

CONTRACT, RESTITUTION AND PROMISSORY ESTOPPEL

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I. INTRODUCTION

A. CONTEXT

In *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd*,¹ Franklins put forward two principal lines of argument. One was the breach of a binding contract with Austotel and the other was promissory estoppel. Rogers A-J.A., at the end of his judgment pointed out² that there:

was no claim advanced for damages based on principles of restitution illustrated, so far as Australian jurisprudence in this field is concerned, for present circumstances, by the judgment of Sheppard J. in *Sabemo Pty Ltd v. North Sydney Municipal Council* [1977] 2 NSWLR 880. The somewhat ill-defined distinction between estoppel and restitution was highlighted by P.Birks, *An Introduction to the Law of Restitution* (1985), 291 *et seq.* The question not having been argued, it is inappropriate to pursue this line of enquiry further.³

Irrespective of whether or not Franklins could have succeeded in recovering something in a claim for restitution⁴ the case illustrates that an important general issue is the relationship between contract, restitution and promissory estoppel. The purpose of this article is to make a start in the examination of that relationship, mainly in the context of anticipated contracts which fail to materialise. That was the context of the *Franklins* case. But it is, of course, relevant in other areas as well.

It is probably fairly predictable that the General Editor of the *Journal of Contract Law* should not intend treating the death of contract thesis as necessarily proven. Indeed, it has always seemed to me a rather strange thesis, given the importance of contract as an institution operating very

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1 (1989) 16 NSWLR 582 (hereinafter *Franklins*).

2 Note 1 *supra*, 621.

3 *Ibid.*

4 See below, discussion accompanying note 75.

successfully in the real world. It may be that the theory of contract today is different from that espoused in the nineteenth century, but then society is different as well. I agree with Professor Coote that:

[c]ontract remains alive at common law and its retention can be justified so long as the balance of advantage to society remains with providing a facility by which parties are able to take legal contractual obligations upon themselves.⁵

Sir Anthony Mason has drawn attention to the plain fact that both the law of restitution and the law of contract have “recently awakened from [a] long slumber”.⁶ And it need hardly be said that, in Australia, equity continues to be regarded as having a separate identity. It is not my main concern in this article to question the scope accorded by the High Court in its recent decisions to the concept ‘contract’. Rather I concentrate on the impact of recent decisions in enlarging the scope of restitution and promissory estoppel. As will be seen, to a large extent the recent developments in restitution and promissory estoppel operate in areas left open by contract. It is not, in other words, a question of contract diminishing. Rather other areas of law which are clearly related to contract and contractual situations are expanding. What *is* important is the extent to which developments in restitution and promissory estoppel create tension with principles of contract law which have hitherto been accepted as ‘correct’.

B. BACKGROUND

Why have we reached the stage when it is possible, indeed necessary, to consider the relationship between these three areas of law? The reasons all stem from the two capital decisions of the High Court in *Pavey & Matthews Pty Ltd v. Paul*⁷ and *Waltons Stores (Interstate) Ltd v. Maher*.⁸

In *Pavey & Matthews* the Court recognised unjust enrichment as the basis for restitution, at least in the context of ineffective transactions. Justice Deane, with whom Mason C.J. and Wilson J. substantially agreed, said that unjust enrichment is a:

unifying legal concept ... [which] ... explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.⁹

In *Waltons* case the Court allowed promissory estoppel, freed of the limitation of a pre-existing legal relationship, to be the basis for a claim in damages. Both decisions have been the subject of considerable academic

5 B.Coote, “The Essence of Contract” (1989) 1 *JCL* 183, 201.

6 The Hon. Sir Anthony Mason, *Book Review*, (1989) 1 *JCL* 265; cf. B.Dickson, “The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law” (1987) 36 *ICLQ* 751, 754.

7 (1987) 162 CLR 221 (hereinafter *Pavey & Matthews*).

8 (1987) 164 CLR 387 (hereinafter *Waltons*).

9 Note 7 *supra*, 256-7.

discussion.¹⁰ And judicially the cases are considered daily.

It is probably true to say that contract lawyers generally understand more about promissory estoppel than unjust enrichment. And the general discussion of these concepts in this paper therefore concentrates on the latter.¹¹

C. PAVEY & MATTHEWS PTY LTD V. PAUL

In *Pavey & Matthews Pty Ltd v. Paul*¹² a builder sued to recover for work done under a building contract. The sum at issue was \$26,945.50.¹³ This was sought on a quantum meruit. That is to say, the plaintiff sought to recover the value of the work done, in a claim for restitution. Although the work had been done under an oral contract to pay a reasonable remuneration, calculated by reference to prevailing rates in the industry, no claim could be brought on the contract, due to non-compliance with section 45 of the *Builders Licensing Act* 1971 (N.S.W.). Section 45 required a contract under which the holder of a licence undertook to carry out (or vary) any building work to be in writing, and provided that a contract which did not comply with section 45 was "not enforceable against the other party to the contract". The builder held a licence, and the work was "building work" under the Act and so section 45 applied. The parties consented to Enderby J. making an order for the trial, as a preliminary issue, whether section 45 defeated the claim.

Clarke J. held in favour of the builder and ordered the remaining issues to be tried before an arbitrator. That decision was reversed by the Court of Appeal which held¹⁴ that the quantum meruit, framed as an indebitatus count, was an action to enforce the contract. In addition it was inconsistent with the legislative policy of the Act for the claim to succeed. An appeal was then taken to the High Court which held, by a majority of four to one (Brennan J. dissenting) that the Court of Appeal was wrong.

Deane J. distinguished two categories of claim available under the old common counts in use prior to the introduction of the Judicature system.¹⁵ First, quantum meruit was used to recover a debt arising under a genuine

10 See e.g. G.Jones, "Restitution: Unjust Enrichment as a Unifying Element in Australia?" (1988) 1 *JCL* 8; D.Ibbetson, "Implied Contracts and Restitution: History in the High Court of Australia" (1988) 8 *Oxford J Legal Stud* 312; J.Beatson, (1988) 104 *LQR* 12; H.O.Hunter and J.W.Carter, "Quantum Meruit in Building Contracts" (1989) 2 *JCL* 95; K.C.T.Sutton, "Contract by Estoppel" (1988) 1 *JCL* 205; C.H.N.Bagot, "Equitable Estoppel and Contractual Obligations in the Light of *Waltons v. Maher*" (1988) 62 *ALJ* 926.

11 See below, discussion accompanying notes 24, 41 ff.

12 Note 7 *supra*.

13 The market value of the work was \$62,945.50, but a sum of \$36,000 had been paid.

14 See *Paul v. Pavey & Matthews Pty Ltd* (1985) 3 NSWLR 114.

15 Deane J. approved Chief Justice Jordan's statement of the law of quasi-contract in *Horton v. Jones* (1934) 34 SR (NSW) 359, 367-8 (affirmed on other grounds (1935) 53 CLR 475). See also *Phillips v. Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 246; cf. *Matthes v. Carter* (1955) 55 SR (NSW) 357, 363; Ibbetson, note 10 *supra*.

contract. The contract might be express or implied. Secondly, quantum meruit was used to recover a debt owing in circumstances where the law itself imposed or imputed an obligation or promise to make payment for a benefit accepted. In the first category the action was on the contract. On the other hand, in the second category the action was not based on a genuine agreement at all. It is the second category of claim, which may be available where there is no applicable genuine agreement or where the agreement is frustrated, avoided or unenforceable, which invokes unjust enrichment. Although previously justified by recourse to a fictional implied contract or assumpsit, it is now based on unjust enrichment. A valid and enforceable agreement would preclude a claim under the second category. Indeed, as Deane J. pointed out, it is the absence of a genuine agreement or the fact that it is not applicable, frustrated, avoided or unenforceable:

that provides the occasion for (and part of the circumstances giving rise to) the imposition by law of the obligation to make restitution.¹⁶

The usual context for such a claim is a contract affected by the *Statute of Frauds*¹⁷ but performed by the plaintiff. Such a claim is maintainable and not regarded as an action on the contract.¹⁸ For Deane J. there was no need to resort to the fictional promise of assumpsit to explain why the *Statute of Frauds* did not preclude the action to recover reasonable remuneration as a liquidated sum.¹⁹ The obligation enforced is not derived from the unenforceable agreement. Under the modern law, the basis of the obligation to make payment for an executed consideration given and received under an unenforceable contract is restitution based on unjust enrichment.²⁰

Having decided that the claim could succeed if the *Statute of Frauds* had been the reason for unenforceability, Deane J. considered the legislative policy behind section 45 and said that it did not touch the quantum meruit claim.²¹ Accordingly the builder could succeed.

16 Note 7 *supra*, 256.

17 29 Car. II c.3 (1677) (hereinafter *Statute of Frauds*).

