RESTITUTION AND QUASI-CONTRACT

STEPHEN OWEN-CONWAY*

The law of restitution has been defined by the learned authors, Robert Goff and Gareth Jones, in their classic work, "The Law of Restitution"[1], as "the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment".[2]

The learned authors point out that the common law of quasi-contract is the most ancient and significant part of the law of restitution and take it as their starting point in their search for a definition of the law of restitution.[3]

Quasi-Contract Defined

The expression "quasi-contract" has been used to give a legal classification to some of the situations in which persons have been held accountable to others which have never been adequately explained by reference to any other category of the common law. It is an expression which has its difficulties and is known by other names and the controversy as to its juridical basis is far from dormant.[4]

The indebitatus counts for money had and received and for money paid and quantum meruit and quantum valebat claims are often said to draw the rough boundaries of quasi-contract, although each of the counts might be used to enforce purely contractual claims.[5] For example, an action for money had and received may be used to compel a contracting party, such as an agent, to account, while the action for money paid may

* Barrister & Solicitor, Supreme Court of W A , formerly lecturer, Law School University of Western Australia

1 Robert Goff and Gareth Jones, *The Law of Restitution* 2nd ed (1978) (hereinafter "Goff & Jones, *Restitution*") Other writings have included P H Winfield, *The Province & Function of the Law of Tort* (1931) and *The Law of Quasi-Contracts* (1952) R M Jackson, *History of Quasi-contract* and J H Munkman, *The Law of Quasi-contract* (1951) More recent is S J Stoljar *The Law of Quasi-contract* (1965)
Two classic American works on quasi-contract are Keener The Law of Quasi-contracts (1893) and Woodward The Law of Quasi-contracts Those two books led eventually to the American Law Institute's *Restatement of the Law of Restitution* Two leading American casebooks are J W Wade, Cases & Materials on Restitution 2 ed (1976) and J P Dawson and G E Palmer, hCases on Restitution 2 ed , (1969) Dawson has also written Unjust Enrichment A Comparative Analysis (1950), while Palmer is the author of the now leading American work, *The Law of Restitution* (1978)

2 Id at 3

3 Id

4 For some definitions of quasi-contract see Winfield, *Province*, supra n 1, at 119-120

5 The boundaries of quasi-contract are drawn by these old forms of action The scope of the common indebitatus counts and quantum meruit and quantum valebat claims is explained by Goff and Jones supra n 1, at 3

be available to enforce a contractual right of indemnity by a surety against his principal debtor. In the same way quantum meruit and quantum valebat claims may be deployed to recover reasonable remuneration for services rendered, or, alternatively, a reasonable price for goods supplied pursuant to a contract in respect of which the remuneration or price was not agreed.

The Goff and Jones View of Quasi-Contract as Part of the Law of Restitution

Goff and Jones claim that quasi-contractual claims are merely part of the law of restitution, which is founded upon the general notion of unjust enrichment.[6] They argue that quasi-contractual claims are those falling within the scope of the actions for money had and received and include the action to recover miscellania such as statutory penalties and judgment debts, such claims being part of the inheritance which indebitatus assumpsit received from debt in the 17th Century, of money paid, of quantum meruit and quantum valebat claims, all of which are said by the learned authors to be founded upon the principle of unjust enrichment.[7]

Goff and Jones note that there are claims of different origin which are also founded upon the principle of unjust enrichment.[8] These are said to include claims in equity analogous to quasi-contractual claims to recover money paid under a mistake and equitable relief from undue influence. They note that some restitutionary claims outside the scope of quasi-contract are known both to law and equity, namely contribution and subrogation.[9] Other restitutionary claims, notably general average and salvage, were developed by the Court of Admiralty.[10]

According to Goff and Jones, the link between these and quasi-contractual claims was hidden by the artificial barriers erected by the forms of action[11] and they argue there is no reason why the forms of action should any longer obstruct a unified treatment of all claims founded upon the principle of unjust enrichment.[12] They define the law of restitution as "the law relating to all claims, quasi-contractual or otherwise, which are founded upon that principle".[13]

6 Id at 4
7 Id
8 Id
9 Id
10 Id at 5
11 Id
12 Id
13 Id at 3

Quasi-Contract and Restitution

Whilst it is difficult to fault the view that quasi-contractual claims are essentially restitutionary in nature, it may be misleading to argue that quasi-contractual claims are merely part of a law of restitution founded upon the general notion of unjust enrichment, if, in fact, quasi- contractual claims are quite distinct from other restitutionary claims.

