Mistake and Unjust Enrichment –

The double life of the law and its progress*

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Introduction

The identification of the concept of unjust enrichment as a distinct area of law is relatively recent,[1] although it is not a 'definitive legal principle according to its own terms.'[2] In Australia, it is a 'unifying legal concept'[3] that encompasses actions dating back to at least the first century,[4] as well as actions that have recently developed to 'fill gaps in the rest of the law'.[5]

It encompasses actions which were born long ago under the common law but over time have been considered in the nature of

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[1] Justice Keith Mason, 'Where has Australian restitution law got to and where is it going?' (2003) *Australian Law Journal* 358.

[2] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 332, 378-379 ('*David Securities*'); see also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, [151].

[3] *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

[4] Justinian Digest 12.6.

[5] Douglas Laycock 'The Scope and Significance of Restitution' (1989) 67 *Texas Law Review* 1277, 1278.

equity.[6] It encompasses actions that were previously classified with equivocal language such as 'quasi-contract'. The development from quasi-contract to the unifying concept has a 'strong appeal to justice' but also a 'delusive appearance of simplicity.'[7]

This paper considers unjust enrichment in the context of mistaken payments and some pairs of concepts that it encompasses: voluntariness and causation; voluntariness and 'honest receipt'; and judicial consideration and criticism.

Mistake

The law of unjust enrichment provides that where a person has been enriched at another's expense, the person enriched must make restitution to the other in the presence of a factor that is considered to be unjust.[8] As restated in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd;*[9] 'whether enrichment is unjust is not determined by reference to a subjective evaluation of what is

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[6] Re mistake – see *Moses v Macferlan* (1760) 2 Burr 1005.
[7] Jack P Dawson 'Restitution without Enrichment' (1981) 61 *Boston University Law Review* 563.
[8] *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 332; see also Peter Birks, *An Introduction to the Law of Restitution* (1989).
[9] [2007] HCA 22.

unfair or unconscionable; recovery rather depends on the existence of a qualifying or vitiating factor falling into some particular category'. [10]

One such unjust factor is mistake. Payments made by one to another that labour under a mistake are considered, prima facie, to be recoverable. This principle has long been recognised. St Paul made a similar statement of principle, as did several Roman jurists of the first century.[11] Canada was the first common law jurisdiction to acknowledge unjust enrichment as the principle underlying restitutionary relief in 1954.[12] It is only within the last 20 or so years that Australian courts have articulated the principles to be applied in this area. Nevertheless, the old comes together easily with the new as restitution for mistaken payments falls neatly within the concept of unjust enrichment.

The concept of unjust enrichment in Australia in relation to mistaken payments is that payments made under a mistake are

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[10] [2007] HCA 22, [149].
[11] Justinian Digest 12.6.
[12] *Rathwell v Rathwell* (1978) 83 DLR (3d) 289, 306; see also Mitchell McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (1999) 37(1) *Alberta Law Review* 1, 5.

prima facie recoverable, unless the defendant can show why an order for restitution would be unjust.[13]

Within this simple statement there are tensions, doctrinal difficulties and disagreements. The obvious questions are: what constitutes a mistake? And when would an order be unjust? Beneath each of these questions lies further, cascading questions that are prompted by the application of principle to the myriad factual scenarios that fall from human endeavour and interaction.

In considering these questions, there have been some relatively recent and significant developments, particularly as a result of the judgment of the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia.*[14]

The case concerned a foreign currency loan between the two parties that included a term that the plaintiff was liable for taxes which were, unbeknown to the parties, in contravention of the relevant legislation. Several important principles may be drawn from the case. First, *David Securities* stated that the 'accurate and

[13] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 332, 379.
[14] (1992) 175 CLR 353.

equitable' principle concerning restitution for mistaken payments is 'founded on the policy that the law wishes to uphold bargains and enforce compromises freely entered into'.[15]

Secondly, a mistaken payment is prima facie recoverable regardless of whether the mistake is one of fact or law.[16]

Thirdly, the mistake must cause the payment to be made.

