Constructive trusts and unjust enrichment in New Zealand

Melvine Easton*

In this article, the author examines the approach of New Zealand judges to the principle of unjust enrichment, and concludes that this principle remains open for adoption as a possible cause of action separate from the well established quasi-contractual and equitable restitutionary claims.

In New Zealand as in the United Kingdom there has as yet been no general acceptance of a principle of unjust enrichment as the basis of restitutionary claims.[1] The attention of the courts is still focussed principally on the various quasi-contractual and equitable remedies. However, major advances have been made in the English Court of Appeal regarding one particular equitable remedy, those situations when the courts will impose a constructive trust.[2] The efforts of that court have given rise to considerable academic and judicial debate as to the foundation of such trusts, and in the New Zealand High Court[3] this debate has culminated in strong rebuttals of any wide doctrine of constructive trusts. Parallel to, and it seems often confused with, this expansion in the use of the constructive trust there has been a move to unify all the various forms of restitutionary claims into one single action based around the concept of unjust enrichment. This move to unify the various actions, a process which has been compared with those developments in the law of negligence which culminated in *Donoghue* v. *Stevenson*,[4] has been especially espoused by Goff and Jones in their *Law of Restitution*:[5]

> It presupposes three things: first that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain that benefit.

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1 Goff and Jones *The Law of Restitution* (2nd ed., Sweet and Maxwell, London, 1978).

2 *Hussey* v. *Palmer* [1972] 3 All E.R. 744, [1972] 1 W.L.R. 1286; *Binions* v. *Evans* [1972] Ch. 359, [1972] 2 All E.R. 70; *Cooke* v. *Head* [1972] 2 All E.R. 38, [1972] 1 W.L.R. 518; *Eves* v. *Eves* [1975] 3 All E.R. 768, [1976] 1 W.L.R. 1338.

3 *Carly* v. *Farrelly* [1975] 1 N.Z.L.R. 365; *Avondale Printers Ltd.* v. *Haggie* [1979] 2 N.Z.L.R. 124.

4 [1932] A.C. 562. See supra n.1, 24.

5 Supra n.1, 13.

The presence of these three factors will, say Goff and Jones, establish a prima facie right to restitution. They further define, however, six broad classes of limits which they say should[6] "mark the boundaries of the law of restitution and the principle of unjust enrichment".

The movement in the United Kingdom towards a generalised right to restitution has been foreshadowed by similar developments in the United States, and more recently in Canada. Klippert,[7] commenting on recent Canadian developments, suggests that Canadian law has included an important element missing in the Goff and Jones formulation — volition. In Klippert's view[8]

> the developing Canadian principle of unjust enrichment presupposes: (1) that the defendant received a benefit at the plaintiff's expense, (2) evidence of volition in the receipt or retention of the benefit, (3) that the benefit was not voluntarily conferred, and (4) that the benefit is unjustly retained by the defendant.

Like Goff and Jones, Klippert recognises the need to establish a series of[9] "control devices which accommodate the overall objective of the law in founding liability on consent, in contract, or fault, in tort."

In New Zealand, Jeffries J. recently accepted in *Van den Berg* v. *Giles*[10] a claim founded upon restitution in preference to alternative grounds of incontrovertible benefit, proprietory estoppel and constructive trust. The ratio decidendi of that case was considered and rejected only seven months later by Mahon J. in *Avondale Printers Ltd.* v. *Haggie*.[11] Echoing his own words earlier in *Carly* v. *Farrelly*,[12] Mahon J. stated his general opposition to unjust enrichment being anything more than just a unifying title under which all the various actions can be assembled:[13]

> Certainly there could be no valid reason against assembling under one general title the forms of quasi-contract and the settled forms of relief in equity . . . . Whether all these remedies are assembled under the rubric of a law of restitution or a doctrine of unjust enrichment does not seem to matter, so long as the forms of relief remain settled and definable.

The purpose of this article is to examine Mahon J.'s two judgments to determine what exactly it was that he rejected. Did he reject the whole idea of unjust enrichment as an integral element in restitutionary claims or, in a more limited context, as a foundation for imposing constructive trusts, or simply the notion that unjust enrichment itself can be the cause of an action? The paper will also analyse

6 Ibid. 24. The six limitations are: (i) the plaintiff conferred the 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's honest claim; (iii) the plaintiff conferred the benefit while performing an obligation which he owed to another 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 may preclude a restitutionary claim.

