BOOK REVIEWS

The Varieties of Restitution by I M Jackman (Sydney: Federation Press, 1998) pages i–xxvi, 1–186. Price $75.00 (hard cover). ISBN 1 86287 282 1. Price $45.00 (soft cover). ISBN 1 86287 293 7.

The key to this thoughtful and elegantly written book lies in the title. The author's thesis is that the law of restitution cannot be analysed exclusively in terms of the prevention of the defendant's unjust enrichment at the expense of the plaintiff. To insist that all restitution is born of unjust enrichment is, in his opinion, to distort the basic concepts of 'enrichment' and 'at the expense of'. This in turn leads to empty over-generalisation and even to erroneous statements of principle. In place of a unitary principle of unjust enrichment, Jackman offers the reader three varieties of restitution.

The first variety comprises restitution of money benefits on the established grounds of mistake, duress, undue influence and total failure of consideration. This will be familiar, at least in outline, to lawyers brought up on Birks, Burrows, and Goff and Jones.[1] But even here the reach of unjust enrichment is limited. The principles applicable to money are not to be extended to benefits in kind.[2] Failure of consideration must be total[3] and restitution by a party who has committed a breach of contract may be permitted by the terms of the contract but not by reference to the operation of an independent principle of unjust enrichment.[4]

The second, and most original, part of the book covers restitution for benefits in kind which are voluntarily conferred. The basis of restitution here is to be found in 'the defendant's failure to fulfil a genuine, but typically implicit, promise to pay for the benefit in question'.[5] The concept of the non-contractual but genuine promise is explicated by a brief, but close, analysis of the leading cases on unenforceable and void contracts, anticipated contracts, contracts discharged by breach or frustration, and voluntary payment of another's liabilities.

The third variety of restitution is that of restitution for wrongs. This is well trodden ground for the author who previously proposed, in an influential article,[6] that restitution is here protecting the legal facilities of private property, relationships of trust and confidence and, to a limited extent, the sanctity of contract. Chapter seven of the book under review usefully updates that article, incorporat-

[1] See, eg, Peter Birks, *An Introduction to the Law of Restitution* (1989); Andrew Burrows, *The Law of Restitution* (1993); Lord Goff and Gareth Jones, *The Law of Restitution* (4th ed, 1993).
[2] I M Jackman, *The Varieties of Restitution* (1998) 20–3, 68–9.
[3] Ibid 53.
[4] Ibid 57–62.
[5] Ibid 4.
[6] I M Jackman, 'Restitution for Wrongs' (1989) 48 *Cambridge Law Journal* 302.

ing decisions such as *Warman International Ltd v Dwyer*,[7] *Inverugie Investments Ltd v Hackett*[8] and *Surrey County Council v Bredero Homes Ltd*[9] into the structure of his argument.

Jackman rounds off the book with chapters on proprietary claims and remedies, and on defences. This part contains little that is new, and the reader is yet again treated to a stereotyped comparison between the backward common law, baffled by the mixing of money or other fungibles, and enlightened equity, not distracted by the problems posed by mingled funds.

The Varieties of Restitution is extremely well written. While the tone of the book is always assured, and sometimes magisterial, a great deal of learning is carried lightly and felicitously. The historical and philosophical dimensions are touched upon, the history not being confined to doctrinal legal history. How many equity and restitution scholars know that Ashburner's fluvial metaphor on the relationship between law and equity[10] reiterates Pitt the Elder's parliamentary attack on the alliance of Newcastle and Fox in 1755? The book expounds Anglo-Australian law. No attempt is made to construct a specifically Australian restitutionary framework although departures from the English model, for example with respect to estoppel, are noted at various points in the text.

Is the thesis convincing? Perhaps by way of establishing his credentials as a contemporary restitutionary *Athanasius contra mundum*[11] Jackman suggests that his central proposition, that the law of restitution cannot be explained in terms of a unitary principle of reversing unjust enrichment, is not 'a currently fashionable position'.[12] He is in fact in grave danger of becoming fashionable. Several other recent studies have rejected monistic explanations of restitution in terms of unjust enrichment.[13] Even Professor Birks, considered by many to be the leading advocate of this model, has admitted that it was an error to assert 'the perfect quadration' of restitution and unjust enrichment.[14] Many of the elements of restitution, so painstakingly assembled, are now being dispersed to other private law categories. Jackman's pluralist conception of the subject is therefore neither particularly new nor shocking, and may ring true to many uncommitted readers.

[7] (1995) 182 CLR 544.

[8] [1995] 1 WLR 713.

[9] [1993] 1 WLR 1361. Dicta in the recent English Court of Appeal decision of *Attorney-General v Blake* [1998] 1 All ER 833, 843–6 (Lord Woolf MR) suggest that disgorgement remedies for breach of contract may not be as rare as *Surrey County Council v Bredero Homes Ltd* assumes.

[10] Made (in)famous by Lord Diplock's extension of the metaphor in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 925.

[11] [Latin], Athanasius against the world, ie, one resolute person facing universal opposition. The phrase refers to the stand made by Athanasius (c 296–373), Bishop of Alexandria, against Arianism. His stand brought him frequent exile, long lawsuits, misunderstandings, and persecution, throughout which he showed inflexible courage. For a brief overview of his life and works see David Farmer, *The Oxford Dictionary of Saints* (2nd ed, 1979) 23–4.