Each of these statements belies more complex inquiries and each is intertwined with issues of voluntariness and causation. As to the first statement, bargains freely entered into will be upheld and, conversely, a bargain not freely entered into will not be upheld. However, the definition of 'freely entered into' causes some debate. It necessarily raises questions of voluntariness and causation. In contrast, the Canadian approach appears to supplant these questions by a different inquiry; that is, whether

[15] Ibid 374.
[16] Ibid 376.

there is no juristic reason for the enrichment,[17] which shifts the focus from the presence of a causative mistake.[18]

The second statement, namely that a mistake may be one of fact or law, is a recent statement of principle, established in *David Securities.* Prior to that case, it was long held that recovery was only available for mistakes of fact, not mistakes of law. However, as the distinction is notoriously difficult to apply, it was discarded. It has similarly been discarded in England[19] and Canada may follow suit should an appropriate case arise.[20] For the purposes of this discussion, it is noteworthy that contrary to the discernable trend, Brennan J, sitting on the High Court in one,[21] and possibly two cases,[22] considered that the distinction is necessary in order to limit recovery in cases of mistake of law.

The third statement, that the mistake must cause the payment to be made, leads into what may be considered to be one of the

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[17] The first and second elements are an 'enrichment' and a corresponding 'deprivation': *Rathwell v Rathwell* (1978) 83 DLR (3d) 289.
[18] Mitchell McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (1999) 37(1) *Alberta Law Review* 1.
[19] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.
[20] *Air Canada v British Columbia* (1989) 59 DLR (4th) 161, 191 (La Forest J).
[21] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.
[22] *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51.

most unclear aspects of this area of law. It requires consideration of the following issues. First, how causation is characterised and, second, how causation relates to the concept of voluntariness.

Voluntariness – a question of causation?

At first glance, the traditional rationale behind restitution for mistaken payments is easily explained: mistake vitiates the intention of the payer and it is unjust for the recipient to retain the payment. Where the mistake has caused the payment, in the absence of a defence, the recipient must make restitution.

But what role must the payer's mistake play within his or her mental processes for the mistake to be legally significant? Does the mistake have to be the sole cause, or merely a cause, or does a 'but for' test apply?

Professor Birks considered that 'mental processes cannot be weighed and measured. Will-power has no voltage. So if we ask, in relation to the mental process which goes into a decision to transfer wealth, how much disturbance shall count as an operative, restitution-yielding vitiation… the truth is that there can

be no exact answer.'[23] However, as it is established that the mistake must cause the payment and vitiate the intent of the payer, curiosity stimulates further inquiry.

The authorities suggest that the relevant inquiry is whether the payment would have been paid but for the mistake. In *David Securities,* upon the abolition of the distinction between mistakes of fact and law, the Court considered whether some other limiting principle was required in its place. It considered the character of the mistake that may lead to recoverability and concluded 'there is … no place for a further requirement that the causative mistake be fundamental; insistence upon that factor would serve to focus attention in a non-specific way on the nature of the mistake, rather than the fact of enrichment'.[24] Beyond that, the Court did not expressly deal with the nature of the causation, except in the statement of principle that:

> 'the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was

[23] Birks, above n 8, 157.
[24] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378.

legally entitled to payment of the moneys. Such a mistake would be causative of the payment.'[25]

In *David Securities,* Brennan J said 'what is essential to the claim in restitution is that the mistake be a cause of the payment to be recovered. If the payer would have made the payment even if the mistaken fact or mistaken operation of law had been known, the money paid is not recoverable on the ground of that mistake'.[26]

In *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation*,[27] the High Court made reference to the basic nature of mistake in its discussion of whether a causative mistake also had to be fundamental. As referred to by the majority in *David Securities,*[28] the Court in *ANZ v Westpac* said that it would leave open the question of whether mistake requires any more than the inquiry as to whether 'without the mistake on the part of the payer the payment would not have been made'.[29]

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[25] Ibid.
[26] Ibid 395-396.
[27] (1988) 164 CLR 662, 671 ('*ANZ v Westpac*').
[28] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 377.
[29] *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 671-672.

