

# **Unjust Enrichment and De Facto Relationships: The End of a Marriage of Convenience**

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## **I: INTRODUCTION**

Justice Richardson has said that the aim of the courts in the area of de facto relationships should be to “achieve socially just results in accordance with legal principle”.<sup>1</sup> The purpose of this article is to attempt to identify an appropriate basis for “achieving socially just results” on the dissolution of a de facto relationship.

To date there has been no definitive statement from the New Zealand Court of Appeal as to the basic principles which should be applied in cases concerning the dissolution of de facto relationships. The usual remedy granted in these cases is that of a constructive trust. The juristic basis for granting this remedy, however, is in a state of flux. In *Gillies v Keogh*<sup>2</sup>, the Court of Appeal judges, despite their varying approaches, all concluded that the plaintiff was not granted the remedy he or she requested. Primary consideration was given to the expectations of the parties.

The approaches to enrichment in the academic literature and commercial cases concerning the law of restitution are set out in Part II of this article, and will be analysed to ascertain the appropriate principles to apply to the de facto cases. Parts

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1 *Gillies v Keogh* [1989] 2 NZLR 327, 340.

2 *Ibid.*

III and IV address “Free Acceptance” and “Incontrovertible Benefit”, respectively, as tests of enrichment. It appears that the defendant in the de facto cases receives a benefit, but no accretion to wealth, from the performance of domestic services by the plaintiff. Thus, the defendant cannot be said to be enriched. Consequently, the principle of unjust enrichment cannot form the basis for granting the plaintiff a remedy on the dissolution of a de facto relationship.

In Canada, the principle of unjust enrichment establishes the cause of action by which a constructive trust can be granted to recognise a plaintiff’s proprietary claim.<sup>3</sup> The Canadian judgments do not, however, provide any theoretical account of the principle of unjust enrichment and the requirements for its application. In particular, the enrichment element of the analysis has been neglected.

It has been suggested in the commercial context that the focus of the enquiry should be to recognise the sacrifice made by the plaintiff, in contrast to establishing the defendant’s enrichment. Part V of this article discusses the concept of unjust sacrifice. This approach provides a more coherent concept of enrichment to be used in commercial cases concerning the provision of services, but is not appropriate in the context of de facto relationships. Neither the unjust enrichment, nor the unjust sacrifice approach, recognise the unique interdependence of the parties in a de facto relationship, as they concentrate solely on the benefit or detriment to one of the parties. Moreover, the principle of unjust sacrifice has yet to be judicially recognised in commercial cases. It would need to be refined before it could be applied to a de facto relationship.

In Australia, equitable principles used in commercial joint venture cases have been extended, first to relationships with a commercial and domestic element,<sup>4</sup> and then to purely domestic cases.<sup>5</sup> Although the High Court of Australia has, perhaps unconsciously, revealed that the interests of the parties lie in the co-operative nature of the relationship, it is submitted that the Court has not appropriately recognised the interests of the parties in the full spectrum of de facto relationships. The concentration has been solely on the parties’ economic contributions to the relationship. It is contended that the parties’ reasonable expectations might better be realised through a close analysis of the nature of the relationship itself. It should be acknowledged when the parties consider themselves to be economically independent of each other. The remedy provided should therefore protect the parties’ expectations by ensuring that each party only retains the benefit of his or her personal economic contribution to the relationship. Where the parties have organised their affairs in a way which indicates a co-operative approach towards providing for their future together, equity should provide a remedy which reflects the parties’ expectations. Therefore, the legal owners of property acquired for the purposes of the relationship would hold the property for the mutual benefit of the

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3 *Pettkus v Becker* (1981) 117 DLR (3d) 257, 273 per Dickson J; *Sorochan v Sorochan* (1986) 29 DLR (4th) 1; *Everson v Rich* (1988) 53 DLR (4th) 470; *Peter v Beblow* (1993) 101 DLR (4th) 621.

4 *Muschinski v Dodds* (1985) 160 CLR 583.

5 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

parties. Part VI discusses the principle of unconscionability as the basis of the constructive trust remedy.

## II: ENRICHMENT

### 1. Introduction

Though Goff and Jones<sup>6</sup> presented the first exposition of the law of restitution in the Commonwealth, Professor Birks<sup>7</sup> should be acknowledged as having provided the theoretical base for the law of restitution. Now that unjust enrichment has been recognised as the basis of “restitutionary” claims in two of the highest courts in the Commonwealth,<sup>8</sup> I shall treat Birks’ analysis as the starting point and review it from a rational, rather than historical,<sup>9</sup> perspective.

