

questioned, that militate against a civilian approach to the law of unjust enrichment. One remembers that on each of the last occasions when Hong Kong was treated, in the public law context, to a dose of civilian interpretation, lawyers were obliged to take to the street to protest against it. I remember one leading barrister, exhorting others to take part in the silent march on 19 April 2005, compared the interpretation being protested against to the equivalent of stating that "f-i-v-e" spelt two.

I would like to thank Dmitri Hubbard and Brendan Clift of LexisNexis Hong Kong for their faith in the project. I am also grateful to them, and to Sharon Kaur, Publishing Manager, Singapore and Hong Kong, for their patience. I was given all the time I thought necessary for writing the book. I would also like to thank Calvinne Luis, the Legal Editor, and Noorunnisa d/o PK Ibrahim Kutty, the Editor, who have scrutinized the somewhat copious footnotes, reviewed the manuscript and raised helpful queries. It goes without saying that I accept full responsibility for all the defects (or remaining defects) in the book. Grateful thanks are also due to Maggie Hui who, with great patience and efficiency, typed the most part of the script, and Law Ka Cheuk, who has made numerous trips to the High Court Library for obtaining research material (with unfailing accuracy).

No one could write a book without the support and encouragement of those who are near and dear. Of these benefits in kind I have had aplenty, and I plead guilty to having been unjustifiably enriched at the expense of those who have rendered them. To my parents I owe the profoundest (and the happiest) duty to make restitution.

I am most grateful to Lord Millett for taking the time to contribute the Foreword, and am deeply honoured that this book is graced by it. I have not made any relevant changes to the Chapter on Tracing, notwithstanding his Lordship's comments on the reference there to the minority speech in *Foskett v McKeown* (which supports a very different approach to tracing), and on the absence of an indication that the distinction between tracing at common law and in equity is likely to be abolished. Leaving the Chapter as it materially is preserves the context in which his Lordship's observations are made, and so would enable readers to appreciate them fully.

I have sought to state the law as at October 2007, although it has been possible to refer to a few cases decided since.

Clemence Yeung
May 2008

Contents

	PAGE
<i>Foreword</i>	v
<i>Preface</i>	vii
<i>Table of Cases</i>	xv
<i>Table of Statutes</i>	xxxi
Chapter 1 Historical Introduction	1
A. The common law	1
I. The forms of action	1
(a) <i>Indebitatus assumpsit</i>	5
(b) <i>Slade's case</i>	7
(c) Money had and received	10
(d) The implied contract theory	13
B. Equity	16
C. Modern developments	17
Chapter 2 The Unjust Enrichment Analysis	21
A. The quadration thesis	21
B. Enrichment	25
I. Subjective devaluation	25
II. Incontrovertible benefit	28
III. Free acceptance and other tests of enrichment	32
(a) Free acceptance	32
(b) The 'bargained-for' test	33
(c) The 'reprehensible seeking-out' test	34
(d) Incomplete performance	34
IV. Valuation ceiling	36
V. Discharge of debts	37
VI. Pure services	39
C. The injustice of the enrichment	40
I. The common law approach	40
II. The "no basis" approach	41
(a) <i>Westdeutsche Landesbank Girozentrale v Islington London Borough Council</i>	41
(b) <i>Westdeutsche Landesbank Girozentrale v Islington London Borough Council</i> in the Court of Appeal	45
(c) <i>Westdeutsche Landesbank Girozentrale v Islington London Borough Council</i> in the House of Lords	46
(d) <i>Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council</i>	47