7 G. G. Klippert "The Juridical Nature of Unjust Enrichment" (1980) 30 U. Toronto L.J. 356. See, also G. B. Klippert "Restitutionary Claims for the Appropriation of Property" (1981) 26 McGill L.J. 506.

8 Ibid. 373-374.

9 Ibid. 376.

10 [1979] 2 N.Z.L.R. 111.

11 [1979] 2 N.Z.L.R. 124.

12 [1975] 1 N.Z.L.R. 356.

13 Supra n.11, 153.

Mahon J.'s treatment of the approach of Jeffries J. in *Van den Berg* and ask whether there is a real inconsistency between the cases. Lastly, there is discussion whether the development of a wide doctrine of constructive trusts is a practicable vehicle by which the courts can seek to do justice in any case.

I. THE CASES

To begin with it is necessary to outline briefly the facts and the various arguments presented by counsel in the three cases.

A. Van den Berg v. Giles

The plaintiff, who rented a house from the defendant, undertook extensive repairs and alterations to the house in the belief that he would be able to buy it from the defendant. The defendant, although admitting knowledge of the construction work, denied that she had ever agreed to sell the property.

The plaintiffs pleaded (1) the existence of a contract, and sought specific performance;[14] and (2) a cause of action on unjust enrichment, and sought restitution of the enhanced value of the value. They succeeded upon this latter ground before Jeffries J.

B. Carly v. Farrelly

Carly had contracted to buy a dwelling house from Farrelly. The contract, which was initially conditional, provided that once it became unconditional Carly would bear the risk on the house, but that Farrelly would hold his existing insurance policy in trust for Carly, provided Carly obtained the sanctions of the relevant insurance company, State Insurance Ltd. Carly, because of the negligence of his solicitor and the delay of Farrelly in providing details of the insurance policy, failed to obtain State Insurance's sanctions and was without insurance cover when on 12 March 1973 the house burned down. Since the contract of sale had become absolute Carly was obliged to pay the purchase price of $29,000 to Farrelly, while State Insurance, although under no obligation to do so, paid to Farrelly $7,300 being the sum assured.

Carly brought an action against Farrelly for the insurance money on various grounds related to the contracts of insurance and sale, none of which succeeded. Almost as a last hope, counsel for the plaintiff argued that the defendant had been unjustly enriched and that this gave rise to a constructive trust over the insurance money in favour of the plaintiff. It was claimed that the unjust enrichment arose from the defendant's slowness in supplying details of the insurance policy in accordance with an assumed mutual understanding between the parties. Mahon J. opined that the doctrine of unjust enrichment did not form part of the law of New Zealand, and that a constructive trust would not be imposed on any party unless that party had shown a lack of probity.

14 Jeffries J. described the plaintiff's task on this first ground as "unsurmountable". Supra n.10, 117.

C. Avondale Printers Ltd. v. Haggie

The plaintiff and the defendant had entered into a scheme for the purchase and redevelopment of a property in which they both had leased premises. Under the original agreement the plaintiff was to purchase the property as the defendant's nominee under the contract of sale with the owner, but problems in obtaining finance at suitably low rates of interest resulted in a new agreement whereby the defendant would take title to the land on the undertaking he would give the plaintiff the right to purchase within two years. The defendant later refused to acknowledge the latter part of the new agreement and the plaintiff brought an action to obtain conveyance of the land to itself, or recover the $34,000 it had spent on development in the belief it would eventually become the owner of the land.

Avondale's two major causes of action were (1) that the doctrine of unjust enrichment required the defendant to pay to the plaintiff the value of the works already undertaken; and (2) that the defendant's fraudulent or unconscionable conduct gave rise to a constructive trust in the plaintiff's favour over the land in question. The plaintiff succeeded on the second of these grounds, but not before Mahon J. had closely examined and rejected the claims based on unjust enrichment.