18 Some of the cases *e.g.* *Souch v. Strawbridge* (1846) 2 CB 808; 135 ER 1161 (*cf.* *Turner v. Bladin* (1951) 82 CLR 463), treated the claim *dehors* the statute as permissible because it was in debt rather than contract; *cf.* S.J. Stoljar, *The Law of Quasi-Contract*, (2nd ed., 1989), 194, 232-5.

19 He agreed with the revised judgment of Denning L.J. (as he then was) in *James v. Thomas H. Kent & Co. Ltd* [1951] 1 KB 551, 556 and rejected the analysis in *Turner v. Bladin* (1951) 82 CLR 463 based on the original views of Denning L.J. in *James v. Thomas H. Kent & Co. Ltd* [1950] 2 All ER 1099, 1103-4. See also *Degelman v. Guaranty Trust Co. of Canada* [1954] 3 DLR 785. Dawson J. disagreed, considering that there was no need to depart from *Turner v. Bladin*.

20 *Cf.* Chief Justice Jordan's statement in *Horton v. Jones* (No. 2) (1939) 39 SR (NSW) 305, 320 that the obligation to pay is "imposed by law, and does not depend on an inference of an implied promise".

21 He relied in part on the interpretation of similar legislation in *Gino D'Alessandro Constructions Pty Ltd v. Powis* [1987] 2 Qd R 40. Brennan J. dissented on this point.

D. WALTONS STORES (INTERSTATE) LTD V. MAHER

In *Waltons Stores (Interstate) Ltd v. Maher*²² Mr and Mrs Maher had been negotiating with Waltons Stores (Interstate) Ltd for the lease by the latter of property owned by the Mahers in the business district of Nowra. The Mahers were to demolish an old building on the land and to erect a new building, to specifications which had been approved by Waltons, by 5 February 1984. On 21 October 1983 a draft agreement for lease was sent to the Mahers' solicitors. Certain proposed amendments were discussed and Waltons' solicitor was informed that the Mahers had begun to demolish the old building. On 7 November 1983 Waltons' solicitors were told that the agreement had to be completed within the next day or two. Otherwise it would be impossible for the new building to be completed in time. As he also said, the Mahers did not want to demolish a new part of the old building until it was clear that there were no problems. This conversation proved to be crucial to the decision in the case. On the same day, Waltons' solicitor sent to the Mahers' solicitor fresh documents incorporating the amendments agreed on by the solicitors and stating:

we have not yet obtained our client's specific instructions to each amendment requested, but we believe that approval will be forthcoming. We shall let you know tomorrow if any amendments are not agreed to.

The documents executed by the Mahers were subsequently (on 11 November 1983) forwarded to Waltons' solicitor "by way of exchange", and the Mahers then began to demolish the new portion of the old building. Waltons, who became aware of this on 10 December, altered its retailing policy. Having been advised that because contracts had not been exchanged it was not bound to proceed, Waltons decided not to commit itself and instructed its solicitors to "go slow". In early January the Mahers commenced construction of the new building. This was approximately 40 per cent complete when on 19 January Waltons informed the Mahers that it did not intend to proceed with the proposed lease. At no time prior to this letter was there any indication that the amendments were unacceptable or that Waltons would not exchange contracts.

Kearney J. awarded the Mahers damages, holding that Waltons was estopped from denying that a concluded contract by way of exchange existed. An appeal to the New South Wales Court of Appeal was dismissed when it also held that Waltons was estopped from denying the existence of a binding contract. Waltons' further appeal to the High Court was also dismissed. However, there was a diversity of approach. A majority of the Court (Mason C.J., Wilson and Brennan JJ.), disagreeing with the Court of Appeal, applied promissory estoppel. In their view there was an implied promise to complete the transaction which Waltons was estopped from denying. Deane J. and Gaudron J. (like the Court of Appeal) based their decisions on common law estoppel. Thus, Deane J. thought that Waltons

was bound to adhere to an assumption that a binding contract existed and Gaudron J. held that Waltons was bound by an assumption of fact that contracts had been exchanged.²³

II. KEY CONCEPTS

A. GENERAL

Having opened up the subject matter of the article with illustrations from the two key decisions on restitution and promissory estoppel, it is next necessary to explain the key concepts which they apply. There are two such concepts: unjust enrichment and promissory estoppel.

B. UNJUST ENRICHMENT

Although *Pavey & Matthews* contains no comprehensive definition of unjust enrichment, the concept is usually understood to signify that the defendant has obtained a benefit at the expense of the plaintiff, in circumstances where it would be unjust not to respond to the benefit by ordering restitution. Indeed, Justice Deane's statement of principle²⁴ presumes these three elements to be satisfied when an order for restitution is made. Restitution is a response to unjust enrichment. However, the measure of the plaintiff's recovery is not usually the amount by which the defendant's assets have increased. In *Pavey & Matthews*, for example, the plaintiff was entitled to recover the market value of the work done rather than the increase in the value of the defendant's land resulting from the building work.

In the present context the most straightforward of the three elements of unjust enrichment is 'at the expense of'. If the plaintiff conferred a benefit on the defendant, the benefit is at the expense of the plaintiff because there is subtraction from the plaintiff's wealth and addition to the defendant's wealth. The concepts of 'benefit' and 'injustice' are more troublesome. These are investigated below.

C. PROMISSORY ESTOPPEL

It is difficult to state a comprehensive definition of promissory estoppel. In *Waltons* Mason C.J. and Wilson J. said:

the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. *Attorney-General (Hong Kong) v. Humphreys Estate Ltd* [1987] 1 AC 114 suggests that this may be found, if at all, in the creation or encouragement by

23 The High Court also held that section 54A of the Conveyancing Act 1919 (N.S.W.) did not preclude the Mahers from obtaining relief.

24 Quoted above, text accompanying note 9

the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party.²⁵

Brennan J. said:

[i]n my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.²⁶

It is not clear that a majority of the court was in support of Justice Brennan's description. In particular, it is not clear that the majority of the court adopted his Honour's first requirement in the form expressed.²⁷ The scope of the requirement may, however, be very significant in determining the ability of promissory estoppel to deal with some of the situations in which restitution (potentially or currently) operates.

III. RESTITUTION AND CONTRACT

A. INTRODUCTION

It has been shown above that in Australia today the obligation to make restitution is seen as an *imposed* obligation. The High Court has rejected the implied contract theory of restitution, there is no fiction of agreement.²⁸ The contrast with contract is then a contrast with an *assumed* obligation. Professor Birks sees a related contrast between purposes.²⁹ It is not the purpose of restitution to protect or fulfil expectations, that is the function of contract. However, we need not go so far as this. The *usual* way of enforcing contracts is by reference to expectations, but that is not the only way, and it should not be thought that contract law is necessarily the only basis by which expectations are protected.³⁰

A very basic point to make is that when comparing contract and restitution we are not comparing like with like. 'Contract' describes a large body of law revolving around the assumption of responsibility for the fulfilment of promises. These promises are usually supported by consideration. The institution is there to enforce liability which has been assumed consensually, expressly or impliedly. The source of rights and

25 Note 8 *supra*, 406.

26 *Id.*, 429.

27 *Cf. Franklins* note 1 *supra*, 612 per Priestley J.A.

28 *Pavey & Matthews* note 7 *supra*.

29 P.Birks, *An Introduction to the Law of Restitution* (1985), 292 (hereinafter *Birks*). See also A.S.Burrows, "Contract, Tort and Restitution - A Satisfactory Division or Not?" (1983) 99 *LQR* 217.

30 *Cf. Junior Books Ltd v. Veitchi Co. Ltd* [1983] 1 AC 520.

remedies is the parties' own agreement. Restitution, on the other hand, is not an institution. Rather, it is a response.³¹ In its interaction with the law of contract it is a response which usually presumes that the parties have not dealt with the matter at issue, or it at least refrains from operating until the contract has been discharged or rescinded. Thus we say that, rather than being consensual, liability to make restitution is imposed.

Contract and restitution often go hand in hand, as where orders are made, following rescission for misrepresentation, to achieve *restitutio in integrum*.³² But equally they may suggest conflicting solutions. As an example of this consider a contract under which S agrees to sell "100 tonnes of wheat" at \$1000 per tonne to B. Assume that X offers to buy all S's wheat at \$1500 per tonne, well above the price which B agreed to pay, and that S accepts the offer. S has no wheat in his or her possession, but can go into the market and purchase wheat to satisfy the contract with B. If he or she does not do so a breach of the contract with B occurs. It might be said that the breach by S allows S to make a profit, and there are suggestions that restitution might be a basis for B recovering such profit (on 100 tonnes) from S.³³ It cannot be said that S has benefited at B's expense in the sense in which we have already investigated, so one idea³⁴ is that the benefit obtained by S is at B's expense because it is the result of a wrong done to B.³⁵ But for contract lawyers this is fantasy, since the loss that B has suffered is, *prima facie*, the difference between the contract price and the market price at the date fixed for delivery. The fact that S has chosen not to go into the market to buy wheat to deliver to B does not mean that B's right to compensation is enlarged. On the other hand, if there is no market for wheat a court might well choose the price obtained by S as the measure of B's loss. In order to make a real case for a promisor to be forced to account for a profit made in breach of contract, the subject matter must be specific, or the parties must stand in a fiduciary relationship which attracts equitable jurisdiction.³⁶ In any event, it seems clear that we are here talking more about a restitutionary way of assessing compensation than an imposed obligation to make restitution.