Professor Winfield has observed: "genuine quasi-contract signifies liability not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit".[14]

Goff and Jones, criticise this definition.[15] They argue that a definition which defines by excluding everything else is unhelpful. They note that it is impossible to tell whether such matters as salvage, general average, subrogation and contribution or equitable claims analogous to claims for money had and received, do or do not fall within that definition. Moreover, they argue that if claims are to be included which were not enforced by the common indebitatus counts, it is difficult to understand why the field should be restricted to money claims.

Is there, then, any basis for a restrictive view of quasi-contractual claims?

The Core: An Obligation to Make Restitution

Paragraph 1 of the American Restatement of Restitution provides that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other".

It is clear that in some circumstances a person who has become unjustly enriched at the expense of another becomes obliged to repay money or some other benefit to that other in situations in which the law imposes a duty to account per se. In *Moses v. Macferlan*,[16] Lord Mansfield said: "the gist of this kind of action is, that the defendant under the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money".[17]

It would appear that in the circumstances contemplated by Lord Mansfield the obligation to repay which is placed on the person who becomes unjustly enriched at the expense of another arises other than contractually or by reference to any other head of law.

Where, however, the obligation to repay in the circumstances of the case arises other than by imposition of law to remedy an unjust enrichment and is explicable by reference to an established head of law or equity,

14 Supra n 4
15 Goff and Jones, supra n 1 11 at fn 64
16 Moses v Macferlan (1760) 2 Burr 1005 at 1012
17 Id

it is difficult to to accept that such an obligation could be said to be merely part of a law of restitution founded upon the general notion of unjust enrichment.

Lord Mansfield described the fundamental notion which underlays the action for money had and received. Lord Mansfield was propounding a juristic concept of unjust enrichment which, as a concept, remains valid today.

The learned authors, Goff and Jones, express the view that a close study of the law of restitution reveals a highly developed and systematic complex of rules which are now sufficiently established for the Courts to recognise the general right to restitution.[18]

Whatever the merits may be of this view, it would appear that the Courts do not yet recognise such a generalised right to restitution. Lord Diplock has recently observed: "My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law."[19]

Classification of Restitutionary Claims: Personal & Proprietary

Before it can be said that a defendant has been unjustly enriched, it appears to be necessary to establish that the defendant was enriched by the receipt of a benefit at the plaintiff's expense and it must be unjust to allow him to retain that benefit.

Restitutionary claims may be personal or proprietary, but most claims are personal. The law prevents a defendant from becoming unjustly enriched and imposes upon him a personal obligation to make restitution to the plaintiff.

A proprietary restitutionary claim may be either legal or equitable and may be asserted in relation to anything which is capable of ownership at law or in equity.

Personal Claims at Law

The most common form of benefit is money, the legal property in which almost invariably passes with delivery. Claims in money are nearly always personal rather than proprietary because the property in money, being currency, will generally have passed to the recipient with delivery.[20]

The mere receipt of money is a benefit to the recipient and it is for this reason that restitutionary claims for money had and received are so frequent.

18 Goff and Jones, supra n 1, at 13
19 Orakpo v Manson Investments Ltd [1977] 3 W L R 229 at 234 per Lord Diplock
20 Miller v Race (1758) 1 Burr 452 at 457-458 per Lord Mansfield

Because the claim is personal in nature, title is not located by virtue of the law of property but rather by imposition of law per se.

It is apparent, therefore, that the obligation to repay the money arises in a truly restitutionary sense and it is for this reason that the common indebitatus counts for money had and received and for money paid are at the epicentre of the truly restitutionary claim.

