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INTRODUCTION

1 Why a Restatement?

A Restatement is a novel concept in relation to English law. In contrast, the Restatements produced by the American Law Institute are well known as non-legislative, but powerfully persuasive, statements of the law applying across the USA. While knowing what the law is in England and Wales does not raise the multi-jurisdictional problems encountered in the USA, there are nevertheless real benefits to be gained in setting out what the law is in England and Wales in as clear and accessible a form as possible. This may be said of more areas of the law than just the law of unjust enrichment, but it is believed that a Restatement of this area is particularly apt at this time for several reasons.

First, the law of unjust enrichment is a newly recognised subject. While the relevant case law is long standing, the subject was only 'officially' accepted in English law in 1991 by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 following the path-breaking work of Goff and Jones, *The Law of Restitution* (first published in 1966). Given its recent provenance, many lawyers have never studied the subject and, not surprisingly, find it an especially difficult area. A Restatement can help to make the law of unjust enrichment better known and better understood.

Secondly, some of the complexity is caused by the archaic terminology used and by the historic failure to provide a clear conceptual structure. Even the name of the subject has been a matter of difficulty, with Goff and Jones' favoured title (until the 8th edition in 2011) being 'the law of restitution' rather than 'the law of unjust enrichment'. A Restatement can remove, or at least reduce, those difficulties.

Thirdly, this area of English law has already benefited hugely from a close working relationship between academics, judges and practitioners. This Restatement project has provided the opportunity for a further strengthening of that collaborative relationship.

Fourthly, those working in this area in this jurisdiction have an expertise, and an interest in the subject, that is unrivalled across the world. It is important that this expertise is tapped while it exists.

Fifthly, there are signs from Europe that aspects of English law may be lost in an attempt to harmonise areas of private law across Europe. Particularly relevant to this project are the European model rules for 'Unjustified Enrichment' in Book VII of the *Draft Common Frame of Reference* (prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)); and the proposed EU Regulation on a Common European Sales Law, which has some provisions on restitution after termination of a contract for the

sale of goods. Whether one believes in European legal harmonisation or not, it is essential that the subtleties of English law are properly understood before there is consideration of whether they should be abandoned.

Sixthly, there is the inspiration to be gained from the recent US *Restatement Third, Restitution and Unjust Enrichment* published in 2011 after some thirteen years of work. This is a magnificent piece of work, led by the reporter Professor Andrew Kull. It is important to appreciate, however, that the approach of the US Restatement is rather different from that of this Restatement. The US Restatement contains a mass of detail with a compilation of all relevant cases from across the USA. This Restatement is more modest in its focus. It aims to stand back from, and to provide an overview of, the details of the English law on this subject. The result is that this Restatement is more conceptual, and less contextual, than the US *Restatement Third*.

It should be added that this Restatement project has provided a major intellectual challenge for those involved. This in turn has helped to enhance our understanding of this area of the law and it is fervently hoped that readers of this work will reap the benefit of that improved understanding. One cannot overstate the complexity and excitement involved in trying to 'hone down' what is essentially a common law area to specific and succinct rules and principles.

2 Type of Restatement

The word 'Restatement' might suggest that one is purely concerned to state the present law. That would be marginally misleading. What is being aimed for is the best interpretation of the present law. In some limited circumstances, this may clash with existing precedents so that one would require a decision of the Supreme Court to lay down the law as here set out. In other words, on some matters the Restatement takes a principled interpretation of the law that may be regarded as going further than the existing cases. The commentary makes clear where this is so. It may help to think of this as a 'principled' or 'progressive' Restatement.

It should be stressed that it is *not* intended that the Restatement should be enacted as legislation. On the contrary, the intention is for the Restatement to be a persuasive authority but non-binding; and it is envisaged that there may be periodic revisions of the Restatement to reflect new developments and thinking. It would be wholly contrary to the desires and aspirations of those who have been responsible for this project for the Restatement to be seen as working against the common law tradition. The idea, admittedly novel, is for the Restatement to supplement and enhance our understanding of the common law, and to make it more accessible, not to replace it.

3 Type of commentary

It will be seen that the commentary attempts to state matters as succinctly as possible. Hypothetical or real examples have often been used in the belief that this is commonly the best way of understanding the law. The leading cases, but not all conceivable relevant cases, have been cited and the citation of academic literature has been kept to a minimum. The aim is to explain the Restatement, not to reproduce the textbooks in this area.

