Book Reviews

Restitution in Australia

Keith Mason and John Carter
Butterworths 1995 RRP $145.00

On 19 December 1995 the Hon. Sir Anthony Mason AC, KBE launched "Restitution in Australia".

Restitution in Australia, by Keith Mason and John Carter, is the first major publication in Australia on the important topic of restitution.

Restitution, like telecommunications, is a growth industry. So much so that I have been predicting for some years that it is only a matter of time before all the titles in *Halsbury's Laws of England* will be subsumed in just one title - "Restitution". Measured against this prediction, Keith Mason's and John Carter's work, magnum opus though it is, is not quite as lengthy as it seems. Of course, as we all know, length is not a measure of worth.

Until now, restitution has been very much an English preserve, though the English foundations, as we know them, may well have been appropriated from the United States. Beginning with Lord Goff and Professor Gareth Jones, English restitutionary theory has advanced a long way. Just as London was the capital of a far-flung empire, so Oxford, under the leadership of Professor Birks, has become the capital of a restitutionary empire that threatens to sweep all before it. His Oxford apostles are migrating to other universities where they are spreading the holy word. There are, of course, pockets of resistance, and wild colonial boys like Justice Gummow and Justice Finn have been heard to doubt the word of the true prophet. Surely divine retribution awaits them.

As a result of a series of High Court decisions, it can be said that the new restitutionary theory is part of Australian law. That is one reason why *Restitution in Australia* is to be welcomed. There is nothing more frustrating for the judge and the practitioner than dependence on an English text book which inevitably fails to take into account, and to shape principles by reference to, Australian decisions. That was a handicap under which we laboured until Australian legal publishers took their courage in both hands and satisfied the demand for Australian text books and monographs. In the course of that publishing revolution, some outstanding Australian works were published, of which the most notable was Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies.*

Whether *Restitution in Australia* will achieve the fame and infamy of that celebrated work only time will tell. The two books look alike as they sit side by side on my shelves, though as the reader savours the contents the reader detects a difference in style. One is acerbic, caustic and intolerant of error; the other is informed by the spirit of Christian forgiveness and charity. That is perhaps as it should be. *Equity: Doctrines and Remedies* deals with an area of law in which the principles were thought to have been settled until the law came under the searching scrutiny of the High Court.

The law of restitution, on the other hand, is in a state of development so that the authors cannot speak from that platform of certainty and conviction which infuses the writings of Justices Meagher, Gummow and Lehane.

The concept of unjust enrichment, which is at the heart of the modern law of restitution, has been criticised on various grounds, including the ground that "unjust" is a vague notion incapable of principled exposition. The authors meet that criticism head-on and, in my view, their discussion of this problem is a valuable response to the criticisms that have been made, even if it does involve the concession that the High Court may have gone too far in speaking of the unconscionable retention of a benefit, too far in the sense that to say that retention of a benefit is unconscionable adds nothing if you take the view that the initial enrichment of the defendant at the plaintiff's expense must be unjust.

Incidentally, the authors make the point that unconscionability looms larger on the Australian scene than it does elsewhere and in saying that they are correct. If you

attend overseas conferences and seminars on Equity, you notice that lawyers from other jurisdictions tend to be sceptical about too much reliance on unconscionability, largely because they fear that it will degenerate into idiosyncratic notions of unfairness.

Launching a book is a much more difficult exercise than launching a missile. In the case of a missile, you think only of the target which you hope to destroy. With the book, you think of the reader whom you hope to inform. This book will certainly achieve that object. It is comprehensive and instructive; it is detailed and, in the footnotes, contains references not only to the relevant Australian and overseas decisions, but also to text books, monographs, academic writings in journals, here and overseas. The book therefore provides a solid basis for those who wish to develop an argument on a particular point by engaging in further research. All in all, *Restitution in Australia* will add greatly to our understanding of restitution.

