Foreword

The Hon Justice James Edelman

This *Handbook* is nothing less than a stunning achievement. The editors set for themselves the goal of bringing together leading scholars to develop an architecture for the branch of the private law of obligations that is known as unjust enrichment. That goal is achieved in spectacular fashion by a tightly structured framework that contains: the deep theory of the subject from Aristotle through Kant to the law and economics of the twenty-first century; the comparative perspectives of the subject from the civilian systems of German and French law, through the mixed systems such as South Africa and Scotland, to the common law of the United States, England and Australia; and the history of the subject from Roman law to decisions that are so recent that the ink is barely dry. The differently authored chapters of the *Handbook* do not all speak with one voice. That would be impossible in a project of this magnitude and depth, with contributions from more than two dozen of the leading scholars of this subject across the world. But powerful threads nevertheless emerge.

One element common to almost all of learned writers on unjust enrichment is that the law of unjust enrichment is concerned with the restitution, or giving back, of a benefit received by a person. But there are different means of restitution of benefits. The most perfect response of restitution, as the application of § 812 of the *Bürgerliches Gesetzbuch* recognises, is the return of a thing to a person. But sometimes the relevant benefit is not a physical thing transferred but is, instead, a right to a thing, or the extinguishment of a debt, or the provision of a service. And even when the transfer was of a physical thing, the common law recognises that a simple payment of money might be just as adequate as requiring a reconveyance. The order for payment of money has been such a ubiquitous restitutionary remedy that sight is sometimes lost of the numerous other techniques of restitution. Not so in this work of excellence.

One of the most significant debates about unjust enrichment that the *Handbook* addresses concerns when and why the remedies of restitution should be awarded. The answers to these questions determine the size of the subject being classified. If the subject matter is too small then the benefit of taxonomy is lost in the granularity of the detail. For instance, a contract for the provision of credit involves some different principles and different context from a contract for the sale of a car, but a higher level classification of both as part of the law of contract makes it possible to see underlying common norms that inform the particular rules. On the other hand, if the subject matter is too wide then the classification can be at such a degree of abstraction from the relevant rules as to be of little utility in developing principle or in elucidating normative foundation.

The widest and most imperial view of unjust enrichment treats the subject as concerned with every order that strips any gain from a defendant. It equates the disgorgement of any profits with the giving back of benefits. It equates actions that respond to an injustice in a transaction between the parties with actions whose primary focus is upon policy concerns independent of any unjust transaction. The imperial approach thus treats, at an extremely high level of abstraction as part of the same category, claims that are based upon very different norms: the disgorgement of some or all of the profits made by a fiduciary or a salvor; the repayment of money overpaid by mistake; and the repayment of tax that has been demanded without authority.

In the adjudicative development of the common law, which is the focus of much of the *Handbook*, imperial claims have often been treated sceptically. One reason for this is that counsel are naturally cautious, preferring the easiest route to win a case, and the judges of the common law have an ingrained instinct, born of procedural fairness, to follow only the coastline mapped by counsel from case to case. Just occasionally, the court will venture more widely. One such example is the leading English case on unjust enrichment, which recognised the subject in the twentieth century, *Lipkin Gorman v Karpnale Ltd.*[1] The claim in that case might have been expressed as an equitable claim by partners against the recipient of money that might have been argued to be held either under the usual trust for all partners of one partner's title to partnership property or on trust for the clients of the firm. But the case was argued in the House of Lords as a common law claim against the recipient of what was described as stolen property. The House of Lords then confronted and applied directly the underlying conception of unjust enrichment and gave structural recognition to actions based upon unjust enrichment in English law. The price of that high level analysis, as the analysis of some of the authors in this *Handbook* reveal, was a lack of clearly exposed reasoning at a lower level of generality. Three decades later there remains debate about how to apply the reasoning in the case.

The institutional restraints that require caution by common law counsel and judges do not confine great scholars. The pioneering modern works by the Reporters of the first *Restatement of Restitution*, and by Goff and Jones and Birks, began with Atkinesque conceptions of unjust enrichment. Although the breadth of the claims by those authors, or the successors to their texts, contracted over time to various degrees, the rich chapters in the *Handbook* show how their modern quest continued the tradition that had extended from the schools of great Roman jurists through the common law writings of Bracton, Blackstone, Mansfield, Keener and Ames, and the civilian writings of Grotius and Savigny. The *Handbook* is a further step in that large scale project to understand and to explain the framework of unjust enrichment. Standing on the shoulders of other giant scholars, the authors and editors of the *Handbook* seek to take our understanding of the very architecture of the law of unjust enrichment another step towards clarity and coherent taxonomy.

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24 December 2019

[1] [1991] 2 AC 548.