Proprietary Claims at Law

At law, proprietary claims to land are enforced by the action for recovery of land and proprietary claims to chattels are enforced by the actions of trover and detinue. Where chattels other than money are involved, the plaintiff will generally have little difficulty in identifying the chattel claimed as his own. But where money is involved, the position is more complex because once the money has left the plaintiff's hands it almost invariably ceases to be identifiable as the plaintiff's money and may pass to a bona fide purchaser for value without notice who would defeat any proprietary claim brought against him. Not surprisingly, therefore, legal proprietary claims to money are rare, whereas personal claims to money are quite frequent.

It follows, therefore, that a true restitutionary proprietary claim, being one in which title is attributed to a claimant because of and to remedy an unjust enrichment, would probably exclude proprietary claims at law because in respect thereof legal title is generally determined other than by reference to any principle or notion of unjust enrichment.

In other words, where the plaintiff is able to obtain restitution by asserting a proprietary right in some asset in the defendant's hands, he does so other than by relying upon the law of restitution understood in context of the doctrine of unjust enrichment.

Personal Claims in Equity

There is little doubt that the personal claims in equity depend for their existence upon a fiduciary relationship. The personal claims in equity involve actions by next-of-kin, legatees or creditors, where a personal representative has paid money to persons not entitled to it. They also include actions by beneficiaries under inter vivos trusts where trustees have paid money to others who are not entitled to it. In this case, the personal claim in equity is similar with the personal claim in law for money had and received, save that it is dependent upon the existence of a fiduciary relationship. In *Re Diplock*,[21] the Court of Appeal held that the common law action for money had and received was of independent

21 [1948] Ch 465
22 Goff and Jones, supra n 1

lineage from the personal action in equity, and accordingly, there was no reason why the action brought on behalf of the next-of-kin should fail on the ground of a mistake of law.

Goff and Jones have recognised that the personal equitable claims are not part of the law of restitution because they are not granted for the purpose of preventing an unjust enrichment.[22]

Proprietary Claims in Equity

Much more difficult to assess is the equitable proprietary claim. It has been argued that equitable proprietary claims play an important part in the law of unjust enrichment. The question is; does equity recognise any circumstances in which it allows title to the plaintiff to remedy an unjust enrichment, or rather, does it subordinate title to the satisfaction of other factors, so that if an unjust enrichment is remedied at all, it is only incidentally and unsystematically?

It is worth noting that many branches of equity are founded upon distinct equitable notions of good faith with their own distinct policies, and where equity intervenes, it does so to support distinct equitable obligations. Where equity exercises concurrent jurisdiction with the common law, it often started out with the same policy considerations as the common law but generally enlarged the common law jurisdiction by expanding the grounds for intervention. Here the equitable rules are based on the concurrent but more restricted common law rules and both sets of rules are enforced by the same policy considerations and are generally directed at the same vice. If equitable proprietary claims have any part of a law of restitution founded upon the principle of unjust enrichment, it seems logical to conclude that such claims may be restricted to those areas in respect of which equity exercises a concurrent jurisdiction with the common law.

Goff and Jones take the view that it is in equity rather than at law that cases are found where rights of property have been granted to prevent an unjust enrichment and they list those situations in which they claim equity has intervened to prevent an unjust enrichment.[23]

A real difficulty with this view is that the authorities tend to support the proposition that the equitable proprietary claims are enforced only in circumstances in which a fiduciary obligation of some kind is present.

The House of Lords in *Sinclair v. Brougham*[24] and the Court of Appeal in *Re Diplock*[25] have held that before any claimant can establish a right of property in equity, there must either be a fiduciary relationship between himself and the defendant who holds the property, or, as a result of a fiduciary relationship between the claimant and another person through whose hands the property has previously passed, some equitable proprietary interest must become attached to the property.

This requirement to identify a fiduciary relationship before a claimant can trace in equity was assumed to be necessary by the Court of Appeal in the recent case of *Aluminium Industrie Vaasen B. V. v. Romalpa Aluminium Limited*.[26]

Goff and Jones are not persuaded that the requirement of a fiduciary relationship is either necessary or just in this respect. In their view, the Courts should abandon the requirement of the fiduciary relationship and recognise that equitable proprietary rights should be granted to prevent an unjust enrichment.