### 2. Restitution and Unjust Enrichment — Remedy and Cause of Action

For Birks, restitution is the judicial response which consists of causing one person to give up to another an enrichment received at his expense or its value in money.<sup>10</sup> The effect of this approach is that “unjust enrichment” stands alongside “contract” and “tort” as a cause of action. “Restitution”, on the other hand, is a measure of relief like “compensation” and “punishment”.<sup>11</sup> Birks breaks the enquiry into whether any given fact situation discloses a cause of action by posing four questions:<sup>12</sup>

- (i) Was the defendant enriched? If so;
- (ii) Was the enrichment at the plaintiff’s expense? If so;
- (iii) Was there any factor calling for Restitution? If so;
- (iv) Was there any reason why Restitution should nonetheless be withheld?

In his analysis of enrichment, Birks considers there are two possible modes by which the enrichment can be derived. The first is “enrichment by subtraction” which occurs where value passes from the defendant to the plaintiff.<sup>13</sup> The second

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<sup>6</sup> *The Law of Restitution* (3rd ed 1986).

<sup>7</sup> *An Introduction to the Law of Restitution* (2nd ed 1990) 13.

<sup>8</sup> *Lipkin Gorman v Karpnale Ltd* [1992] 2 AC 548; *Pavey & Matthews v Paul* (1986) 60 ALR 577.

<sup>9</sup> Which approach frequently refers to principles of Roman law, and Lord Mansfield’s judgment in *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676.

<sup>10</sup> *Supra* at note 7, at 13.

<sup>11</sup> *Ibid*, 26.

<sup>12</sup> *Ibid*, 7.

<sup>13</sup> This transfer of value increases the defendant’s wealth by decreasing the plaintiff’s wealth if it is

type of enrichment is “enrichment by wrongdoing”. This occurs where a defendant is enriched as a consequence of a breach of duty owed by the defendant to the plaintiff.<sup>14</sup> According to Birks’ scheme, enrichment by subtraction<sup>15</sup> is the head under which the cases we will deal with, in the context of the provision of services in the de facto relationships, should fall. For this reason, only the independent restitutionary claim will be considered.

### 3. Enrichment by Subtraction

The first step in Birks’ enquiry is an examination of whether the defendant has been enriched. This part of the analysis has been sorely neglected,<sup>16</sup> particularly regarding de facto cases, and is probably due to nearly all of the law of restitution being concerned with monetary claims. As Lord Goff has noted,<sup>17</sup> money is the universal medium of exchange, and therefore the enrichment of the defendant is patent. Birks proposes that benefits in kind, such as domestic services should be treated symmetrically with monetary benefits; that is, both monetary and non-monetary benefits should be analysed as enrichments, and restitution should be effected under the independent restitutionary claim without reference to any other source of obligation.<sup>18</sup> Birks considers this symmetry to be essential to the validity and rationality of unjust enrichment as a cause of action.

### 4. Restitution’s Concern with Wealth

For Birks, the law of restitution is not concerned with attributes and interests which are not wealth; an enrichment is equated with the concept of wealth.<sup>19</sup> The case of enrichment by the receipt of money is contrasted with benefits received in kind, such as goods and services. The common law has always shown a preference for a subjective approach to the valuation of a benefit when that benefit is not of a monetary nature.<sup>20</sup> Birks provides what he calls the argument from “subjective devaluation” as a rationalisation of the common law’s preference.<sup>21</sup>

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not matched by consideration flowing from the defendant to the plaintiff. Ibid, 22.

14 The duty which has been breached is derived from one of the other obligations recognised by the law, that is, contract, tort, equity, or a statutory duty. Ibid, 313.

15 Birks, *supra* at note 7, refers to this as the independent restitutionary claim.

16 Ibid, 7.

17 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783,799 per Goff J.

18 *Supra* at note 7, at 7.

19 Ibid, 13.

20 For example, the choice of an individual is preferred over the value society as a whole may place on a non-monetary benefit.

21 *Supra* at note 7, at 109.