[12] Jackman, above n 2, 1.

[13] Jack Beatson, 'Benefit, Reliance and the Structure of Unjust Enrichment' in Jack Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (1991) 21; Lionel Smith, 'The Province of the Law of Restitution' (1992) 71 *The Canadian Bar Review* 672.

[14] Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623, 626, 658–9.

The argument for the individual varieties seems to this reviewer, however, to be less compelling. Jackman draws a sharp distinction between money and non-money benefits. We are told that 'the common law aims to treat like cases alike, not to treat disparate cases "symmetrically"'.[15] Fair enough, but what justification can there be for treating cases of mistaken payments differently from cases of mistaken transfers of land and chattels? Whatever may be the case with services, mistaken transfers of property cannot be distinguished from mistaken payments on the principle (accepted by Jackman) that a recipient of property might not have wanted the property in the first place. This simply invites the response that the recipient should either pay for the property or return it. Here, as elsewhere, the format of the book works against the author. It is impossible within 182 pages of text both to provide an accurate account of the law and to meet all possible criticisms of his theoretical approach.

Jackman's promissory explanation of restitution for benefits in kind which are voluntarily conferred encounters similar problems. It is just bad luck that in one area, concerning restitution for the plaintiff's discharge of another's mortgage, the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd*[16] appears to have dealt the theory a mortal blow. It was there held that a plaintiff who paid another's mortgage debt was entitled to be subrogated to the personal rights of the mortgagee as against the mortgagor, even in the absence of any agreement or common intention as between the mortgagor and the plaintiff that the latter should have the benefit of subrogation. Lord Hoffman declared that it would be 'a mistake to regard the availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral'.[17] The decision could not of course have been foreseen but it had been foreshadowed by earlier case law, and Jackman concedes that 'to analyse the mortgagor's conduct as promissory is somewhat attenuated'.[18]

Even in less esoteric areas of restitution the promissory approach is not entirely convincing. In his analysis of the landmark High Court decision of *Pavey & Matthews Pty Ltd v Paul* ('*Pavey*'),[19] Jackman finds the source of liability in a non-contractual obligation undertaken by Mrs Paul to pay the builders. For this purpose Dawson J's neglected judgment occupies centre stage while Deane J's emphasis on 'acceptance' as the source of obligation, which has influenced the direction taken in later cases, is relegated to the wings. The promissory approach does not really assist in explaining the most puzzling aspect of the case, namely why s 45 of the *Builders Licensing Act 1971* (NSW) did not defeat the claim. To argue that the section prevents builders from enforcing oral contracts for building work, but not oral promises to execute such work, appears, to this reviewer, to assert a distinction which, in this context at any rate, is without difference. The statutory policy of ensuring that building disputes are resolved on the basis of

[15] Jackman, above n 2, 58.
[16] [1998] 2 WLR 475.
[17] Ibid 486.
[18] Jackman, above n 2, 95.
[19] (1987) 162 CLR 221.

reliable written evidence, and not on contradictory oral testimony, must surely apply to contracts and promises alike. That said, Jackman might reasonably respond that *Pavey* illustrates not so much the deficiencies of the promissory approach as the failure of the High Court to come to grips with the policy objectives of the legislation.

One final reservation concerns Jackman's treatment of theoretical approaches which are opposed to his own. This reviewer was taught as a graduate student always to restate an argument with which one is in disagreement in its strongest possible form. In this book alternative points of view are sometimes discussed peremptorily, so that the uninitiated reader is left wondering how apparently distinguished scholars could ever have held them. Much of restitution is complex, and there is no point in minimising the complexity. For example, Professor Birks' writings on change of position[20] will not suggest to everyone, as they do to Jackman,[21] that Birks considers the application of the defence as a purely mechanical exercise. And only one very oblique footnote[22] will alert the reader to the arguments recently advanced by Dr Lionel Smith, contrary to the position adopted in the text, that *Taylor v Plumer*[23] may not be authority for a distinctively common law approach to tracing.[24]

It has been said that it is harder to write a good short book on a legal subject than a good long book. *The Varieties of Restitution* demonstrates, sometimes unintentionally, the difficulties experienced by a writer of a short book on the law of restitution. But the author has brought a keen critical intelligence to bear on important questions while simultaneously writing a book that is very easy to read. It should be read by anyone interested in the structure of the modern law of restitution.

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[20] Peter Birks, 'Change of Position: The Nature of the Defence and Its Relationship to Other Restitutionary Defences' in Mitchell McInnes (ed), *Restitution: Developments in Unjust Enrichment* (1996) 49; Peter Birks, 'Overview: Tracing, Claiming and Defences' in Peter Birks (ed), *Laundering and Tracing* (1995) 289, 323–32.

[21] Jackman, above n 2, 164.

[22] Ibid 139, fn 24.

[23] (1815) 3 M & S 562; 105 ER 721.

[24] Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240; Lionel Smith, *The Law of Tracing* (1997) 162–74.

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