In a recent English case, Lord Hope expressed that causation is the critical issue and that to determine the effect of any doubt of the payer that the payment was due, the inquiry should be 'what was the effect of the mistake on the payer?'[30] To extrapolate, the content of the test for causation should be by reference to the primary concept of voluntariness.

Edelman and Bant propose that the 'test to be applied should be whether the mistake was *a* factor that influenced the plaintiff's decision-making process, even if the enrichment would still have resulted 'but for' the mistake.'[31] The authors draw upon the causation tests in relation to duress, undue influence and misleading and deceptive conduct.[32] However, it is arguable that there is a relevant difference between causation in these types of cases and in cases of mistake. Unlike mistake, the other cases of duress, undue influence and misleading and deceptive conduct may all be classified as unconscionable conduct. The law considers unconscionable conduct to be so reprehensible that if it had any

[30] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] 3 WLR 781, [65].
[31] James Edelman and Elise Bant, *Unjust Enrichment in Australia* (1st ed, 2006), 179.
[32] Ibid, 180; *Como Investments Pty Ltd (In Liq) v Yenald Nominees Pty Ltd* (1997) 19 ATPR 41-500, 43-619; *Henville v Walker* (2001) 206 CLR 459, 494.

effect on the innocent party's decision-making then relief in the nature of restitution is available. An analogy arises with the doctrine of 'unjust retention of property'.[33] Some might argue that mistaken payments may be classified under this category as it is unconscionable for the recipient to retain the relevant property. However, an action to recover a mistaken payment arises at the time of payment and not at the time the recipient realises the receipt. In this sense, the liability is not contingent upon the frame of mind of the defendant – an action for mistake in restitution comprises strict liability. Further, as Professor Birks expressed, if unconscionability is relevant in this context, it must mean 'enrichment *retained* contrary to good conscience' and not 'enrichment *obtained* contrary to good conscience'.'[34] Mistake connotes that neither party was 'at fault'; it was simply an unintentional, erroneous supposition that a particular fact was true.[35] As we are cautioned against subjective evaluation of

[33] *The Laws of Australia: Unconscionable Conduct* [35.5.2] Categories: (1) exploitation of vulnerability or weakness; (2) abuse of positions of trust or confidence; (3) insistence upon rights in circumstances which make that insistence harsh or oppressive; (4) inequitable denial of legal obligations; and (5) unjust retention of property.
[34] Peter Birks, *Unjust Enrichment* (2nd ed, 2005), 275 (emphasis added).
[35] *Kelly v Solari* (1841) 9 M&W 54.

unfairness or unconscionability,[36] we must focus on the mistake which constitutes the unjust factor.

In *Hookway v Racing Victoria Limited,*[37] Ormiston JA provided a detailed discussion of voluntariness in the context of mistaken payments. The case involved the payment of prize money for a horse race. Upon completion of the race, the horse first past the post was disqualified. Consequently, the relevant authority paid the prize money to the owners of the second horse past the post, overlooking that the owners of the first horse had a right of appeal. Subsequently, the disqualification was overturned on appeal and the relevant authority sought restitution of the prize money from the owners of the second horse. The Victorian Court of Appeal[38] upheld the decision of the County Court ordering restitution. Ormiston JA wrote the lead judgment and, whilst his Honour did not expressly consider causation, his Honour's analysis of the relationship between voluntariness and causation suggests that a 'but for' test should be applied.

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[36] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, [150].
[37] (2005) 13 VR 444 ('*Hookway*').
[38] Including the author of this paper.

Ormiston JA's analysis set out five situations in which, notwithstanding the presence of a mistake on behalf of the payer, recovery would not be available.[39] Each of the situations concerned the mindset of the payer and the extent to which the payer had adverted to the supposed obligation to make the payment. Broadly, if the payer had turned his or her mind, in one way or another, to the requirement or obligation to pay then the payment would not be recoverable. This suggests a 'but for' test of causation. Arguably, Ormiston JA resolved that the payment was repayable because, but for the mistaken belief that there was no further avenue of appeal, the payment of prize money would not have been made.

In establishing causation, to adopt any test other than the 'but for' test would lead to restitution in unjust circumstances and would be contrary to the lengthy analyses in *David Securities* and *Hookway*. It would destroy the virtue of justice that commands the making of restitution.