II. DIFFERING APPROACHES AND PROPRIETARY ESTOPPEL

The facts of the three cases fall within the two most common of the three categories of restitutionary claims identified by Goff and Jones:[15]

(1) where the benefit has come into the defendant's hands from a third party (*Carly* v. *Farrelly*);

(2) where the plaintiff has conferred some benefit on the defendant because,
   (a) he was mistaken (*Van den Gerg* v. *Giles*),
   (b) he acted under compulsion,
   (c) he intervened as a matter of necessity, or
   (d) he conferred a benefit under an ineffective transaction (*Avondale Printers Ltd.* v. *Haggie*).

The argument presented by the plaintiff in both the cases before Mahon J. centred around Lord Denning M.R.'s judgment in *Hussey* v. *Palmer*,[16] where Lord Denning stated in a very general way that a constructive trust is imposed whenever justice and good conscience require it.[17] In *Carly* Mahon J. summed up the plaintiff's submissions as being[18]

> founded upon the supposed existence of a broad principle that the implication of a constructive trust is justified in any circumstances where it would be against equity and good conscience to allow one party to retain property to which he had an apparent legal title.

15 Supra n.1, 44.
16 [1972] 3 All E.R. 744; [1972] 1 W.L.R. 1286.
17 Ibid. 747; 1290.
18 Supra n.12, 365.

It can be seen therefore that the notion of unjust enrichment as put to and dealt with by Mahon J. took the form of a proposed basis for establishing the equitable remedy of the constructive trust, rather than as founding a separate claim in and of itself. This approach of counsel and the judge to the principle of unjust enrichment, that it might found a constructive trust, but would not necessarily be itself the vehicle for a remedy of simple restitution, may have resulted from their considering[19] the constructive trust itself primarily as a vehicle by which the court could award damages or order the conveyance of the property involved. Thus, in *Avondale Printers Ltd.* v. *Haggie,* Mahon J.'s preoccupation with whether he could fix a trust on the property in question meant that he did not at any stage consider whether he could simply award the plaintiff a sum equal to that which it had spent on developments to the property, on the basis of the defendant's unjust enrichment. Mahon J.'s approach contrasts with that of Jeffries J. who in *Van den Berg* v. *Giles* awarded an amount equal to that by which the value of the property had been enhanced as a result of the plaintiff's activities.

It is unfortunate that Mahon J. did not examine more closely the differences, if any, between the notions of equity and good conscience as applied in the area of constructive trusts by Lord Denning M.R., and Jeffries J.'s more straightforward approach to restitution based an unjust enrichment. Mahon J.'s failure to differentiate between the two approaches may be attributable to counsel's presentation of the argument, in apparently citing *Van den Berg* v. *Giles* and *Hussey* v. *Palmer* together as authorities for claims based on unjust enrichment, and thereby implying that constructive trusts and unjust enrichment are identical concepts. The two cases are in fact authorities for two entirely different approaches to restitutionary claims. In *Van den Berg* Jeffries J. made no reference to *Hussey* v. *Palmer* or to other similar English Court of Appeal decisions,[20] or to constructive trusts at all when granting relief on restitutionary grounds. He based himself rather on a claim implied by law resulting from the defendant's knowingly permitting the plaintiff to perform certain alterations on the land to the defendant's enrichment. By permitting the plaintiff so to act the defendant was held to have requested the plaintiff's services, which request gave rise to a remedy at law in damages, based perhaps on an unarticulated quasi-contract, or alternatively on a properietary estoppel, but not needing more for its justification than an unjust enrichment in the defendant. Although cited to Mahon J. with *Hussey* v. *Palmer,* the *Van den Berg* decision seems to have caused him some trouble in *Avondale Printers.* Mahon J. agreed that the result reached in Van den Berg was correct, but he[21]

> could not agree, with all due deference, to the ratio decidendi founded upon a general right of restitution for unjust enrichment which is admitted by Goff and Jones themselves, . . . to be as yet unrecognised by English law.

Mahon J. suggested that *Van den Berg* was preferably to be seen as a case of proprietary estoppel,[22] which ground was in fact tentatively suggested by Jeffries J.