31 Cf. note 29 *supra*, 10.

32 See generally *Alati v. Kruger* (1955) 42 CLR 216.

33 See generally G. Jones, "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 *LQR* 443; J. Beatson, "What Can Restitution do for You?" (1989) 1 *JCL* 65; cf. S. Stoljar, "Restitutionary Relief for Breach of Contract" (1989) 2 *JCL* 1; J.L.R. Davis, "Damages" in P.D. Finn (ed.), *Essays on Contract* (1987), 200.

34 Note 29 *supra*, 313 *ff.*

35 Alternatively, the defendant is estopped by his wrongful act from denying that the benefit was made at the plaintiff's expense: Lord Goff and G. Jones, *The Law of Restitution*, (3rd ed., 1986) (hereinafter *Goff and Jones*), 26.

36 See *Thornley v. Tilley* (1925) 36 CLR 1; *United States Surgical Corp. v. Hospital Products International Pty Ltd* [1983] 2 NSWLR 157; (1984) 156 CLR 41. See also R.P. Austin, (1986) 6 *Oxford J Legal Stud* 444.

B. COMPENSATION AND RESTITUTION

As a classic situation, which may be used to illustrate an area of overlap between contract and restitution, consider a contract for the sale of land by instalments which is repudiated by the vendor after the purchaser has paid, say \$100,000 towards the contract price of \$150,000.

If the purchaser terminates the performance of the contract in reliance on the repudiation, no one would doubt that the purchaser may recover the money paid. In a contract claim the sum paid could be awarded as damages. Equally, however, the money could be recovered as restitution for unjust enrichment. The vendor has undoubtedly benefited. The benefit is unjust because the money was paid on the understanding that title to the land would be transferred. Termination serves to ensure that title will not be transferred and the purchaser's claim is water tight. In the language of the common counts, the total failure of consideration gives rise to a right to recover the payments as money had and received by the vendor to the use of the purchaser.³⁷

It would be wrong to say, relying on the above example, that restitution and contract correspond in both conferring rights of compensation by way of damages. The award of restitution is not compensation for a loss suffered. Rather, as Lord Wright said in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*,³⁸ "unjust enrichment" is designed to prevent a person, such as the vendor, from retaining money derived from the purchaser which it is "against conscience" that the vendor should keep. On the other hand, because damages in contract is a remedy aimed at compensating the purchaser for the vendor's breach of contract, the purchaser may go further and claim *in addition* a loss such as the difference between the contract price of the land and its market price at the time stipulated in the contract for settlement. Notwithstanding the statement by Rogers A-J.A. quoted at the beginning of this article,³⁹ an award of restitution is not an award of damages.⁴⁰

C. SERVICES RENDERED

It is when we turn to an analysis of restitutionary claims for services rendered that the potential for tension between contract and restitution is greater. Some very important issues for both concepts are still to be settled. Expressed in broad terms there are two areas of interest.

The first includes situations in which services are rendered but in which it is argued there is no contract. If the argument is successful the plaintiff is left to make a claim for restitution (or to rely on promissory estoppel). It is, however, important to see that the claim may bear very little relation to the contract argued. For example, in anticipation of entering into a lease with

37 *McDonald v. Dennys Lascelles Ltd* (1933) 48 CLR 457.

38 [1943] AC 32, 61.

39 See above, discussion accompanying note 3.

40 But see S.J.Stoljar, *The Law of Quasi-Contract*, (2nd ed., 1989), 231.

the defendant the plaintiff may have built a house on the defendant's land.

The sub-issues which can be seen to arise are:

- (a) the scope to be given to contractual concepts such as consideration, certainty of agreement, mistake *etc*; and
- (b) the extent to which restitution should provide a remedy when contract law refuses to do so.

Issue (a) is essentially a contract issue, although the decision made will certainly influence the perception of the need to provide a restitutionary remedy and therefore go some way towards responding to the second issue. For convenience I will refer to the area as the 'no contract problem'.

The second area includes situations in which services are rendered under a contract for services which has been discharged and for which there is no contractual right to payment. There are two sub-issues, namely:

- (a) the extent to which restitution should provide a remedy when contract law already does so; and
- (b) the extent to which restitution should provide a remedy when contract law refuses to do so.

For convenience I will refer to this as the 'discharged contract problem'.

D. RESTITUTION THEORY IN THE CONTEXT OF SERVICES

Before elaborating on these problems a little more should be said on the theory of restitution. It can be inferred from what has been said so far that where a restitutionary claim is made in the context of contract, the claim will rarely succeed if the contract exists in law and is undischarged.⁴¹

The next point is that the mere fact that services have been provided is not of itself enough to justify a claim for restitution: the elements of unjust enrichment must be satisfied. Even if we assume that the defendant requested the supply of services the claim of the plaintiff is not necessarily secure for two reasons. First, there may be no benefit. Secondly, it may not be unjust to deny the plaintiff's claim.

The reason why benefit is often a problem is that the law does not adopt a simple objective approach. It is very frequently open to a defendant to devalue - subjectively - the services so as to deny benefit. Services are either consumed by the defendant or form an unrealisable part of his or her wealth. 'Subjective devaluation' is a description of the right of a person who receives such services to say that he or she has not benefited. Restitution lawyers introduce a number of concepts to deal with the problem. The anticipation of a necessary expenditure, or a benefit realised

41 But see *Miles v. Wakefield Metropolitan District Council* [1987] 2 WLR 796, 799, 807.

in money, will constitute an "incontrovertible benefit".⁴² The concept of "free acceptance" is used in Birks'⁴³ analysis of restitution to deal with the inability of a defendant to restore what is, objectively, a benefit. There is no question of supply of equivalent services by the defendant, but the defendant can be made liable to pay money by an acceptance of the benefit of the services. It is not proposed to deal in any detail with these concepts.⁴⁴ But their existence and scope is clearly important in determining how far the law of restitution will extend into the contract area.

IV. THE 'NO CONTRACT PROBLEM'

A. TYPICAL SITUATIONS

The decided cases bear witness to the frequent use in the commercial world of documents described variously as 'letters of intent', 'heads of agreement' *etc.* Generally the intention is for such documents to be replaced by more formal agreements. In that regard their function is not dissimilar from an agreement 'subject to contract'. It is, clearly, at least intended that the parties to the agreement will continue to negotiate. Equally, however, they are not necessarily irrevocably bound to one another. Just why this method of dealing is chosen is not always self-evident, but commonly it is because one party has a particular project in mind, a project which requires considerable planning and discussion. So government projects are often put out to tender on the basis that initially the process is merely to bring the parties to the negotiating table.

In all such cases the agreements may in fact be contracts, the issue being decided by recourse to concepts such as consideration, certainty of agreement and intention to contract. The narrower the definition of these concepts under the law of contract the more likely the conclusion that there is no contract. But such a decision may cause a significant commercial loss, not just in not receiving the profit anticipated, but in also being unable to make a contractual claim for work done. It is a fact of commerce that the documentation of contracts frequently lags significantly behind the doing of work. In one sense the issue may be stated simply: 'Who bears the risk that negotiations will come to nought?'. But the issue is really much broader: 'Is the definition of contract wide enough?'. Australian law may have made two mistakes: in adopting too narrow a definition of consideration; and in the refusal to enforce implied promises to negotiate. On the other hand it is believed that, save in one

42 Birks, note 29 *supra*, 117; Goff and Jones, note 35 *supra*, 19 *ff*; G. Jones, "Claims Arising Out of Anticipated Contracts Which Do Not Materialize" (1980) 18 *U W Ontario LR* 447, 449.