4 Intended readership

It is hoped that all lawyers dealing with issues in this area, whether as practitioners, judges, or academics, will benefit from this Restatement. Non-lawyers too may find it of interest and help, but the complexities are such that a degree of legal knowledge is likely to be necessary in order to understand all the provisions and commentary.

5 Working methods

Work started on this project in October 2010 and was completed in June 2012. Four five-hour meetings of the advisory group were held, three at All Souls, Oxford, and one at University College London. In advance of those meetings, drafts of parts of the Restatement and the commentary were prepared by Andrew Burrows and circulated electronically. Comments were then sent back, and revised versions of the Restatement and commentary were again sent out in advance of each meeting. Those drafts were then discussed at the meetings. They were further revised in the light of the discussions. While Andrew Burrows alone accepts responsibility for the Restatement and the commentary, and not all members of the Advisory Group agree with his version—indeed, it may be that each member would express matters somewhat differently throughout—he wishes to put on record the immense assistance he has derived from the Advisory Group, for which he is extremely grateful. The Restatement and the commentary seek to reflect the insights gained from the written comments and the discussions in the meetings. It has been a rich and rewarding collaborative exercise. Further invaluable assistance on drafting has been given by retired Parliamentary Counsel.

Andrew Burrows would also like to thank Norton Rose, who provided funding for this project, and those involved at Oxford University Press, especially Alex Flach and Emma Brady, for their enthusiasm for publishing this work and for their efficiency and skill in doing so.

6 Overview of structure and substance of the Restatement

The Restatement has five Parts. After the Introduction (which introduces the central ideas and provides an overview of what follows), the Restatement follows the conceptual structure for the subject that is now widely accepted. So it examines

enrichment, at the claimant's expense (both in Part 2), the unjust question (Part 3), and defences (Part 4). Part 5 looks at the rights (or, as some might prefer to label them, the remedies) that effect restitution for unjust enrichment.

Some particular substantive features of the Restatement are worthy of mention at the outset.

(i) Restitution for wrongs, and other examples of restitution for reasons other than unjust enrichment, are outside the scope of this Restatement (s 1(3)).

(ii) In deciding whether an enrichment is unjust, the Restatement takes the 'unjust factors' approach (s 3). But it accepts that, in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid legal obligation (s 3(6)). This qualification suggests that the distinction between the 'unjust factors' approach at common law and the civilian 'absence of basis' approach to the unjust question is not as sharp as is often thought.

(iii) It is explained in s 3 that the unjust factors, which are set out in detail in Part 3, fall into two classes: first, those dealing with problems with the claimant's consent and, secondly, those dealing with other valid reasons why the enrichment is unjust.

(iv) The Restatement presents an integrated view of common law and equity within this area. Indeed, with one minor exception in s 30(8)(a) (dealing with the doctrine of laches) there is no reference in the Restatement to the historical labelling of common law and equity.

(v) Both personal and proprietary restitution are dealt with. While the standard restitutionary right is a personal right to a monetary restitutionary award to recover the value of the defendant's enrichment (ss 5(2)(a) and 34), other restitutionary rights (often referred to as 'proprietary restitution') are also responses to unjust enrichment (ss 5(2)(b) and 35). The role of subrogation (by operation of law) in effecting proprietary, as well as personal, restitution (and in preventing an anticipated unjust enrichment) is set out in s 36.

(vi) Much archaic terminology is cut through by referring to the standard award as a 'monetary restitutionary award' (ss 5(2)(a) and 34).

(vii) It is recognised that 'free acceptance' is a test of enrichment (s 7(3)(c)).

(viii) 'At the expense of' is analysed as meaning that the benefit was obtained from the claimant and, subject to exceptions, directly from the claimant rather than by way of a third party (s 8). Tracing within the law of unjust enrichment is explained as a means of establishing that the enrichment was at the claimant's expense (s 9).

(ix) Ignorance and powerlessness are recognised as unjust factors but, where operative, a fiduciary's lack of authority is recognised as being the appropriate unjust factor, rather than ignorance or powerlessness (ss 16 and 17).

(x) Some uncertainties in the law are left open. For example, whether in the context of mistaken gifts there is a requirement for the mistake to be serious as well as causative (s 10(4)(a)); whether in the context of obtaining a trust asset from a fiduciary acting without authority the defendant is strictly liable (s 17(2)); and whether agency operates as a strong or weak defence (s 25).

The Restatement is based on the law as at 30 June 2012.