19 Supra n.11, 145. Counsel appears to have made submissions regarding a judgment for the amount by which the defendant benefited.
20 Supra n.2.
21 Supra. n.11, 150.
22 Ibid. 149.

himself. Mahon J. did not however take up Jeffries J.'s other suggestion in *Van den Berg,* that a constructive trust might be applicable. In both his own judgments, Mahon J. confined the application of the constructive trust to cases where there can be shown to be a want of probity or dishonest conduct, thus firmly rejecting Lord Denning's wide view of it as "a trust imposed by law wherever justice and good conscience require it". The facts of *Van den Berg* probably reveal nothing strong enough to satisfy Mahon J.'s test of circumstances amounting to a fraud upon the plaintiff. To have accepted Jeffries J.'s contention for a constructive trust on those facts would have been effectively to put into practice Lord Denning's approach to constructive trusts. Mahon J.'s need to explain away the correct result of the case resulted in his reference to proprietary estoppel as the real ratio in *Van den Berg.*

The similarity of the facts in *Van den Berg* with those in *Avondale Printers Ltd.* v. *Haggie* provided Mahon J. with problems, particularly as he rejected proprietary estoppel as a ground of decision in the plaintiff's favour in *Avondale Printers.* Although after the conveyance had taken place in *Avondale Printers,* the defendant attempted to repudiate any developments that occurred from that time on, he had freely accepted the development that was occurring on the land before he agreed to purchase the land in place of the plaintiff. Jeffries J., had he been deciding this case, would probably have been able to imply the same request for the improvements by the defendant as he was able to imply on Giles's behalf in *Van den Berg.* This would have given rise to a proprietary estoppel. Perhaps it was this difficulty with the facts that led Mahon J. in *Avondale Printers* not to decide the factual issue of whether there was actual fraud until after he had dealt with the legal issue of whether there could be a case of action based on unjust enrichment. It is submitted, however that even without an element of fraud, i.e. the defendant's refusal to grant the plaintiff its right to purchase, the facts are sufficient to give rise to the implied promise, and hence to a proprietary estoppel consistent with the estoppel in *Van den Beerg* which Mahon J. himself saw as explaining the correct decision in that case.

III. CONSTRUCTIVE TRUSTS AND UNJUUST ENRICHMENT

In *Avondale Printers* Mahon J. examined Lord Denning's view on constructive trusts and found two major faults with it. First, it runs contrary to the decisions of the House of Lords in *Gissing* v. *Gissing*[23] and *Pettitt* v. *Pettitt,*[24] both of which rejected the notion of imputing an agreement between the parties to vary their legal interests, requiring instead an agreement or common intention, express or inferred, concerning the beneficial ownership of the property. Secondly, such a broad action, were it allowed, would be too wide and undefined for counsel or the judges to be certain of its application: "No stable system of jurisprudence could permit a litigant's claim to justice to be consigned to the formless void of individual moral opinion."[25] As a matter of strict precedent, Mahon J. is correct as to the legitimacy

23 [1971] A.C. 886; [1970] 2 All E.R. 768.
24 [1970] A.C. 777; [1969] 2 All E.R. 385.
25 Supra n.12, 367.

of the wide doctrine in view of the House of Lords decisions. Lord Denning's treatment of *Gissing* and *Pettitt* bears little resemblance to what was exactly said in them. However, Mahon J.'s views as to the practicability of basing the constructive trust on unjust enrichment, or perhaps even a more general guide of justice and good conscience, may not be so valid, and, at least from the point of view of first principles, the question is still very open.

McKay[26] disagrees that the consequences of a widely available constructive trust would be to introduce a practice of palm-tree justice, with the result that a litigant's claim to justice would be "consigned to the formless void of individual moral opinion." He suggests that because the issue would be decided by judges and lawyers there would arise a series of quasi-legal signposts which will apply when deciding any particular case and give rise to general judicial agreement as to the merits of any case. Thus any tendency towards excessive subjectivism would be removed by the relatively quick introduction of tests which would aid in establishing an objective approach.[27]

> Did the plaintiff rely on the defendant's undertaking? Did the defendant intend to be relied upon? Was there equality of bargaining positions? Did the defendant stand in a special relationship to the plaintiff? Did he abuse that position?