43 Birks, note 29 *supra*, 282.

44 See J.W. Carter, "Ineffective Transactions" in P.D. Finn (ed.) *Essays in Restitution* (forthcoming).

respect, the law on certainty of agreement is sufficiently broad and flexible.⁴⁵ The one qualification to that proposition is the difficulty which still arises in transactions involving land due to the refusal of Australian courts to imply a reasonable price.⁴⁶

Even if the main contract which the parties had in mind does not come into being, the law of contract knows solutions to deal with expenditure in anticipation. For example in *Turriff Construction Ltd v. Regalia Knitting Mills Ltd*⁴⁷ a letter of intent was regarded as an "ancillary contract" for preparatory work. The collateral contract device must not be overworked, but it seems wrong to conclude, as some have done⁴⁸ that the opportunity to apply restitution implies that the decision whether or not there is a contract may be made by a simple application of the rules of an offer and acceptance. That would elevate concepts which are merely tools of analysis to the status of essential contractual requirements. The truth is that a contract may be found even though offer and acceptance are not present.⁴⁹

B. THE RELEVANCE OF PROMISSORY ESTOPPEL

The earlier⁵⁰ discussion of *Waltons* is enough to indicate the undoubted relevance of promissory estoppel to the typical situations outlined above. We must reject the idea that promissory estoppel and contract are unrelated.⁵¹ Some will see the decision in *Waltons*, enforcing a promise not supported by consideration, as reinforcing the death of contract thesis. That is, it might be taken to illustrate that contract cannot last because it is tied to a narrow theory of consideration which gives insufficient prominence to reliance.⁵² However, that misses at least two points. First, although the High Court did see promissory estoppel as necessary to fill one gap exposed by the consideration concept⁵³ it did not regard reliance as a substitute for consideration⁵⁴ and there is no reason why contract law should not ultimately reject the consideration requirement, or redefine it

45 See, e.g. *Cudgen Rutile (No. 2) Pty Ltd v. Chalk* [1975] AC 520; *Meehan v. Jones* (1982) 149 CLR 571.

46 See *Hall v. Busst* (1960) 104 CLR 206.

47 [1972] EG (Dig) 257.

48 E. McKendrick, "The Battle of the Forms and the Law of Restitution" (1988) 8 *Oxford J Legal Stud* 197, 207.

49 Cf. E.A. Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations" (1987) 87 *Col L Rev* 217, 286-7.

50 See above, discussion accompanying note 22.

51 The Hon. Sir Anthony Mason, note 6 *supra*, 266.

52 See P.S. Atiyah, "Contracts, Promises and the Law of Obligations" (1978) 94 *LQR* 193.

53 *Waltons* note 8 *supra*, 402.

54 There is a contrast with section 90 of the *Restatement, Second, Contracts* which was originally interpreted as allowing enforcement of gratuitous promises on the basis that reliance was a substitute for consideration. See, e.g. *Drennan v. Star Paving Inc.* 333 P 2d 757 (1958). Cf. *Waltons* note 8 *supra*, 402. Nowadays, (and see *Restatement, Second, Contracts*, s.90(1)) the section is seen as having a wider scope and greater emphasis is given to the need to avoid injustice: *Hoffman v. Red Owl Stores Inc.* 133 NW 2d 267 (1965).

in broader terms. Secondly, the essence of promissory estoppel is something quite different from the assumption of obligation which typifies contract. Waltons refrained from assuming obligations towards the Mahers. But its conduct nevertheless created an equity in the Mahers' favour which allowed them to obtain compensation from Waltons. Once the Mahers had relied on the promise implied by Waltons' conduct, the latter could only deny the promise if that would cause no detriment to the Mahers. In a society where contract is seen as the basis for enforcing promises, it will normally be perfectly legitimate for a person to withdraw a non-contractual promise. But the circumstances were that detriment to the Mahers *would* result from that course of action. Therefore, Waltons had engaged in unconscionable conduct and was precluded from contradicting its promise.

There are two aspects to the relation between promissory estoppel and restitution. First, promissory estoppel influences the concept of benefit. Secondly, unconscionability, the key to promissory estoppel, may in a given case be the basis for saying that it is unjust for the defendant not to make restitution for a benefit received. For the moment I am concerned solely with the question of benefit.

Beatson⁵⁵ has argued in favour of an "exchange value" test of enrichment or benefit. This is significantly narrower than the Birks conception based on a wide definition of "wealth". Beatson labels services where there is no end product, and no saving of a "necessary" expense, "pure" services. Birks, by contrast, sees professional services as involving the marketing of "time".⁵⁶ They are equivalent to the hire of corporeal property. And a saving in expenditure is then a benefit which may count as enrichment. Beatson treats such services as outside the concept of unjust enrichment.⁵⁷ Pure services undoubtedly have a cost, namely the expenditure (or income forgone) of the person rendering the services. However, where there is no increase in any physical or human capital in the hands of the defendant, Beatson says unjust enrichment is irrelevant. Two views are then open: either restitution may be based on something other than unjust enrichment; or a concept such as promissory estoppel has to be used to provide the plaintiff with a remedy.

C. *SABEMO* AND PROMISSORY ESTOPPEL

In the passage quoted at the beginning of this article Rogers A-J.A. draws attention to the relevance of *Sabemo Pty Ltd v. North Sydney Municipal Council*⁵⁸ to restitution for the provision of services in a 'no contract' situation.

55 J. Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] *CLP* 71.

56 Birks, note 29 *supra*, 129.

57 *Cf. Restatement, Second, Contracts*, s. 370.

58 [1977] 2 NSWLR 880 (hereinafter *Sabemo*).

That case provides a good context in which to consider the relationship between promissory estoppel and restitution.

In 1969 the Sydney Municipal Council decided to build a grand civic centre. It advertised this fact, with the ultimate intention of awarding a building lease, for development of the land in question, to the successful tenderer. Finance for the project was to come from a commercial developer. Tenders were sought but the purpose was merely to bring about a negotiating relationship between the council and the successful tenderer. Sabemo was that tenderer. It prepared a number of schemes. One (at least) of these was satisfactory to all interested parties. Subsequently, after a change in the policy of the Council, it was decided that a more modest development should be undertaken. Accordingly, no contract was entered into with Sabemo even though development approval had been received. The decision not to proceed had nothing to do with the conduct of Sabemo or the quality of its work. The position was simply that the Council agreed with the proposal of one of the councillors that the idea of a commercial development be rejected. Sheppard J. held that Sabemo could not be deprived of payment for its labours even though he was unable to characterise the claim as based on unjust enrichment. He based his decision on the following statement of principle:

[w]here two parties proceed upon a joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party.⁵⁹

In evaluating his Honour's decision it must be borne in mind that it was reached before the High Court's recognition of unjust enrichment in *Pavey & Matthews*. It would seem that he refused to apply the principle of unjust enrichment because of the absence of authority in its favour and, perhaps, because the Council received no tangible benefit from the work done. In that regard the case supports the Beatson view of benefit. The other basis stated by Sheppard J. was a right to compensation.⁶⁰ It is difficult to find the basis for a right to damages, there being no breach of contract or tort committed.⁶¹ The case might be seen as resting on some independent principle of good faith in negotiating.⁶² Our interest is whether the decision of the High Court in *Waltons* would justify a damages claim, on the basis that the requirements of promissory estoppel were satisfied.

59 *Id.*, 902-3.

60 It is not clear whether his Honour was treating restitution as a form of compensation. Rogers A.J.A. seems to have adopted this view in *Franklins* note 1 *supra*. See above, discussion accompanying note 3.

61 *Trade Practices Act* 1974 (Cth) s.52, and corresponding provisions under fair trading legislation in some jurisdictions, might now provide a basis.

62 Cf. The Hon. Sir Anthony Mason & S.J.Gageler, "The Contract" in P.D.Finn (ed.), *Essays on Contract* (1987), 15-6. The concept has greater vitality in America, see Farnsworth, note 49 *supra*.

It would be difficult to say, on his Honour's analysis of the facts, that Sabemo did the work in the hope that the contract might be awarded, taking the risk of ultimate disappointment. The real complaint of Sabemo was that it had relied on the Council's conduct, and incurred expenditure in the legitimate expectation that if a scheme was found to be suitable the contract would be awarded. The Council in fact had before it a scheme which met the requirements communicated to Sabemo. Although it (at least) found out what schemes would be unsuitable, the work was not used by the council in any building project and it is impossible to say that any benefit was realised. Moreover, given that the commercial development project was finally abandoned, the benefit was not realisable. *Sabemo* is then an example of "pure services" as defined by Beatson. If this means there is no 'benefit' within the concept of unjust enrichment, some other basis for restitution must be found. The suggestion that the Council was saved an expense will not do, because it was not a necessary expense.⁶³ And that reason has been criticised as a basis for restitution.⁶⁴

An alternative argument would be that because Sabemo complied with the Council's request, the latter's conduct in dropping the project was, in the circumstances, unconscionable conduct. The satisfaction of the request might then be the benefit, and the unconscionable conduct a basis for saying that it would be unjust not to order restitution for the unjust enrichment. Such an argument would clearly be tenable in some jurisdictions in the United States. For example in *Earhart v. William Low Co.*⁶⁵ the Supreme Court of California overruled its earlier decision in *Rotea v. Izuel*⁶⁶ which required restitution to be based on a "direct benefit". The Court said that a defendant:

who receives the satisfaction of obtaining another person's compliance with the defendant's request to perform services incurs an obligation to pay for labor and materials expended in reliance on that request.⁶⁷

Were the requirements of promissory estoppel satisfied in *Sabemo*? It is suggested that they were. The basic assumption was that if Sabemo came up with a suitable scheme the contract would be awarded. There was an implied promise to enter into the building lease once the project received the necessary approval. Since Sabemo had undertaken considerable expenditure in reliance on this implied promise an equity arose for the enforcement of the promise when the necessary approvals were given. The conduct of the Council in seeking to withdraw its promise was unconscionable, and a remedy was available to Sabemo to claim damages equal to the market rate for the work done.⁶⁸

⁶³ Cf. *Craven-Ellis v. Canons Ltd* [1936] 2 KB 403.