## 5. Argument From “Subjective Devaluation”

“The subjective devaluation argument is that benefits in kind have value to a particular individual only insofar as he chooses to give them value”.<sup>22</sup> The value that other people place on a particular service in the market place is irrelevant to the enquiry. Each individual has the right to dispose of her own store of wealth in the way she sees fit and this cannot be dictated by anyone else.<sup>23</sup> The law’s commitment to a subjective approach to enrichment was eloquently expressed by Pollock CB:<sup>24</sup>

Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another’s shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself.

Lord Chief Baron Pollock recognised that the ephemeral nature of services means that they cannot be given back in the way that money can. The benefit of the service itself disappears as soon as performance is completed. Whilst it is not unfair to require someone who has received money for no reason to give it back, it does seem unfair for someone to provide a service, which cannot be given back, and expect to be paid for it without the recipient first requesting performance. Furthermore, Birks notices a continuum in the types of benefit in kind available which starts with cases where the defendant retains some sort of marketable residuum after receiving the benefit, and extends to cases where the service provided results in no marketable residuum for the plaintiff whatsoever.<sup>25</sup> Though one might have thought that the subjective devaluation argument would become stronger the further along the continuum one progressed from the receipt of a permanent benefit as a result of a service, Birks maintains that the argument applies with equal force to each of these situations.<sup>26</sup> The argument is not defeated simply because the defendant retains some sort of marketable residuum. The reason for this is that the defendant might not want the benefit.

## 6. Limitations on Subjective Devaluation

However, Birks considers that it would be too simplistic to say that the law allows the defendant the benefit of the argument from subjective devaluation in all situations where services are performed for the defendant’s benefit.<sup>27</sup> Birks

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid, 110.

<sup>24</sup> *Taylor v Laird* (1856) 25 LJ Ex 329, 332.

<sup>25</sup> Supra at note 7, at 110. For a more careful analysis of this continuum, see Beatson’s criticism of Birks’ approach to enrichment, *infra* at note 39.

<sup>26</sup> Supra at note 7, at 110.

<sup>27</sup> Ibid, 111.

considers that non-monetary benefits such as services can be enriching in two primary ways:<sup>28</sup> first, where the defendant is “incontrovertibly benefited” by performance of the service, and second, where the defendant has “freely accepted” the benefit of the service offered. If either of the two conditions is satisfied, then the subjective devaluation argument is overridden and the defendant is deemed to have valued the service at a reasonable price.

### III: FREE ACCEPTANCE

#### 1. Introduction

Free acceptance is perhaps the most problematic aspect of Birks’ analysis of how an enrichment can be made out considering the subjective devaluation argument. The essence of free acceptance is that a person may still be enriched if she has freely accepted the performance of the services offered by the plaintiff. This is despite the fact that in certain situations a defendant cannot be said to be incontrovertibly benefited.<sup>29</sup> Through the operation of free acceptance Birks attempts to overcome the subjective devaluation argument. The importance of free acceptance to the analysis is twofold. It shows that there is both an enrichment and that it is unjust. We will, however, only consider it in its role as a test of enrichment.<sup>30</sup>

Birks’ theory of free acceptance focuses on the defendant’s conduct and knowledge in the situation in order to establish that there is no enrichment by the performance of the services. The principle is similar to an estoppel. Once the defendant has accepted the benefit of the services knowing they were not being performed gratuitously, she cannot be heard to say that she did not value them. Therefore, the three elements are evident:<sup>31</sup>

- (i) The defendant must have had an opportunity to reject the services.<sup>32</sup>
- This principle is qualified in that if a defendant has been

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28 Ibid, 114. Birks actually provides three categories which override the argument from subjective devaluation. The third category is a miscellany called “others”, which adds little to the analysis and is not important for the purposes of this paper. Only the two nominate categories will be analysed.

29 The concept of incontrovertible benefit is analysed *infra* at Part IV.

30 For an analysis of the role of free acceptance as an unjust factor see *supra* at note 6, at 104. Burrows criticises free acceptance as an unjust factor and suggests that failure of consideration should more properly be treated as the unjust factor in the cases Birks relies upon for support of his theory. Burrows, “Free Acceptance and the Law of the Restitution” (1988) 104 LQR 576.

31 Ibid, 283.

32 Ibid, 268. The principle that a forced acceptance is no acceptance at all was expressed by Brett MR in *Leigh v Dickeson* (1884) 15 QBD 60, 64.

incontrovertibly benefited, he is deemed to be enriched even when there was no opportunity to reject the plaintiff's services.