The Scope of Voluntariness

[39] Set out below, n 51.

Voluntary is a 'slippery'[40] term and one that is 'apt to mislead'.[41] Nevertheless, it features prominently in the cases on mistake. In addition to connoting the opposite of vitiated intent, the term is also used in reference to a so-called defence of 'voluntary submission to an honest claim.'[42] However, the recognition of voluntary submission to an honest claim as a substantive defence – to be made by a defendant in response to what would otherwise be a successful claim – is conceptually incongruous. Given the rationale for the recognition of mistake as an unjust factor, for a defendant to assert that a plaintiff has submitted voluntarily to his or her claim may really constitute a negation or denial by the defendant of an element in the plaintiff's principal cause of action, rather than a separate defence. On this view, it does not involve a shift in evidentiary burden. The term 'defence' is used in a very general sense in that it is something upon which the defendant will rely to prevent the plaintiff from establishing its claim.[43] It is really a shield for the defendant against recovery that would be otherwise unjust.

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[40] Keith Mason and JW Carter, *Restitution Law in Australia* (1995), [299].
[41] Ibid [299].
[42] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Hookway v Racing Victoria Limited* (2005) 13 VR 444.
[43] Mitchell McInnes, 'Mistaken Payments Return to the High Court' (1996) 22 *Monash University Law Review* 209, 225.

In *David Securities,* the majority considered the role and effect of voluntariness in the context of 'the traditional rule' relating to the distinction between mistakes of fact and law. Their Honours reasoned that whilst the traditional rule provided a principle limiting recovery, that rule could be reconciled with another limiting principle: namely, that restitution will be denied in cases of voluntary submission to an honest claim. Their Honours quoted from the case of *Werrin v The Commonwealth*[44] that:

> 'the principle appears to me to be quite clear that if a person, instead of contesting a claim, elects to pay money in order to discharge it, he cannot thereafter, because he finds out that he might have successfully contested the claim, recover the money which he so paid merely on the ground that he made a mistake of law'.[45]

In this situation, the payer has made an 'election' to pay regardless of any mistake of fact or law. 'Election' is a helpful

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[44] (1938) 59 CLR 150. The facts were that the plaintiff queried the validity of the Commissioner of Taxation's demand to pay sales tax. The plaintiff nevertheless paid the tax. Subsequent, unrelated litigation disclosed that the tax was not payable. The plaintiff sought restitution.

[45] *Werrin v The Commonwealth* (1938) 59 CLR 150, 159; cited in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 372.

expression, being apposite and perhaps less confusing than 'voluntary'. It connotes knowledge of at least two options and the active choice of one over the other. Of course, the use of election here is of a different nature to its use in contract law. Whilst they both involve a choice between two alternative and inconsistent options, in contract law the choice must be made intentionally and with full knowledge of the circumstances giving rise to the choice.[46]

The use of 'election' in the context of mistaken payments is not new. In *Kelly v Solari;*[47] it was stated that payments were irrecoverable where the plaintiff 'waives' inquiry into the truth or falsehood of a fact[48] or where a plaintiff declines to investigate the true facts and chooses to pay regardless.[49]

In *Hookway,* Ormiston JA considered the recipient's claim that the payment was made voluntarily because the payment was made, or at least appeared to have been made, freely, intentionally and deliberately. As his Honour stated, this appearance of

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[46] DW Greig and JLR Davis, *The Law of Contract* (1987).
[47] (1841) 9 M&W 54.
[48] *Kelly v Solari* (1841) 9 M&W 54, 59 (Parke B).
[49] Ibid 58 (Lord Abinger CB).

voluntariness is 'not the end of the matter' because, notwithstanding the appearance, the will of the payer may have been affected by a mistake.[50] In this way, Ormiston JA considered that voluntariness was a defence, in one way or another, to an assertion of mistake and that, in any event, the enquiries of mistake and voluntariness should be conducted together.