	(e) Absence of consideration and unjust factors	50			
	(f) <i>Kleinwort Benson Ltd v Lincoln City Council</i>	51			
III.	Roman Law	53			
	(a) Introduction	53			
	(b) <i>Condictio indebiti</i>	54			
	(c) <i>Condictio ob rem</i>	55			
	(d) <i>Condictio sine causa</i>	55			
IV.	A new approach	56			
	(a) Introduction	56			
	(b) German enrichment law and the new Birksian scheme	57			
	(c) Absence of basis in the case law	60			
V.	Unjust enrichment and conscience	65			
D.	At the expense of	67			
	I. Introduction	67			
	II. Intercepted subtraction	68			
	III. <i>Trustee of the Property of F.C. Jones & Sons v Jones</i>	73			
	IV. Leapfrogging	79			
Chapter 3	Tracing	85			
	A. Tracing at common law	86			
	I. <i>Taylor v Plumer</i>	86			
	II. <i>Agip (Africa) Ltd v Jackson</i>	89			
	III. <i>Trustee of the Property of F.C. Jones & Sons (a Firm) v Jones</i>	92			
	IV. <i>Kwai Hung Realty Co Ltd & Ors v Kung Mo Ng & Ors</i>	95			
	B. Tracing in equity	98			
	I. <i>Re Hallett's Estate</i>	99			
	II. <i>Re Oatway</i>	100			
	III. <i>Re Tilley's Will Trust</i>	101			
	IV. The lowest intermediate balance rule	102			
	V. <i>Space Investment Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd and Ors</i>	104			
	VI. <i>Bishopsgate Investment Management Ltd (in liq) v Homan</i>	105			
	VII. <i>El Ajou v Dollar Land Holdings Plc</i>	107			
	VIII. <i>Boscawen v Bajwa</i>	111			
	IX. <i>Foskett v McKeown</i>	112			
	X. <i>PBM (Hong Kong) Ltd v Tang Kam Lun & Ors</i>	117			
Chapter 4	Subrogation	123			
	A. Introduction	123			
	B. A remedy against unjust enrichment	124			
	C. An unjust enrichment analysis	129			
	D. Cases since <i>Banque Financière de la Cité SA v Parc (Battersea) Ltd</i>	134			
	E. Recent cases in Hong Kong	144			
	F. Discharge of another's debt	153			
	G. Proprietary remedy	155			
Chapter 5	Proprietary Restitution	157			
	A. Introduction	157			
	B. Pure proprietary claims	158			
	C. Substitute assets	159			
	D. Unjust enrichment and property	160			
	E. Competing approaches	164			
	F. A remedial approach	165			
	G. The resulting trust as core case of proprietary restitution	175			
	H. Lord Millett's thesis	179			
	I. Restitution and insolvency	183			
	J. Case law in Hong Kong	184			
	K. Personal restitution where property has not passed	186			
	Informed Consent				
Chapter 6	Incapacity	191			
	A. Minors	191			
	B. Mental incapacity	193			
	C. Corporate incapacity	197			
	D. <i>Ultra Vires</i> payments by public authorities	197			
Chapter 7	Ignorance	199			
	A. Introduction	199			
	B. Recipient liability in equity	201			
	I. Lord Nicholls' extra-judicial views	201			
	II. A likely wrong turn	205			
Chapter 8	Mistake	217			
	A. Introduction	217			
	B. Mistake and misprediction	219			
	C. Doubt	221			
	D. Ignorance	226			
	E. Mistake of fact	228			
	I. The early case law	228			
	II. <i>Barclays Bank Limited v WJ Simms, Son & Cooke (Southern) Ltd</i>	230			
	III. Good consideration	236			
	F. Mistake of law	245			
	G. Test for causation	255			

Chapter 9 Duress	259	Qualified Consent	
A. Traditional categories of duress	260	Chapter 13 Failure of Consideration	357
I. Duress of the person	260	A. Meaning of failure of consideration	357
II. Duress of goods	260	B. Requirement of total failure	371
III. Threats to prosecute	261	C. Test for total failure	373
IV. The <i>colore officii</i> cases	262	D. The <i>Thomas v Brown</i> requirement	377
B. Economic duress	263	E. Contracts discharged for breach	378
I. The leading cases	263	I. Introduction	378
II. Illegitimate threat	268	II. Recovery by an innocent party	379
III. Causation	271	III. Recovery by a party in default	390
IV. Unconscionability	274	F. Void contracts	394
V. Acquiescence	279	G. Contracts unenforceable for non-compliance with formality	395
Chapter 10 Undue Influence	283	H. Frustrated contracts	395
A. Traditional classification of undue influence	285	I. Failure of consideration and free acceptance	406
B. Relationships of influence	288	I. Common law	407
C. Husbands and wives: the <i>O'Brien</i> principle	300	II. Equity	412
Chapter 11 Unconscionability	309	Policy-Motivated Recovery	
A. Commonwealth authorities	310	Chapter 14 Illegality	415
I. <i>Blomley v Ryan</i>	310	A. Introduction	415
II. <i>Archer v Cutler</i>	311	B. Execution of illegal purpose and penitence	416
III. <i>Hart v O'Connor</i>	312	C. <i>Locus poenitentiae</i> and title	419
IV. <i>Nichols v Jessup (No 2)</i>	314	D. <i>Tinsley v Milligan</i>	423
B. English decisions	315	E. <i>Locus poenitentiae</i> in equity	427
I. <i>Multiservice Bookbinding Ltd & Ors v Marden</i>	315	Chapter 15 Ultra Vires Demands by Public Authorities	437
II. <i>Alec Lobb (Garages) Ltd & Ors v Total Oil Great Britain Ltd</i>	317	A. <i>Woolwich Equitable Building Society v Inland Revenue Commissioners</i>	437
III. <i>Credit Lyonnais Bank Nederland NV v Burch</i>	318	B. The <i>Woolwich</i> principle in Hong Kong	441
C. Further Commonwealth authorities	319	Chapter 16 Necessity	449
I. <i>Commercial Bank of Australia Ltd v Amadio</i>	319	A. Introduction	449
II. <i>Louth v Diprose</i>	321	B. Agency of necessity	450
III. <i>Boustany v Pigott</i>	321	C. A unifying principle	454
D. Cases in Hong Kong	323	D. Cases in Hong Kong	458
I. <i>Lo Wo & Ors v Cheung Chun Ka & Anor</i>	323	Chapter 17 Defences	461
II. <i>Standard Chartered Bank v Shem Yin Fun (The Administratrix of the Estate Tang Chun, deceased) and Shem Yin Fun</i>	323	A. Introduction	461
III. <i>Ming Shiu Chung & Ors v Ming Shiu Sum & Ors</i>	326	B. Change of position	463
E. Further issues	327	I. Causation	464
Chapter 12 Legal Compulsion	335	II. Anticipatory reliance	473
A. Introduction	335	III. Relative fault	478
B. Discharge of debt	336	IV. Bad faith & wrongdoers	481
C. Reimbursement	337	C. Bona fide purchase	488
D. <i>Owen v Tate</i>	342	D. <i>Restitutio in integrum</i>	491
E. Contribution	345	E. Ministerial receipt	500
		F. Estoppel	505
		G. Illegality	510