⁶⁴ See J.P.Dawson, "Restitution Without Enrichment" (1981) 61 *Boston ULR* 563, 612.

⁶⁵ 600 P 2d 1344 (1979).

⁶⁶ 95 P 2d 927 (1939).

⁶⁷ Note 65 *supra*, 1348; see also J.P.Dawson, note 64 *supra*, who argues, more generally, that restitution remedies under American law do not depend on proof of enrichment. See also Farnsworth, note 49 *supra*.

There are English cases similar to *Sabemo*. In *William Lacey (Hounslow) Ltd v. Davis*⁶⁹ work was done in contemplation of entry into a building contract. Barry J. held that the plaintiffs believed that the contract would be awarded. This belief was generated by the words and conduct of the other party. The work took the form of the preparation of estimates. This was a benefit to the defendants, since they used the plaintiffs' estimates in evidence to the War Damage Commission. Although the element of realisation of benefit makes it impossible to describe the case as belonging to the "pure services" category, Barry J. did not rely on the point. He awarded restitution in the form of a quantum meruit by reference to the general circumstances of the case. His Lordship relied principally on the "mutual belief and understanding that the building was being reconstructed and that the plaintiff company was obtaining the contract".⁷⁰ This also sounds like a case more easily dealt with by recourse to promissory estoppel.⁷¹ We may contrast cases such as *British Steel Corp. v. Cleveland Bridge & Engineering Co. Ltd.*⁷² Work was done under a letter of intent which was held by Robert Goff J. to have no contractual effect. Although there was considerable negotiation in relation to contract documents, no contract arose because the parties were unable to agree on terms. The work which the parties contemplated as being done under contract - the manufacture and delivery of 137 steel nodes - was substantially done. It was clear that the work was not done gratuitously. Robert Goff J. held that a quantum meruit claim was available. Since Cleveland Bridge & Engineering actually received the nodes, restitution could be based on unjust enrichment even under a narrow definition of benefit.

The virtue of applying promissory estoppel to some of the cases so far dealt with as part of the law of restitution is twofold. First, emphasis would be given to the real basis for the plaintiff's claim, namely unconscionable conduct. There would be no need to 'fudge' the element of benefit under restitution. Concepts such as "acceptance" and "incontrovertible benefit" would be unnecessary to explain the existence of unjust enrichment. It is preferable to the conclusion which Beatson draws, namely restitution even though there is no unjust enrichment. Secondly, promissory estoppel provides more flexibility in response to the plaintiff's reliance. The plaintiff's equity must be satisfied, but this need not be to the extent of a full quantum meruit. It has often been pointed out that the court can

68 Cf. Jones, note 42 *supra*, 457 (analogy of proprietary estoppel). Contrast P. Birks, "Restitution for Services" [1974] CLP 13, 16.

69 [1957] 1 WLR 932.

70 *Id.*, 939.

71 See Jones, note 42 *supra*, 454-6.

72 [1984] 1 All ER 504. See also *Peter Lind & Co. Ltd v. Mersey Docks & Harbour Board* [1972] 2 Lloyd's Rep 234.

fashion the award in a way which ensures justice between the parties.⁷³ For example, it might be possible to impose a contract solution which deals with the objection sometimes made to quantum meruit claims, namely that they throw the risk of incomplete negotiations on one party.⁷⁴ This would be particularly applicable in cases where the assumption is that a contract exists already, or where the defendant promised to enter into a contract with the plaintiff.

It remains to consider *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd*.⁷⁵ Franklins sought an order for the grant of a lease of part of commercial premises in the course of construction. A letter of intent was given by Franklins to enter into a lease for the purpose of opening a supermarket in Mosman. Although the letter was very detailed, it was clear for two reasons that it did not constitute a contract with Austotel. First, Franklins said on a number of occasions that entry into a formal contract would have to wait until other projects were completed. Franklins did however say that it would honour the letter of intent save in "extenuating circumstances". Secondly, there was an increase in the floor area for the supermarket so that the rent for the lease was never agreed.

Although no formal lease was signed Franklins did incur substantial costs. For example, it ordered equipment and fittings to a cost of \$500,000. More significantly it communicated to Austotel information about the setting up of a supermarket which was commercially very significant. Due to the delay with the Franklins contract Austotel was under pressure from its financiers to provide evidence of commitment on the part of Franklins. This was given. One letter actually said that Franklins had entered into a lease, a fact which Austotel was concerned to emphasise in order to allay the concerns of the financiers. Ultimately, however, Austotel discontinued negotiations with Franklins and leased the supermarket to another party. No doubt it was possible to enter into a very profitable arrangement because of the expertise obtained from Franklins.

The main argument put forward by Franklins, based on promissory estoppel was rejected by a majority of the court (Priestley J.A. dissenting). Kirby P. emphasised the relative equality in bargaining positions of the parties and said that the court should be slow to allow promissory estoppel to operate in clear contradiction to the intention of the parties by substituting for the "hard headed decisions of business people" a more tender "lawyerly conscience".⁷⁶ As he said, it is self-interest and profit

73 *Amalgamated Investments & Property Co. Ltd v. Texas Commerce International Bank Ltd* [1982] QB 84, 103; *Waltons*, note 8 *supra*, 419. But see Birks, note 29 *supra*, 291 (uncertainty in response).

74 S.N.Ball, "Work Carried Out in Pursuance of Letters of Intent - Contract or Restitution?" (1983) 99 *LQR* 572. Cf. McKendrick, note 48 *supra*.

75 Note 1 *supra*.

76 *Id.*, 585.

which motivate commercial people, not conscience or fairness. Franklins consciously refrained from entering into the lease for good commercial reasons, but it misjudged the hold which it had over Austotel. Rogers A-J.A. said that the case for Franklins depended on a conclusion that an equity in its favour had arisen from the combination of: first, encouragement that a lease would be entered into; and, secondly, Austotel standing by while expenditure was incurred. But, in his view it was clear that Franklins had intentionally refrained from entering into the lease and from discussing the price element which proved to be crucial. It was simply impossible, in his view, to identify an assumption on the basis of which Franklins was encouraged to proceed. More accurately, he said, Franklins had made a "deliberate gamble" that the contract would not materialise.

Mr Justice Priestley, in a long and scholarly judgment, would have held in favour of Franklins. He considered it important to investigate the relationship between two types of estoppel. A *Waltons* type of estoppel may arise where there is no dispute about the terms of the agreement, but the terms of the agreement are not enforceable. But the present case, in his view, belonged to a second category, where the plaintiff is granted relief, often of a proprietary kind, even though there is no agreement on terms. Typical of the latter type of estoppel is the encouragement by the defendant that the plaintiff spend money on the defendant's property in the belief that an interest in that property will be obtained by contract. Mr Justice Priestley said that analysis in a series of recent English cases,⁷⁷ approved by the Privy Council in *Attorney-General of Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd*⁷⁸ if applicable in Australia, would justify the expansion of the scope of promissory estoppel as stated in *Waltons*. In *Silovi Pty Ltd v. Barbaro*⁷⁹ Priestley J.A. had summarised the requirements of promissory estoppel. One proposition (numbered 5) referred to encouragement of an "assumption" that a "contract will come into existence or a promise be performed" followed by reliance in circumstances that make departure from the assumption unconscionable.⁸⁰ This proposition was applied by the trial judge in *Franklins* case, but Priestley J.A. considered that it had to be broadened to be applicable because it assumed the enforcement of a promise the content of which was known. He said this was possible because of the acceptance in *Waltons* of the English cases referred to. He expressed the principle as follows:

77 Such as *Crabb v. Arun District Council* [1976] Ch 179; *Taylor's Fashions Ltd v. Liverpool Trustees Co. Ltd* [1982] QB 133, 145-55; *Habib Bank Ltd v. Habib Bank AG Zurich* [1981] 1 WLR 1265, 1285; *Amalgamated Investment & Property Co. Ltd v. Texas Commerce International Bank Ltd* note 73 *supra*, 104.

78 [1987] AC 114.

79 (1988) 13 NSWLR 466.

80 *Id.*, 472.

[f]or equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.⁸¹

The granting of a proprietary remedy - an interest in the defendant's land - is then seen merely as the only appropriate way of giving effect to the equity raised by promissory estoppel.