What McKay says is in line with a statement made by Lord Wright,[28] itself referring to a quote from Lord Mansfield C.J.[29] concerning the basis of quasi-contractual claims.[30]

> Like all large generalisations, it has needed and received qualifications in practice . . . . The standard of what is against conscience in this context has become more or less canalised or defined.

McKay suggests, therefore, that in the majority of cases most lawyers would agree as to the merits. This may well be so for situations which are in the second of the Goff and Jones categories,[31] but the answer may not be so clear in the first of the categories where the benefit has been conferred by a third party as in *Carly* v. *Farrelly*. Where are the merits in *Carly* v. *Farrelly?* Should the insurance money be transferred to Carly who has been deprived of all consideration for the contract he has made, or is the better view that of Sutton?[32]

> Was the enrichment "unjust"? Prima facie, it would seem that a defendant who does no more than insist on his rights under a contract which, in itself, is not unfair or unreasonable, can hardly be acting unjustly.

It is suggested that in such situations disagreement and confusion would arise quite often, even amongst lawyers and judges. Some lawyers would be influenced by a conception of the overall justice of the case, while others would be concerned

26 L. McKay "*Avondale Printers* v. *Haggie:* Mr Justice Mahon and the Law of Restitution" [1980] N.Z.L.J. 245.
27 Ibid. 253.
28 *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barber Ltd.* [1943] A.C. 32, 62-63.
29 *Moses* v. *Macferlan* (1760) 2 Burr. 1005, 1008; 97 E.R. 676.
30 Supra n.28.
31 Supra n.15.
32 R. J. Sutton "Unjust Enrichment" (1975) 6 N.Z.U.L.R. 367, 368-369 (Case note on *Carly* v. *Farrelly*).

with ideas of legal rights and obligations taking precedence over what may be the general merits of the situation. It would not be until sign-posts had been established that these sorts of disputes could be resolved, and because of the potential for dispute it is doubtful that lawyers could easily agree upon which sign-posts to put up.

One matter affecting the viability of the constructive trust as a widely available remedy, which is not considered by either McKay or by Mahon J., is the consequences of imposing a constructive trust. Oakley lists three factors which he considers to be arguments against the use of the constructive trust simply to do justice in any case:[33]

(1) The trust places a considerable liability upon the defendant trustee as he is obliged to account with interest for the property in question;

(2) The constructive trust gives the beneficiary an equitable proprietary interest in the property in question which means that priority is given to the beneficiaries the general creditors should the trustee become bankrupt;

(3) Property rights are affected as the constructive trustee is divested of the beneficial interest in the property.

Oakley points out that this is contrary to statements in the House of Lords[34] to the effect that rights in property are not to be determined according to what is reasonable and fair or just in the circumstances, but in line with well-established principles of property law.

A contrary view to that of Oakley is presented by Klippert.[35] Klippert sees the precedence over general creditors afforded by the constructive trust as a positive advantage. He also sees advantage in the trust concept itself as it allows for any appreciation in the value of a property which occurs after it leaves the plaintiff's hands, but admits that this can be hard on a morally innocent trustee.[36] Another benefit derived from using the constructive trust as a remedy is that it permits an equitable tracing remedy, by satisfying the prerequisite of an equitable proprietary interest.

Klippert's view on giving precedence over unsecured creditors is the more sound. When a trust is declared over certain property the court is recognising some beneficial right in the property, i.e. this property has belonged to the plaintiff but has wrongfully or unjustly been moved to the defendant's hands or it is property which has come from a third party and should have gone to the plaintiff but has somehow been channelled to the defendant. The remedy in rem on the property seems the more logical as against an in personam remedy which is in the nature of a normal personal debt. For Klippert the major problem lies in devising rules which would prevent existing unsecured creditors themselves claiming under unjust enrchment rather than under their contractual rights, that is in "rooting

33 A. J. Oakley *Constructive Trusts* (Sweet & Maxwell, London, 1978) 3-6.
34 Supra nn.23 and 24.
35 Supra n.7, 412.
36 Ibid. 413.

out unjust enrichment claimants who are entitled to an *in rem* remedy from those who are entitled to an *in personam* remedy".[37]