Laudable as this view may be, the position seems to be that a fiduciary relationship must be found to exist before a claimant can establish a right of property in equity, and, if such is the case, it would follow that the equitable proprietary remedy owes its existence to the law of fiduciaries and not to any doctrine of unjust enrichment. In this regard, it would appear that the doctrine of unjust enrichment is very little concerned with proprietary claims at law or in equity and its boundaries may not extend much, if at all, beyond the common indebitatus counts.

If Goff and Jones are correct in their analysis, the equitable proprietary claims would be founded upon the doctrine of unjust enrichment, and would presumably include those proprietary claims which are clearly not granted for the purpose of preventing an unjust enrichment. How, then, would it be possible to determine which proprietary claims are part of the law of restitution and which are not?

23 See Id generally The cases claimed by Goff & Jones to be those in respect of which restitutionary proprietary claims have been recognised in equity and enforced by the Courts to remedy an unjust enrichment are as follows
(1) Depositors who had deposited money with a Society which carried on an ultra vires banking business were allowed to follow their money into the hands of the Society, Sinclair v Brougham [1914] A C 398
(2) A person who paid money under mistake to an officer of the Court was granted priority over the bankrupt's general creditors Ex parte James (1874) L R 9, Ch App 609,
(3) A defendant to whom the plaintiff had conveyed a cottage in consideration of his oral promise to let her live there rent free, unsuccessfully pleaded that the promise was unenforceable and he was compelled to hold the cottage on a constructive trust for her, Bannister v Bannister [1948] 2 All E R 133,
(4) A purchaser of a house, with notice of the vendor's agreement to permit another to live there rent free for her life, was held to hold the house as a constructive trustee for that other during her lifetime, Vinions v Evans [1972] Ch 359,
(5) A son-in-law who allowed his mother-in-law to pay for improvements to his house was made a trustee to protect her interest because it was against conscience not to impose a trust, Hussey v Palmer [1972] 1 W L R 1286,
(6) A surety who paid off a debtor's secured creditor stands in the creditor's shoes and succeeds to his security, Duncan, Fox & Co v North & South Wales Bank (1880) 6 App Cas 1, 19, per Lord Blackburn,
(7) A person who improved the defendant's land mistakenly thinking that the defendant's father had power to grant him a new lease for a specified term, was allowed to enjoy the land for the residue of that term because the defendant had acquiesced "in him doing what he did", Hunting v Ferrers (1711) Gilb 85,
(8) A criminal who killed his wife was not allowed to benefit from the crime, In the Estate of Crippen [1911] 108,
(9) A fiduciary who personally acquired an opportunity which he ought to have taken for his beneficiary was held a constructive trustee of the gains which he consequently made, Keach v Sandhood (1726) Cas Temp King 61
In each of these cases, it would appear that the Courts have imposed a fiduciary obligation upon the defendant to hold the property as constructive trustee for the plaintiff
This classification of proprietary claims depends for its justification upon acceptance of Goff and Jones' view that the fiduciary relationship in Sinclair v Brougham was created by the House of Lords specifically to prevent an unjust enrichment In the writer's opinion however, the judgments in Sinclair v Brougham support the view that the establishment of the fiduciary relationship was necessary for the creation of the equitable proprietary claim

24 [1914] A C 398

25 Supra n 21

This dilemna was highlighted in *Sinclair v. Brougham*.[27] Whilst Goff and Jones have argued that the fiduciary relationship in *Sinclair v. Brougham*[28] was created by the House of Lords specifically to prevent an unjust enrichment, such is mere speculation. It would appear that *Sinclair v. Brougham*[29] is authority for the proposition that a fiduciary relationship is necessary for the creation of an equitable proprietary right and indeed was regarded as such by the Court of Appeal in *Re Diplock*.[30] If this view is the correct one, it follows that the proprietary claim came into existence as a result of the fiduciary relationship between the depositors and the directors of the society and not as a means to remedy an otherwise unjust enrichment.