In the view of Priestley J.A., the justification for applying this proposition here⁸² was as follows. Austotel, while recognising that Franklins was not "finally committed in a legal sense" was as a matter of practicality bound to proceed. Austotel represented that it was unconditionally bound to grant a lease and Franklins had relied to its disadvantage to an extent where it would be unconscionable for Austotel to be permitted to deny the promise to grant the lease. He dealt with the argument that Franklins had behaved unconscionably in refraining from discussing a higher rent by pointing to Franklins' submitting to an appropriately higher rent. Moreover, the conduct of Franklins was never communicated, it remained "internal" in the sense that there was merely the hope that Franklins might get an increase in area without rental increase.

Restitution lawyers have frequently referred to proprietary estoppel as part of the law of restitution.⁸³ It is not too difficult to apply unjust enrichment as a basis for saying that the plaintiff is entitled to restitution for the benefit conferred on the defendant in doing work on his or her land at the defendant's request. The fact that Priestley J.A. was able to accommodate proprietary estoppel within the principles of *Waltons* lends some support to the view expressed above that promissory estoppel may be more appropriate than restitution in *Sabemo*-type cases.⁸⁴ What is uncertain is whether the two concepts merely overlap - through the element of unconscionability - or whether promissory estoppel is in reality the key to a remedy which has the effect of reversing an unjust enrichment. There is no problem in saying that the element of injustice in unjust enrichment is satisfied by unconscionability, but both Kirby P. and Rogers A-J.A. seem to suggest that restitution may be relevant through reasoning such as that employed in *Sabemo* even though there is no unconscionable conduct under the promissory estoppel concept.

It is clear that in *Franklins* benefits were conferred on Austotel at its request and for which Franklins seems to have received no payment. What

81 *Franklins*, note 1 *supra*, 604.

82 He was also of the view that Justice Brennan's formulation in *Waltons*, note 8 *supra*, 429 (quoted above, discussion accompanying note 26) was satisfied, although he said that it might not represent the view of the majority.

83 See e.g. A.Burrows, "Free Acceptance in the Law of Restitution" (1988) 104 *LQR* 576.

84 And Kirby P. agreed generally with the reasoning of Priestley J.A. and in the extension of proposition 5 in *Silovi*, note 79 *supra*, 472.

is difficult to establish, however, is that the elements of benefit and injustice under the concept of unjust enrichment were satisfied. If we assume that *Franklins* differs from *Sabemo* in that tangible benefits were either received or realised in *Franklins*, the stumbling block is injustice. To a large extent the same arguments arise against a claim by *Franklins*, based on restitution, as were made in the discussion of promissory estoppel. Thus, in *Franklins* the conduct of Austotel did not go beyond the use of their legal position, to rely on the absence of a binding contract. In *Hooker Corp. Ltd v. Darling Harbour Authority*,⁸⁵ Rogers J. concluded that the "consortium had taken a risk in expending money" prior to a report on the suitability of the consortium for the project in circumstances where, in his view,⁸⁶ there was no contract. When the report turned out to be adverse to the consortium the risk "came home" and he rejected the claim for restitution based on *Sabemo* when the Authority abandoned the consortium. It is difficult to see why *Franklins* did not take a similar risk. The words used by Sheppard J. in *Sabemo*⁸⁷ were:

unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into.

For the majority in *Franklins* it was the fact that a crucial term was still to be agreed that went a long way towards showing the inapplicability of promissory estoppel, and forced Priestley J.A. to consider the proprietary form of estoppel. Indirectly, this supports the view expressed above that *Sabemo* was really a case of promissory estoppel, and if this is the true rationale the case may be of no assistance to *Franklins*.

V. THE 'DISCHARGED CONTRACT' PROBLEM

A. GENERAL

There is a danger that discussion of this area will take us into issues which are part of the detail of contract or restitution and not of importance to an investigation of the relation between the concepts. At the outset we must I think put to one side the law of frustration. In any event, much of that is now governed by statute⁸⁸ and the major points taken up below are more easily discussed from the perspective of contracts discharged for breach or repudiation.

B. CONTEXT FOR RESTITUTION

As has already been explained, discharge of a contract for breach or repudiation is an important context for a claim for restitution. Where a contract is discharged for breach or repudiation the rights of the parties

⁸⁵ Unreported, Supreme Court of New South Wales, 30 October 1987.

⁸⁶ Subsequently reversed by the Court of Appeal, unreported, 20 September 1988.

⁸⁷ Note 58 *supra*, 902-3.

⁸⁸ Frustrated Contracts Act 1978 (N.S.W.); Frustrated Contracts Act 1959 (Vic.); Frustrated Contracts Act 1987 (S.A.); Law Reform (Frustrated Contracts) Act 1943 (U.K.).

under the law of contract depend largely on two factors:

- (1) whether it was the plaintiff's breach or repudiation which led to discharge of the contract; and
- (2) the extent to which the plaintiff performed the contract.

A plaintiff who has not performed cannot claim the contract price even if the defendant prevented performance. This is because the defendant's obligation to perform is dependent on performance by the plaintiff.⁸⁹ The doctrine of substantial performance ameliorates this by allowing recovery, subject to the defendant's claim for damages, where performance is substantially in accordance with the contract.⁹⁰ The second factor introduces the law of damages rather than performance. A plaintiff has a claim for damages in relation to losses suffered, and within the rules on remoteness, by reason of the defendant's breach. So, a plaintiff who cannot claim the contract price will be able to claim damages from the defendant. But a party in breach, who has no claim for damages, must go away empty handed in cases where performance is less than substantial.

A plaintiff may see restitution as providing a remedy where contract does not, or perceive restitution as preferable, that is more generous, than contract. Those are the areas we need to investigate.

C. CONTEXT OF ESTOPPEL

Estoppel is much less significant than restitution in the discharged contracts area. The context of estoppel is the denial of a right or remedy a party subsequently seeks to enforce. It can be disposed of briefly.

It seems only too obvious that if a party to a contract represents, or promises, that a particular right will not be enforced, he or she ought not to be allowed to go back on that representation or promise if the representee or promisee has relied to an extent where it would be unjust to allow the representor or promisor to contradict the representation or promise.⁹¹ The High Court accepted this in *Legione v. Hately*.⁹² A vendor of land served a notice, in accordance with the contract, advising the purchasers that the contract would terminate if the purchase price was not paid by a certain date. The purchasers had breached an essential term of the contract, but prior to the expiry of the notice their solicitor asked whether the time to pay could be extended. The secretary of the vendor's solicitor said "I think that'll be all right, but I'll have to get instructions" from the vendor. Although nothing further was heard, the purchasers took the view that further time was being given. However, the vendor treated the contract as terminated on the expiry of the notice and refused to allow further time. The contention of the purchasers was that the vendor was estopped from

89 I ignore the enforcement of independent obligations. But see J.W.Carter, *Breach of Contract* (1984), paras 114, 1248.

90 See generally *id.*, para. 693 *ff.*

91 *Id.*, paras 1076, 1081.

92 (1983) 152 CLR 406.

relying on the notice as served. The purchasers had apparently relied on the words quoted above by not finalising arrangements for finance to be available on the expiry of the notice. However, a majority of the High Court rejected the argument that the vendor was estopped, on the basis that the words quoted were not an unequivocal promise or representation that the contract would not be enforced according to its terms.

D. RESTITUTION IN RELATION TO DISCHARGED CONTRACTS

1. Introduction

At first sight the law of restitution in relation to discharged contracts looks unsatisfactory in two ways. First, in relation to money there is an all or nothing approach which frequently leaves the defendant with a windfall profit. Secondly, it seems unbalanced, favouring 'innocent' parties by suggesting a remedy which distorts the contractual allocation of risk, and at least in relation to services leaves 'guilty' parties without remedy. This first impression seems to be confirmed by recent law reform body reports suggesting an increase in restitutionary rights.⁹³ However, it will be shown that this first impression is not the true picture.

2. Failure of Consideration

In relation to money claims the basic criterion under the law of restitution is total failure of consideration. If money has been paid conditionally it can be recovered.⁹⁴ The classic example was given above.⁹⁵ Even a party in breach may rely on the total failure of consideration principle,⁹⁶ if the contract is discharged prior to satisfaction of the condition. Far from contradicting the contract, this aspect of restitution gives effect to the intention of the parties. The problem with restitution is that if the failure of consideration is not total the plaintiff can recover nothing.⁹⁷ The suggestion in *Dies v. British & International Mining & Finance Corp. Ltd*⁹⁸ that the law should be different has not met with much judicial support.⁹⁹ This is unfortunate because it seems that the law is derived from cases¹⁰⁰ which were based on the now discredited¹⁰¹ view that *restitutio in integrum* is a requirement of recovery of money paid.

93 Law Commission, *Pecuniary Restitution on Breach of Contract*, No. 121 (1983); Law Reform Committee of South Australia, *Nineteenth Report* (1986).