He notes, first,[38] that Palmer[39] suggests that the principle of accountability for profit through the use of tracing, for which the constructive trust is used, should only be applied where the defendant is a fiduciary or a conscious wrong-doer. This suggestion seems in accord with what is required by Mahon J. in his adoption of want of probity as a suitable test for all constructive trusts, unless the definition of a conscious wrongdoer is widened so as to embrace such a wide category of persons that Mahon J.'s fears of 'palm-tree justice' might well be realised. Klippert's second point[40] is, nevertheless, the more realistic, that the constructive trust remedy should be refused where an ordinary Common Law remedy exists. This check is of a similar nature to that which has acted as the brake on the use of tort in place of available contract remedies.

IV. SOME CONCLUSIONS

The two judgments of Mahon J. clearly represent strong rebuttals of the wide doctrine of constructive trusts. At the time of writing the *Avondale* judgment is under appeal, but it does not appear to have been examined elsewhere. The *Hussey* v. *Palmer* line of cases has however been briefly mentioned in the Court of Appeal,[41] but without any firm indication as to whether or not the New Zealand courts should accept them.

As regards unjust enrichment as itself the basis of a claim, however, Mahon J.'s position is not clear. His discussion of *Van den Berg* perhaps indicates his rejection of any such role for the principle, and some of his remarks addressed to constructive trusts in general are couched in such terms as to support such a rejection. His confusion when examining *Van den Berg* should, of course, be remembered when assessing the impact of that examination, and his more general words cannot be taken as a valid rebuttal of a wide role for unjust enrichment, as, in the words of McKay, what Mahon J. had in mind was not[42]

> even vaguely related to that form of doctrine around which academic and judicial debate had centred in recent decades and which represents a far more likely candidate for adoption into the common law.

The extent to which Mahon J. is looking at the wrong thing is demonstrated in *Avondale Printers* where he doubts whether the existing restitutionary remedies are in any way insufficient.[43] He continues

> The American system which accepts unjust enrichment as the controlling principle of restitution also rejects the theory that a remedy may be invented whenever the justice of the case seems so to require.

37 Idem. 38 Idem.
39 G. E. Palmer, *Law of Restitution* (Little Brown, Boston, 1978).
40 Supra n.36.
41 *C.I.R.* v. *Gerard* [1974] 2 N.Z.L.R. 279, 286-287, per McCarthy J. His Honour says that there is much to be said for a wide doctrine of constructive trusts but accepts that current opinion is that the constructive trust is a substantive not a remedial device.
42 Supra n.26, 253.
43 Supra n.11, 128.

Had Mahon J. been given the opportunity of considering "unjust enrichment" as conceptualised and defined by Goff and Jones, or Klippert, or any of the other numerous writers on the subject, his fears as to the vagueness of the doctrine might well have been assuaged. His Honour can have gained very little assistance when deciding *Avondale Printers* from academic comment on his previous decision in *Carly* v. *Farrelly*. Sutton,[44] analysing the merits of the dispute in *Carly,* looks at unjust enrichment along lines vaguely similar to those espoused by Goff and Jones, but then goes on to describe the doctrine as an underlying theme in a number of restitutionary claims but not as one that can "be applied in its naked form to any other problem."[45] Sutton's view is typical of the failure of judges and lawyers to recognise a separate, well-defined and controlled cause of action based upon the defendant's unjust enrichment at the plaintiff's expense, not reliant upon other forms of action such as quasi-contract or constructive trust to bring about a remedy. The two judgments delivered by Mahon J. do not come to grips with such a concept or deal with its feasibility as an alternative to the various orthodox restitutionary actions.

In conclusion it is suggested that "unjust enrichment" is far from eradicated as a possible cause of action in New Zealand. Should counsel argue it as a separate and well-defined ground of restitution distinct from other more particularised remedies, and as being not dependent upon the judge's subjective view of the merits, the lead given by Jeffries J. in *Van den Berg* v. *Giles* may well result in the adoption of the principle of unjust enrichment in the New Zealand courts.

44 Supra n.32.

45 Ibid. 369-370. Professor Sutton has written at length on his view of the notion of unjust enrichment in a paper soon to be published in the Otago L.R.