Are Quasi-Contractual Claims Sui Generis?

These difficulties militate against any easy acceptance of the view expressed by Goff and Jones that the whole of restitution is founded upon the general notion of unjust enrichment.

Professor Stoljar has expressed the view that unjust enrichment is not satisfactory as a theory because it may sometimes go without legal redress, and that it includes the recovery of all kinds of property.[31] Such is the scheme of the American Law Institute's restatement of restitution which proposes a fundamental reorganisation of private law into tort, contract and restitution, the latter incorporating all rules concerning the return of property, whether previously part of tort or part of equity.

Professor Stoljar has argued that the recovery of money has its own problems and particular peculiarities.[32] Not only does the manner or occasion of paying money differ greatly from that of transferring land or goods, but the recovery of money can never operate in specie or in rem. In his view, "quasi-contract" is a useful term because it has long been associated with the classical money counts. He notes that many of the rules which have traditionally formed part of quasi-contract may sometimes inter-relate and overlap with purely contractual claims.

If the position is that the true restitutionary claims are confined to the money counts, there may well be merit in persevering with the generic term "quasi-contract".

26 [1976] 1 W L R 676
27 Supra n 24
28 Id
29 Id
30 Supra n 24
31 S J Stoljar, *The Law of Quasi-Contract* (1965)
32 Id

Conclusion

The Goff and Jones classification of restitutionary claims[33] quite deliberately includes those claims well outside the scope of the common indebitatus counts for money had and received and for money paid. In order to explain the inclusion of those claims in the classification, it was necessary for the learned authors to promulgate a notion of the law of restitution which ex necessitate was not restricted to the money counts.[34]

The learned authors point out that those who have in the past attempted to classify quasi-contracts have generally done so in terms of remedy. Where there is a remedy, there is a means of redressing or preventing the infringement of a right. The existence of a remedy assumes that a right has, or is about to be, infringed and that the requirements of procedural law are satisfied.

The learned authors note that a classification in terms of remedy is unrevealing because it tells us nothing about why or when the plaintiff may be entitled to recover and is harmful because the expression "quasi-contract" conjures up an image of the implied contract theory, which is a meaningless, irrelevant and misleading anachronism.

In this writer's opinion, Goff and Jones' criticism of attempts to classify restitutionary claims in terms of remedy are wholly justified. In particular, such a classification may well hinder the rational development of a general doctrine of the law of restitution in English law which must inevitably come to pass.

The object of this paper, however, is to question whether the boundaries of restitution do, in fact, extend beyond those restitutionary claims stemming from the indebitatus counts for money had and received and for money paid and from quantum meruit and quantum valebat claims.

It appears from a review of the authorities, that Goff and Jones' view that a general doctrine of unjust enrichment should be recognised in English law has not, to date, been accepted by the Courts.

33 The classification of restitutionary claims adopted by Goff and Jones is extremely wide and appears to embrace many instances in which the obligation to make restitution emanates from either an established head of law or by reason of the existence of a fiduciary relationship In such circumstances, the obligation to make restitution is imposed other than by law *per se* and for this reason it can be argued that the G & J classification does not accord with the author's own view of what the law of restitution actually encompasses Indeed, the width of this classification is such that it is difficult to relate the first part of the learned authors' work to the parts that follow

34 Goff and Jones suggest that restitution will be denied in the following circumstances
(i) Where the plaintiff conferred a benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant
(ii) The plaintiff submitted to or compromised the defendant on its claim
(iii) The plaintiff conferred the benefit while performing an obligation which he owed to a third party or otherwise while acting voluntarily in his own self-interest
(iv) The plaintiff acted officiously in conferring the benefit
(v) The defendant cannot be restored to his original position or is a bona fide purchaser
(vi) Public policy precludes restitution
(vii) If an award of restitution would lead to an indirect enforcement of a transaction which the law refuses to enforce
(viii) If an award of restitution would allow a claimant to make a profit out of his own wrong