94 See e.g. *McDonald v. Dennys Lascelles Ltd* note 37 *supra*; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Rowland v. Divall* [1923] 2 KB 500.

95 See above, discussion accompanying note 37.

96 See e.g. *Mayson v. Clouet* [1924] AC 980.

97 *Whincup v. Hughes* (1871) LR 6 CP 78; *Shaw v. Ball* (1962) 63 SR (NSW) 910.

98 [1939] 1 KB 724.

99 See *Hyundai Heavy Industries Co. Ltd v. Papadopoulos* [1980] 1 WLR 1129.

100 E.g. *Hunt v. Silk* (1804) 5 East 449; 102 ER 1142; *Street v. Blay* (1831) 2 B & Ad 456; 109 ER 1212.

101 *McDonald v. Dennys Lascelles Ltd* note 37 *supra*; *Johnson v. Agnew* [1980] AC 367.

3. Relief Against Forfeiture

The total failure of consideration concept will not apply if the parties have agreed that money paid is not to be recovered. This may be implied, for example in relation to a deposit payment, or express, as where there is an express provision for forfeiture. In terms of the unjust enrichment principle, it is not unjust for money to be kept if the parties have agreed to that. If the law of restitution were to step in with a general right of recovery here it would make a mockery of the terms of the contract. On the other hand, once there is a basis for action under statute,¹⁰² restitution is possible because the statute overrides the contract. There is also support for a narrow jurisdiction in equity to grant relief against forfeiture.¹⁰³ In *Stockloser v. Johnson*¹⁰⁴ Denning L.J. (as he then was) said that if the forfeiture clause is penal in the sense that the sum forfeited is out of all proportion to the damage suffered and it would be unconscionable for the defendant to retain the money, restitution may be granted. This has some support in the cases,¹⁰⁵ even though it looks to be a contradiction of contract principles. The justification, however, is the analogy with the law of penalties which suggests that it *is* unjust not to allow restitution.

4. Quantum Meruit in Favour of Party in Breach

A party in breach of contract will be refused a claim for restitution in respect of services rendered prior to the discharge of the contract unless the defendant accepted the benefit of the services. For example in *Sumpter v. Hedges*¹⁰⁶ the plaintiff agreed to build two houses and stables for the defendant for £565. Work with a value of £333 was done, and part of the price was paid. The builder then ran out of money and abandoned the contract. The defendant finished the buildings himself, using certain loose building materials left behind. Judgment was given for the defendant in an action for work done and materials supplied. However, there was an order in the plaintiff's favour in respect of the loose materials used. An appeal to the Court of Appeal was dismissed. The Court stated that no "fresh contract" to pay could be implied because the defendant had no choice whether to accept or reject the work. There are many other cases to the same effect.¹⁰⁷ It might seem that these decisions are based on erroneous reasoning and manifestly the source of injustice. It is true that the implied contract theory on which most of the cases were based has been rejected,¹⁰⁸ but the argument for restitution in respect of an unjust enrichment is not

102 See e.g. Conveyancing Act 1919 (N.S.W.) s.52(2A); Contracts Review Act 1980 (N.S.W.).

103 See generally *Shiloh Spinners Ltd v. Harding* [1973] AC 691, 723-4; *Legione v. Hateley* (1983) 152 CLR 406; *Stern v. McArthur* (1988) 62 ALJR 588.

104 [1954] 1 QB 476, 490.

105 See e.g. *Smyth v. Jessep* [1956] VLR 230.

106 [1898] 1 QB 673.

107 See e.g. *Summers v. Commonwealth* (1918) 25 CLR 144 (affirmed (1919) 26 CLR 180).

108 *Pavey & Matthews* note 7 *supra*.

strong. There is no enrichment of the defendant because he or she has not received what was requested and it is not unjust for any benefit to be kept because the contract conferred a right to full, or at least substantial, performance.

The position was different in *Steele v. Tardiani*.¹⁰⁹ Steele employed the plaintiffs, who were released Italian internees during the second world war, to cut timber. They cut 1500 tons under an agreement which required the timber to be cut with dimensions of six feet in length and six inches in diameter. The judge found that the timber had not been cut to the contractual diameter and held that the plaintiffs' action on the contract had to fail in respect of all such timber. He also held that Steele was obliged to pay "a fair estimate" of the value of the timber not of the correct dimensions but nevertheless accepted. The Full Court of the Supreme Court of Queensland held that there had been substantial performance by the plaintiffs and that they could recover on the contract. The High Court took the view that this interference with the trial judge's decision was not justified. Accordingly, unless the trial judge was correct in his findings in relation to the non-contractual timber received by Steele, the plaintiffs would recover nothing.

Mr Justice Dixon (as he then was) said the contract was not an "entire" contract. Rather it was "infinitely divisible",¹¹⁰ the contract price indicating the rate at which the cut timber was to be paid for. That did not help the plaintiffs very much because, "each divisible application of the contract is entire and is only satisfied by performance, not partial, but substantially complete".¹¹¹ Clearly, in respect of timber not of the correct dimensions recovery on the contract was not possible. In order to recover in respect of such timber the plaintiff had to show "circumstances removing their right to remuneration from the exact conditions of the special contract".¹¹² This was Mr Justice Dixon's expression of the way of avoiding the rule applied in *Sumpter v. Hedges*.¹¹³ However, it was "not enough that the work has been beneficial",¹¹⁴ in this case by turning standing timber into valuable firewood. The evidence had to be examined to see the circumstances under which Steele obtained the benefit. The evidence showed that the point as to dimensions had only been taken late in the day (during cross-examination), and that he had stood by while the timber was cut and made no complaint. The deviation from contract had been acquiesced in, and the plaintiffs left their employment under the impression that he was not insisting on the contract. In these circumstances the subsequent sale of the timber could be regarded as:

109 (1946) 72 CLR 386.

110 *Id.*, 401.

111 *Ibid.*

112 *Id.*, 402 *per* Dixon J.

113 Note 106 *supra*.

114 Note 109 *supra*, 402 *per* Dixon J.

a taking of the benefit of the work and so, as involving either a dispensation from precise performance or an implication at law of a new obligation to pay the value of the work done.¹¹⁵

*Steele v. Tardiani*¹¹⁶ was a fairly exceptional case. It is clear that ordinarily the guilty party will have no claim, and there is considerable pressure, as the reports of law reform bodies indicate, for restitution to develop wider principles. This would be at the expense of the contractual allocation of risk. It may be that the pressure is misplaced and that contract law can respond by a re-examination of the doctrine of substantial performance. The idea that a party who has contracted to receive complete performance should be obliged to pay even though performance is merely substantial seems peculiar, and perhaps explains why it is often said that the deviation from the contract must be minor.¹¹⁷ However, the solution may be the view expressed by Denning L.J. (as he then was) in *Hoenig v. Isaacs*,¹¹⁸ that performance is to be regarded as substantial unless the defendant has the right to treat the contract as discharged.¹¹⁹ Alternatively the way in which the value of the performance is judged could be reconsidered. At present the criterion is the cost of remedying the defects in the work done. This means that very valuable performance can be effectively discounted by pointing to the high cost of remedying the plaintiff's breach. A more rational approach is to adopt the flexibility present in American law¹²⁰ under which the value of the plaintiff's performance is taken as the criterion where it would be unreasonable - a waste of resources - to have the defects in the work remedied. It will usually in such cases be obvious that the defendant has no intention of remedying the defects in the work and is rather seeking to avoid paying for substantial benefits.

5. Quantum Meruit in Favour of the Innocent Party

In the context of a claim as on a quantum meruit in favour of a plaintiff not in breach, that is the 'innocent party', the law is extremely generous. The cases seem to support three principles:

- (1) the plaintiff may pursue the claim even though performance is less than substantial;
- (2) that claim may be made even though the defendant has received no realisable benefit from performance; and
- (3) the plaintiff is not restricted by the amount stated as the contract price.

115 *Id.*, 405 *per* Dixon J.

116 Note 109 *supra*.

117 See *e.g.* *Bolton v. Mahadeva* [1972] 1 WLR 1009.

118 [1952] 2 All ER 176.

119 See Carter, note 89 *supra*, para. 694.

120 See *e.g.* *Jacob & Youngs Inc. v. Kent* 129 NE 889 (1921).

The first principle is fully justified by authority, although various explanations have been given. Take a case where the contract was governed by the *Statute of Frauds*, but no written evidence of the contract can be put forward. If the plaintiff partially performed, but the defendant repudiated liability, the statute is not regarded as a bar to the claim.¹²¹ But the principle applies generally, it is not limited to cases where unenforceable contracts are discharged for breach or repudiation.

Since the plaintiff has not complied with the defendant's request, acceptance must be inferred from the conduct of the defendant. Three ideas have been discussed:

- (a) free acceptance of benefit;
- (b) prevention of performance; and
- (c) the fact that the defendant breached the contract.