In *Hookway,* Ormiston JA expanded on the analysis of the majority in *David Securities* and articulated that there were at least five situations in which, notwithstanding a mistake, the payments would not be recoverable. These were: [51]

(1) Payments where the payer believes a particular law or contractual obligation is invalid but chooses to pay;

(2) Payments where the payer believes that the law or obligation *may be* invalid but chooses to pay;

(3) Payments where the payer pays but is not concerned to query whether the payment is required at law;

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[50] *Hookway v Racing Victoria Limited* (2005) 13 VR 444, [22].
[51] Ibid [41]; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 35, 373.

(4) Payments where the payer is prepared to *assume* the validity of the obligation and therefore pays; and

(5) Payments where the payer in making payment is prepared to do so irrespective of the validity or invalidity of the obligation and chooses not to contest the payment.

Ormiston JA drew his analysis of election to pay from the majority in *David Securities* who observed that 'we use the term "voluntary" … to refer to a payment made in satisfaction of an honest claim, rather than a payment not made under any form of compulsion or undue influence.'[52] The defence of voluntary submission to an honest claim has been said to comprise more than just an absence of causation.[53] However, it is difficult to see how the defence would apply in the context of a 'but for' test.

If we examine each of Ormiston JA's five categories, the salient feature is that, in each case, the payer has contemplated or adverted to the legality of his or her perceived obligation to pay.

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[52] *Hookway v Racing Victoria Limited* (2005) 13 VR 444, [23].
[53] Michael Bryan, 'Mistaken Payments and the Law of Unjust Enrichment' (1993) 15 *Sydney Law Review* 461.

From this, it follows that where a payer has not so contemplated or adverted to the issue, his or her intention maintains its status as 'vitiated'. In the context of a mistake of law, a payer's actions would seem to fall outside these categories only where the payer was unaware of the applicable law or where the payer had made an inquiry and was 'positively' mistaken as to the applicable law – such as in *Hookway* where the racing stewards held a positive belief that there was no further avenue of appeal.

Voluntariness and 'Honest Receipt'

In *Hookway,* Ormiston JA considered that Brennan J rejected the notion that the critical inquiry of voluntariness must concentrate on the mind and intention of the person making payment.[54] However, the reasoning of Brennan J in the cases, particularly in *David Securities,* may be suggestive of, or at least open to, another interpretation. Brennan J made three distinct points.

[54] *Hookway v Racing Victoria Limited* (2005) 13 VR 444, [41]. However, the author of this paper in her judgment did not consider it necessary to decide the point, [1]. Harper AJA considered the defence was not open in the case, [103].

First, his Honour said that satisfaction of an honest claim cannot affect the 'voluntariness' of the payment. Whereas satisfaction of an *honest claim* looks to the mind of the recipient – that is, the recipient has made a claim and has done so 'honestly' – voluntariness must be determined by reference to the mind of the payer. Therefore, at a minimum, the defence of submission to an honest claim may be seen to have two distinct parts – first whether the recipient has made an honest claim and, secondly, whether the payer voluntarily submitted to it.[55] The majority in *David Securities* seemed to emphasise the second part whereas Brennan J's observations focussed on the first.

Next, Brennan J said that payments made in satisfaction of an honest claim should be protected.[56] Thirdly, Brennan J said that the defence of honest receipt should only protect defendants where there has been a mistake of law, not a mistake of fact.[57] This is a critical point of difference from the majority in *David Securities*. The majority abandoned the law/fact distinction, noting

[55] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 399.
[56] Ibid.
[57] Ibid 398.

that it is unworkable.[58] Brennan J agreed with this with respect to the kind of mistake that leads to prima facie recoverability of payments. However, his Honour considered the distinction necessary as a principle limiting recovery and protecting the certainty of transactions.[59] Brennan J stated that whilst mistakes of fact are unique to the particular situation at hand, the same mistake of law may be shared by many different payers. Therefore, allowing restitution for such a mistake has the potential to unhinge many arrangements and as such undermine the policy of upholding bargains freely entered into. Brennan J stated that:

> 'To admit mistake of law as a ground for restitution in any case in which a mistake of fact would ground such a remedy would render many payments insecure even in cases where both parties expected the payment to be final: the uncertainty of the law and the overruling decisions by later cases or on appeal would infect many payments with a provisional quality incompatible with orderly commerce'.[60]

His Honour continued that:

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[58] Ibid 374.
[59] Ibid 394.
[60] Ibid 394.