Chapter 18 Choice of Law	515
A. Characterisation	515
B. The incidental question	519
C. Choice of law rule	521
I. The proper law approach	521
II. Other approaches	530
III. <i>First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd & Anor</i>	532
Bibliography	541
Index	553

Table of Cases

A

Aberdeen Winner International Co Ltd v Incorporated Owners of Albert House & Anor [2004] 3 HKLRD 910	352
Abou-Rahmah v Abacha & Ors [2007] 1 Lloyd's Rep 115	215, 482, 500
Advance Distribution Co Ltd v Shun Yip Ltd & Ors [2003] 2 HKC 608	85
Aerolíneas Argentinas v Federal Airports Corp (1995) 63 FCR 100	263
A-G for Hong Kong v Reid [1994] 1 AC 324	183
Agip (Africa) Ltd v Jackson [1990] Ch 265	
[1989] 3 WLR 1367	80, 85, 88, 91, 214, 215, 502
Agip (Africa) Ltd v Jackson [1991] Ch 547 (CA)	83, 88, 89, 94, 98
Agnew v Commissioner of Inland Revenue (2001) 2 AC 710	72
Aiken v Short (1835) 1 H & N 210	228, 230, 236, 242
Aiken v Short 2, L.JEX. 321	237
Air Canada v British Columbia 59 DLR (4) TH 161	440
Air Jamaica Ltd v Joy Charlton & Ors [1999] 2 WLR 1399	179
Alco Lobb (Garages) Ltd v Total Oil Great Britain Ltd [1983] 1 All ER 944	
[1983] 1 WLR 87	317, 319, 322, 323, 325
Alco Lobb (Garages) Ltd v Total Oil Great Britain [1985] 1 All ER 303	
[1985] 1 WLR 173 (CA)	322, 328
All Vaughan Co v Royscot Trust [1999] 1 All ER Comm 856	273
Allcard v Skinner (1887) 36 Ch D 145	285, 291, 300
Amir Rasheed Shipping Corp v Kuwait Insurance Co (1984) AC 50	522
Appleby v Myers (1867) LR 2 CP 651	385, 386
Arab Monetary Fund v Hashim [1993] 1 Lloyd's Rep 543	525, 526
Arab Monetary Fund v Hashim [1996] 1 Lloyd's Rep 589	527, 528, 529, 530
Archer v Cutler [1980] 1 NZLR 386	194, 311, 312, 313, 314
Arris v Stewkly (1677) 2 Mod 260	69
Associated Japanese Bank (International) Ltd v Credit Du Nord SA [1989] 1 WLR 255	217
Astley v Reynolds (1731) 2 Str 915	259
Atlantic Coast Line Railroad Co v Florida 295 US 301 (1935)	66
Attorney General for Hong Kong v Reid [1994] 1 AC 324	181-182
Attorney General v Leung Kam-Wah [1968] HKLR 366	218
Au Hung Lit v Nguy Can & Fils (China) Co Ltd [2004] HKCU 1441	218, 250
Au Lung (No 1) v Lam Ho Ling & Anor [1962] HKLR 434	511, 513
Auckland Harbour Board v The King [1924] AC 318	197-198
Australia and New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662	83, 504
Avon County Council v Howlett [1983] 1 WLR 605	506, 507, 508, 510
Avon Finance Co v Bridger & Anor [1985] 2 All ER 281	293

B

B Liggett (Liverpool) Ltd v Barclays Bank Ltd [1928] 1 KB 48	80, 154, 155
Baden case [1983] B.C.L.C. 325	204
Baden Delvaux and Lecuit v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1983] BCLC 325	188
Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1993] 1 WLR 509	215
Balvair Finance Co Ltd v Stapleton [1971] 1 QB 210	422
Banco Nacional SA v Tse Mun Hei (a male) [1994] HKCU 125; [1994] HKLY 847	501