The third of these - what Birks describes¹²² as "limited" acceptance - is more relevant to the second principle than the first.

In *Horton v. Jones*¹²³ Jordan C.J. said that acceptance occurs if the recipient has behaved in relation to benefits in such a way that in the absence of a contract the plaintiff could sue on the common money counts. The basic reasoning is that termination by the plaintiff in reliance on the repudiation discharges the contract, and leaves the plaintiff free to make a claim based on the value of the benefit obtained by the defendant.

In the cases themselves the approach seems more to be based on the fact that the plaintiff was prevented from performing.¹²⁴ This seems to me an appeal to estoppel. Having prevented performance by the plaintiff, which might otherwise have been completed, he or she is precluded from setting up as a defence the fact that the performance rendered does not correspond to the request in the contract.¹²⁵

The second principle is illustrated by *Planché v Colburn*.¹²⁶ The plaintiff agreed by contract to write a volume on costume and ancient armour for the Juvenile Library, a publication of the defendants. He visited various places by way of research, and wrote part of the manuscript. Although ready and willing to complete the volume, and then to deliver it, the defendants discontinued the Library and refused to pay the plaintiff for his efforts. The jury awarded £50 damages and the defendants moved to have the verdict set aside (1) on the basis that the contract had not been performed and (2) because the common counts were not available. The

121 See e.g. *Mavor v. Pyne* (1825) 3 Bing 285; *Horton v. Jones* (No. 2) (1939) 39 SR (NSW) 305, 319; *Matthes v. Carter* (1955) 55 SR (NSW) 357, 362-3; *Brooks Robinson Pty Ltd v. Rothfield* [1951] VLR 405, 409; *James v. Thomas H. Kent & Co Ltd* [1951] 1 KB 551, 556; *Bolwell Fibreglass Pty Ltd v. Foley* [1984] VR 97, 114.

122 See Birks, note 29 *supra*, 126-7.

123 (1934) 34 SR (NSW) 359, 367-8 (affirmed on other grounds (1935) 53 CLR 475); approved *Pavey & Matthews* note 7 *supra*.

124 See, e.g. *Forman & Co. Pty Ltd v. The Ship "Liddesdale"* [1900] AC 190, 202; *Segur v. Franklin* (1934) 34 SR (NSW) 67.

125 *Segur v. Franklin id.*, 72.

126 (1831) 8 Bing 14; 131 ER 305.

jury's verdict was upheld by the Court, but the basis is not clear. The fact that the Court saw no objection to a common count does, however, support the view that receipt of benefit is not to be regarded as essential. Nevertheless, there is much to be said for the argument that where the defendant is in breach the appropriate form of relief is an action in damages rather than restitution because of the absence of unjust enrichment.¹²⁷

None of the cases in fact employ the terminology of limited acceptance to explain cases like *Planché v. Colburn*,¹²⁸ and the spectre of restitution based on a fictional analysis would appear if that basis were to gain approval. It is tempting to say that, given the ability of the plaintiff to claim damages for breach of contract we should not attempt to bring such cases within unjust enrichment. The danger - a real danger for contract analysis - lies in making restitution almost a general remedy for reliance loss.¹²⁹ Given the adoption of unjust enrichment by the High Court, there must be some benefit to the defendant. It ought then to be arguable that if the defendant received nothing, because there was merely reliance by the plaintiff in incurring expenditure, no claim is possible. There are cases to this effect.¹³⁰ But why was the position different in *Planché v. Colburn*?¹³¹ It is submitted that it was not and that the case has to be justified on a contract basis.

The third principle cannot be said with certainty to represent the law. What is at issue is whether a plaintiff may ignore the contract price and recover, proportionately, more than would have been received under the contract. Thus, if the plaintiff agreed to a bad bargain, or the market has moved adversely, for example a rise in building costs after entry into a building contract, the defendant can be forced to bear the consequences. In *Lodder v. Slowey*¹³² the Privy Council affirmed a decision of the Court of Appeal of New Zealand¹³³ that allowed a plaintiff contractor to elect between damages and restitution, on a quantum meruit, after the defendants breached and excluded the plaintiff from the site thereby preventing him from completing the job. The contract had been for the construction of a tunnel and the trial judge refused to award more than a nominal sum because there was no evidence that the contract would have been profitable. He also rejected the claim for restitution which found favour with the Court of Appeal. That court regarded the question of profit as immaterial. The decision finds some support in recent cases in England and Australia.¹³⁴

127 Goff and Jones, note 35 *supra*, 27, 466-7; K.E.Lindgren, J.W.Carter and D.J.Harland, *Contract Law in Australia* (1986), para. 2318. Cf. Stoljar, note 40 *supra*, 231 who sees the case as illustrating quantum meruit as damages for breach of contract.

128 Note 126 *supra*.

129 Cf. Dawson, note 64 *supra*, 578-9.

130 See, e.g. *Boone v. Coe* 154 SW 900 (1913).

131 Note 126 *supra*.

132 [1904] AC 442.

133 (1902) 20 NZLR 321.

It is also supported in a majority of jurisdictions in the United States.¹³⁵ A leading decision is that of the California Supreme Court in *Boomer v. Muir*¹³⁶. The consequences were dramatic. Had it been expressed as damages the plaintiff's claim would have amounted to about \$20,000. His suit on a quantum meruit led to the recovery of \$250,000. The court said:

[t]o hold that payments under the contract may limit the recovery where the contract is afterwards rescinded through the defendant's fault seems to us to involve a confusion of thought. A rescinded contract ceases to exist for all purposes. How then can it be looked to for one purpose, the purpose of fixing the amount of recovery? ... The contract is annihilated so effectively that in contemplation of law it has never had any existence even for the purpose of being broken.¹³⁷

The reasoning, which can be found in some of the Commonwealth cases,¹³⁸ seems to confuse termination for breach with rescission for misrepresentation.¹³⁹ On that basis it ought to be rejected and the contract price seen as a limitation on the plaintiff's recovery.

VI. CONCLUSION

It seems abundantly clear that the growth of restitution and promissory estoppel cannot proceed willy nilly. There is cause for concern in the way in which in some of the cases unjust enrichment is bandied about without regard to the underlying concepts.¹⁴⁰ The publication of Birks has given considerable impetus to restitution. But the burden of Birks is that unjust enrichment is a substantive legal concept which must pay due regard to contract principles and analysis.

One feature of *Waltons* which deserves further mention is the way in which the High Court was able to countenance the award of an expectation remedy even though, for the majority, there was no contract by estoppel. It is nevertheless clear that the flexibility of promissory estoppel may serve to control the expansive concept of restitution espoused in *Sabemo*. The indications in *Franklins* case, that promissory estoppel should be applied with considerable caution in the context of commercial relations serves to reinforce this. Restitution, under the principle of unjust enrichment, is quite different from compensation for an expectation loss, and it has been

134 *Rover International Ltd v. Cannon Film Sales Ltd* [1988] 2 FTLR 536; *Minister for Public Works v. Renard Constructions (ME) Pty Ltd*, (Unreported, Supreme Court of New South Wales, 15 February 1989).

135 See Hunter and Carter, note 10 *supra*.

136 24 P 2d 570.

137 *Id.*, 577.

138 *Brooks Robinson Pty v. Rothfield* note 121 *supra* 409.

139 See above, discussion accompanying note 101.

140 See e.g., the judgment of Gaudron J. in *Trident General Insurance Co. Ltd v. McNiece Bros Pty Ltd* (1988) 165 CLR 107. See also *Esanda Finance Corp. Ltd v. Plessnig* (1988) 84 ALR 99, 115 *per* Deane J.

argued above that the temptation should be resisted to turn restitution into a basis for compensation for reliance loss.

No attempt has been made in this article to justify the stance of the High Court in *Pavey & Matthews* that unjust enrichment is the basis for restitution. That is clearly Australian law, at least in the context of ineffective transactions. But there are many who doubt the general validity of unjust enrichment as an explanation and question the scope given to restitution in Birks and Goff and Jones.¹⁴¹ It would be difficult to speak of the death of restitution when there are still those who doubt its existence, or its maturity. However, it might be suggested that the problems discussed above about 'benefit' and 'enrichment', and the attempts to find solutions within the law of restitution, ignore the fact that damages in contract could frequently be used as a solution.¹⁴² But for the moment most contract lawyers in Australia seem content merely to justify the ground which the subject currently occupies. Those of the next generation may well have a more voracious appetite.

141 See e.g. S.Hedley, "Unjust Enrichment as the Basis of Restitution - An Overworked Concept" (1985) 5 *Legal Studies* 56; S.J.Stoljar, "Unjust Enrichment and Unjust Sacrifice" (1987) 50 *MLR* 603, 605.

142 See J.M.Perillo, "Restitution in a Contractual Context" (1973) 73 *Col L Rev* 1208; Farnsworth, note 49 *supra*.