> 'although payments made under a mistake of law should not be excluded entirely from the categories of cases in which restitution may be ordered, something more than a mere mistake of law is required before the remedy is available.'[61]

It was from here that Brennan J articulated the principle that:

> 'it is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer that he was entitled to receive and retain the money or property'.[62]

Brennan J refers to this principle of 'honest receipt' in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*.[63] In that case, his Honour said that the relevant party 'must be taken to have known' that it was not entitled to the payments and therefore there was no 'honest receipt'. For this conclusion his Honour cites his judgment in *David Securities.*[64] Toohey and

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[61] Ibid.
[62] Ibid 399.
[63] (1994) 182 CLR 51.
[64] *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 89.

McHugh JJ in separate judgments agree with Brennan J. As such, it has been commented that this could supplant the statement of principle in *David Securities.*[65] Ormiston JA observed in *Hookway* that this is highly unlikely, particularly as both Toohey and McHugh JJ were in the majority in *David Securities.* Further, Ormiston JA considered it to be unlikely that their Honours would have significantly changed their views approximately two years later without any discussion or explanation. It is also possible, given the vastly different fact situation and the brevity with which Brennan J considered the application of his 'honest receipt' test, that it was not an issue to which Toohey or McHugh JJ turned their minds. Furthermore, it would be difficult to argue that the outcome of the case depended upon the application of Brennan J's construction of 'honest receipt' as opposed to the majority view in *David Securities.*

In *Hookway*, Ormiston JA acknowledged the apparent conflict and applied the approach of the majority in *David Securities. Hookway* has only been judicially considered once to date in the case of

[65] See eg *Hookway v Racing Victoria Limited* (2005) 13 VR 444.

Ovidio Carrideo Nominees Pty Ltd v Dog Depot Pty Ltd[66] by the Victorian Court of Appeal. The case involved a dispute between a landlord and tenant. It was common ground that the tenant had made payments by mistake to the landlord. The issue was whether the tenant was precluded from recovery by his receipt of good consideration in the form of exclusive possession. *Hookway* was distinguished on the ground that it concerned 'a restitutionary claim in respect of a voluntary payment where entitlement to restitution was in dispute.'[67] In *Ovidio*, 'it was accepted that, prima facie, there was entitlement to restitution and the critical question was whether the landlord had a good defence to it.'[68] Interestingly, the way this was expressed highlights the conceptual distinction referred to earlier concerning defences; that is, a distinction between the 'defence' of voluntary payment in considering whether there is entitlement to restitution and a substantive defence, in this case the defence of good consideration.

[66] [2006] VSCA 6. *Hookway* was also cited in *Woodgate v Keddie* [2006] FCA 1728.
[67] *Ovidio Carrideo Nominees Pty Ltd v Dog Depot Pty Ltd* [2006] VSCA 6, [8].
[68] Ibid.

There was an opportunity for the Court to consider the apparent difference in the approach to voluntariness, honest receipt and the analysis in *Hookway,* but for whatever reason it was not taken up.

With a paucity of cases referring to *Hookway* and to the different approaches of the majority and Brennan J in *David Securities,* an analysis of the subsequent applications and outcomes is difficult. Nevertheless, if we consider the elements of the two approaches we may consider the different outcomes that may arise from each.

The majority in *David Securities*[69] held that the payer's intention will be deemed 'voluntary' where, in response to an honest claim by a payee, 'the [payer] chooses to make the payment even though:

- he or she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required; [or]
- he or she is prepared to assume the validity of the obligation, or is prepared to make the payment

[69] (1992) 175 CLR 353.

irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment.'[70]

Arguably, this may be summarised by saying that, where a payer is put on notice of the absence of an obligation to pay, a payee will have the benefit of the defence.

