehane of Allen Allen & Hemsley on 'Delegation of Trustees' Powers and Current Developments In Investment Funds Management'; Mr Andrew Butler of Victoria University, Wellington on 'Modern Portfolio Theory and Trust Investment Powers: The New Zealand Experience'; and Dr Michael Bryan of The University of Melbourne on 'Cleaning Up After Breaches of Fiduciary Duty: The Liability of Banks as Constructive Trustees'.

As far as the role of the concept of unjust enrichment in commercial activities is concerned, although there might be some who would question whether it does in fact have a part to play in our jurisprudence, one cannot deny that the High Court has accepted this concept as part of our law. In the words of Deane J: '[u]njust enrichment in the law of this country ... constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make a fair and just restitution for a benefit derived at the expense of the plaintiff and which assists in the determination, by the ordinary processess of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case ...' (*Pavey & Matthews Pty Ltd Ltd v*

Paul (1986) 162 CLR 217 at pp 256-257).

Given that the concept of unjust enrichment has a 'fairness and justice' undertone, one might be excused for thinking that it is derived from equity. This, of course, is not the case. The form of action called *indebitatus assumpsit*, for instance, was the most convenient common law procedure to recover money paid (*Slade*'s case (1602) 4 Co Rep 92b; 76 ER 1074). This form of action was based on an implied promise to pay in circumstances where no express contractual basis to a claim existed. The High Court has, however, made it clear in *Pavey & Matthews Pty Ltd v Paul* that it is now artificial to say that the ability to recover money paid to the plaintiff's use is based on an implied promise to repay; rather, it is based on the concept of unjust enrichment. Other forms of common law procedure such as an action for a *quantum meruit*, as was indeed the claim made in *Pavey & Matthews*, can now be said to also come under the rubric of the concept of unjust enrichment which seeks to reverse benefits unjustly gained at the expense of the plaintiff. In short, much of what is regarded as falling within the law of restitution today covers the area of the common law that used to be called quasi-contracts.

The law of restitution purports to cover not only areas of the common law but also areas in equity such as the fiduciary's duty to account for profits obtained in breach of fiduciary duty and the remedy of rescission for executed contracts (on the grounds of undue influence, misrepresentation and other vitiating factors such as duress and mistake). It therefore crosses the boundaries between common law and equity and unites the historical divide between them (see Goff and Jones, *The Law of Restitution*; Birks, *An Introduction To The Law of Restitution* and Burrows, *The Law of Restitution*).

It will be interesting to see in future cases how the High Court will categorise the precise role of the concept of unjust enrichment in Australia. It is clear that the concept has, at the very least, an explanatory role as to why an order of restitution is granted in a given case. Beyond that, it seems that the High Court has taken a cautious approach. For instance, in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, the High Court did not take up the comment by Deane J in *Pavey & Matthews Pty Ltd v Paul* that the obligation to disgorge a benefit obtained at the expense of the plaintiff could lead to a '... new and developing category of case... '. Indeed, the court rejected the suggestion that 'in Australian law unjust enrichment is a definitive legal principle according to its own terms and not just a concept' (at 378). The facts of *David Securities* were therefore not analysed on the broader basis of unjust enrichment but rather, on the basis of mistake. Similarly, in the more recent case of *Commissioner for State Revenue v Royal Insurance Australia* (1994) 264 CLR 1, Mason CJ was alone in discussing the relevance of unjust enrichment in his judgment whereas the majority of the High Court took the view that the matter could be decided on an examination of various relevant tax provisions.

Whether unjust enrichment is, in Australia, a legal institution which gives rise to an obligation and if so, what the elements of such a cause of action are (see *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101

ALR 363 at p374 per Gummow J; cf *Service Station Association Limited v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393 at p 407 also per Gummow J), thus remains to be seen. There is no doubt, however, that it is an important concept of which practitioners and students of law must have some basic understanding. The paper presented by Professor Andrew Burrows at the conference entitled 'Understanding The Law of Restitution: A Map Through The Thicket' introduces the basic principles of the law of restitution to those unfamiliar with this area of law and discusses its practical application to those in banking practice. (This paper will be published separately in the forthcoming September, 1995 issue of the University of Queensland Law Journal.)

The paper by Assistant Professor Kwai-Lian Liew titled 'Mistaken Payments, The Right to Recovery and The Defences' discusses the role of restitution in cases where payments to and by banks are made under mistake. Its relevance to the banking practice is obvious. She seeks to show the circumstances in which a restitutionary claim may be made for payments made under a mistake, as opposed to a voluntary payment, and suggests some of the elements for the defence of change of position which might be available to a recipient who has received and spent the money in good faith.

The conference was held under the auspices of The Banking Law Association of Australia and New Zealand to whom the conference convenors would like to express their grateful thanks. They would also like to thank the chairpersons: The Hon Mr Justice WMC Gummow of the High Court of Australia, Professor Julie Maxton of The University of Auckland, Dr Ian Spry, Queen's Counsel of Melbourne, Mr Peter Butler of The University of Queensland and Professor John Farrar of Bond University for agreeing to chair the various sessions and for their willingness to participate in the discussions. Finally, thanks must go to the conference speakers for their generous contributions in time and effort and generally in helping to make the conference a success.[1]

K-L Liew

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