I thoroughly commend it, not least the opening which sets in its correct context the development of the modern law of restitution. Dissatisfaction with legalism and the old forms of action, in particular the money counts, which had become encrusted with precedent, gave way to a new emphasis on substance rather than form. This proved to be a suitable climate for the development of the modern law of restitution.

Restitution in Australia succeeds in integrating modern theory with the established body of case law. Those lawyers whose habit of mind accustoms them to thinking in forms of quantum meruit, quantum valebat and the old common money counts, will not feel that they are struggling with alien and deleterious matter in the pages of this book. There is a harmony here that will appeal to even the most rugged and lantern-jawed of common lawyers.

In conclusion, I congratulate the authors on producing a splendid book which will be of inestimable value to lawyers in Australia and elsewhere. My only regret is that the publishers have not provided me with a magnum of champagne with which I can drench the authors in the manner befitting the winners of a Grand Prix. Without the champagne, I declare *Restitution in Australia* duly launched. ❑

Principles of European Community Law

Simon Bronitt, Fiona Burns and David Kinley
Law Book Company, 1995, Pages i-lxi; 1-587
RRP $95.00(SC) $130.00 (HC)

It is, no doubt, somewhat unusual for a student casebook to be reviewed in this Journal and, no doubt, even more unusual when that casebook is entitled *Principles of European Community Law*. Yet it is the very subject matter of this book which may make it of interest and value to the practitioner.

The first point to note is that the book has been written for an Australian audience. As such, it makes few assumptions as to the reader's knowledge of or familiarity with the history of, and progress towards, European integration and the institutions and treaty structures which have been central to this process. Indeed, in this reviewer's opinion, one of the book's most valuable chapters is that which deals with the institutions and legislative process of the Community. The work is divided into five parts: the Constitutional Structure of the European Union; the Internal Market and Free Movement of Persons, Goods and Capital; Competition Law; the Community's Social Dimension (including a lengthy chapter on Gender Discrimination); and the Environment.

Each chapter contains a mixture of treaty and statutory material, extracts from case law and academic writings, and the authors' accompanying commentary. Given the size of the subject and the relative scarcity in Australian libraries of both official and academic materials on the field, this work is more than just a "convenient compilation". It makes accessible, in a well ordered and discriminating manner, a wide range of materials which provide an excellent entrée to the subject. Unlike many casebooks, the interconnecting commentary is not sparse and perfunctory. Rather, it adds both coherence and insight into the various subjects treated.

Although by no means common, European decisions and doctrines have been cited and discussed in Australian courts in recent times. This has especially been so in the areas of competition law (dealt with extensively in Part 3 of the book) and civil liberties. The concept of "proportionality", discussed in an excellent chapter entitled "The Jurisdiction and Jurisprudence of the European Court of Justice", has also found its way into some recent Australian decisions. One can only assume that, given rapidly improving technology and the growth of legal databases, resort to principles of European law and decisions of the Court of Justice and the Court of First Instance, will increase rather than diminish, especially in an appellate context. With regard to the specific subject areas it addresses, the book is a convenient first port of call for comparative research. Moreover, it provides much useful background material which may assist in placing particular decisions in their proper context or else enhance an understanding of a particular decision. The chapter on "The Jurisdiction and Jurisprudence of the European Court of Justice", already referred to, is particularly useful in this respect. By way of illustration, one is often struck, when reading a decision of the ECJ, at the minimal level of reasoning disclosed. It is only when the role and significance of the preceding Opinion of the Advocate-General is understood that the "whole" decision may be properly appreciated. Moreover, it is both necessary and important to understand the ECJ's teleological approach to law-making, and to appreciate the larger imperatives of European integration which underpin many of its decisions, sometimes explicitly, sometimes *sub silentio*, before the full import of a particular decision can be assessed.

The authors have had to strike a balance in the length and quantity of the material chosen for inclusion in view of the breadth of the subject which, in truth, subsumes a number