Brennan J poses a broader principle in response to the same problem. As quoted above, his Honour held that:

> 'It is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property.'[71]

Unlike the majority, Brennan J imposes no real qualification on the payer's frame of mind. The practical consequence is that a payer will be precluded from recovery even where that payer has positively misconceived the state of the law.

Take the example of A who, because she has misread the *Corporations Act*, pays money to B. B accepts the money under

[70] Ibid 373-74.
[71] Ibid 399.

the honest but mistaken belief that she is entitled to it. Under the majority's test, A's claim against B would succeed; under Brennan J's test, it would fail.

This example illustrates that Brennan J's test undermines the rationale of mistake as an unjust factor: A's intention in this example is vitiated no less than if she was mistaken as to B's identity. However, according to his Honour, the compromise of this rationale is necessary in favour of another competing policy objective. As explained previously, this objective is certainty in commercial transactions.

The difference between the two approaches may be played out in future cases and will, of course, turn on the particular facts of the case at hand.

Judicial Consideration & Criticism

A broader consideration for this discussion of mistake and unjust enrichment is the appropriate role of the judge in the development of the law.

The American jurist, Benjamin Cardozo, said that the process of considering the facts and applying the correct principle is like matching 'the colors of the case at hand against the colors of many sample cases… The sample nearest in shade supplies the applicable rule.'[72]

Ordinarily, there is some level of judicial trepidation at selecting the wrong colour – or a colour with which a higher court will disagree. The development of the concept of unjust enrichment and its application in the courts has led to significant disagreement and criticism.

Farah Constructions Pty Ltd v Say-Dee Pty Ltd[73] demonstrates this point. The case involved a joint venture between the parties to purchase and develop land. The local council informed the controller of Farah Constructions, Mr Elias, that for a development application to be successful the site would have to be amalgamated with adjoining sites. Allegedly without advising Say-Dee of the amalgamation requirement, Mr Elias arranged for the

[72] Benjamin Cardozo, *The Nature of the Judicial Process* (1949), 20; See also Justice Finkelstein, 'Decision making in a vacuum?' (2003) 29 *Monash University Law Review* 11.
[73] [2007] HCA 22.

purchase of the adjoining sites by parties associated with him. The parties were another company that he controlled, his wife and his daughters. Say-Dee brought proceedings against Farah Constructions and the associated parties claiming that Farah had breached its fiduciary duties and that the associated parties were liable under both limbs in *Barnes v Addy*.[74]

At trial, the claims failed. On appeal, the NSW Court of Appeal granted a constructive trust in the claimant's favour. The precise role of restitutionary principles within the Court's reasoning is unclear. Either the Court relied on restitutionary principles in abandoning the notice test for the first limb of *Barnes v Addy* or it recognised an alternative remedy that may exist alongside the first limb.[75] On appeal from that decision, the High Court forcefully expressed its disapproval of the reasoning and outcome below.

The judgment provides an interesting exposition of the principle of unjust enrichment, as well as an analysis of judicial reasoning generally. While the substance of the judgment is not relevant for

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[74] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, [110]; *Barnes v Addy* (1874) LR 9 ChApp 244.
[75] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, [134].

the present, it suffices to say, the NSW Court of Appeal stated that with respect to restitutionary liability, it was 'biting the proverbial bullet', but was criticised for doing so. Given the adaptive role of restitution and equity in 'filling the gaps', incremental progression seems to provide the better means to pave the pathway ahead.

For example, before *Farah Constructions Pty Ltd v Say-Dee Pty Ltd,* in the case of *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd,*[76] Hansen J considered a similar question of whether the defendant was liable under the principle of 'knowing receipt' or a strict liability restitution based approach. Whilst his Honour favoured the strict liability approach, because the plaintiff did not conduct its case on that basis, his Honour declined to decide the point.[77]

It is clear from *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* that restitutionary principles should not be used to re-rationalise otherwise established equitable doctrines. That said, there are obviously interwoven concepts that, without careful consideration,

[76] [1998] 3 VR 16.
[77] *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16, 105; Also considered in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, [133].

could lead to a double, or parallel, development on the law. We might watch the treatment of mistaken payments in the context of unjust enrichment with interest, indeed, with an equity lawyer's fascination with human interaction and its consequences.