- (ii) The defendant must have known that the services performed by the plaintiff were not being offered gratuitously. The defendant must also have known of the nature of the plaintiff's intention. If the defendant did not know that the plaintiff was expecting payment for the services he would not have truly had the opportunity to decide whether to take steps to stop the plaintiff from performing the services.
- (iii) The defendant's decision to accept the services, knowing that they were not offered gratuitously, must have included some element of neglect on his part which in some way makes him responsible for the plaintiff's provision of the services.

The classic illustration of free acceptance is the window-cleaner example.<sup>33</sup> Birks asks us to imagine a householder who sees a window-cleaner begin to clean the windows of her house. The householder knows that the window-cleaner expects to be paid but she stands back unseen by the window-cleaner until the job is finished at which point she steps out and tells the window-cleaner that she does not intend to pay as she never ordered that the work be done. Birks maintains that the householder must pay for the services as she has "freely accepted" them.<sup>34</sup> The householder had the opportunity to send the window-cleaner away but chose not to. It is too late, once the services are performed, to say that you do not want to pay for them.

## 2. Application of Free Acceptance to De Facto Relationships

### (a) *Pettkus v Becker*<sup>35</sup>

Mr Pettkus and Ms Becker were in a de facto relationship for nearly twenty years. Although Mr Pettkus refused to marry Ms Becker, they lived together, to all appearances as though they were married. Initially, Ms Becker paid all of the household expenses and rent, while Mr Pettkus saved his entire income. In the 1960s the couple purchased a farm to start an apiary business. Title was taken in Mr Pettkus' name only. Due to the labours of both parties, the business prospered, and new properties were acquired, also in his name alone. By 1972 the relationship had deteriorated and mistreatment was alleged. Ms Becker left Mr Pettkus, taking a car, \$3,000 in cash, and forty beehives, which represented less than ten percent of the hives worked. Returning briefly, at Mr Pettkus' behest, Ms Becker finally ended the relationship in 1974. She took the car and some cash, and

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<sup>33</sup> Ibid, 265.

<sup>34</sup> Ibid.

<sup>35</sup> (1980) 117 DLR (3d) 257.

claimed her half interest in the property owned by Mr Pettkus.

In *Pettkus v Becker*, the Supreme Court of Canada recognised a de facto partner's interest in the property of the partnership on the basis of a constructive trust. Justice Dickson held that the remedy ought to be granted to prevent the unjust enrichment of the defendant. Although Dickson J did not analyse the issue of enrichment in any depth, Birks' theory of free acceptance appears to have provided the basis for saying that the defendant was enriched at the plaintiff's expense by receiving the benefit of the domestic services performed by the plaintiff. The role of free acceptance in *Pettkus v Becker* will now be reviewed.

Justice Dickson held that Ms Becker should be awarded a half share by reason of a constructive trust awarded to prevent the unjust enrichment of Mr Pettkus.<sup>36</sup>

[T]here are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.

In the judgment itself, little was said on the issue of enrichment. However, Dickson J referred to the free acceptance of a benefit as disentitling the recipient from arguing that they were performed on a gratuitous basis.<sup>37</sup>

It is not enough for the Court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must in addition be evident that the retention of the benefit would be "unjust" in the circumstances of the case. Miss Becker supported Mr Pettkus for five years. She then worked on the farm for about 14 years. The compelling inference from the facts is that she believes she had some interest in the farm and that that expectation was reasonable in the circumstances. *Mr Pettkus would seem to have recognised in Miss Becker some property interest, through the payment to her of compensation, however modest. There is no evidence to indicate that he ever informed her that all her work performed over the 19 years was being performed on a gratuitous basis. He freely accepted the benefits conferred upon him through her financial support and her labour.*

Justice Dickson's judgment demonstrates that the concept of free acceptance can provide both the basis of the enrichment and the unjust factor in the analysis. His Honour clearly uses the defendant's acceptance of the plaintiff's services to prevent the defendant from using the argument from subjective devaluation. The Supreme Court of Canada was therefore able to say that the defendant was enriched by the receipt of the services performed by Ms Becker. Whether that conclusion is correct in principle will be discussed in the next section of this paper.

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<sup>36</sup> Ibid, 273-274.

<sup>37</sup> Ibid, 274 (emphasis added).



### 3. Criticisms of Free Acceptance

#### (a) Introduction

Birks' use of free acceptance to establish that the defendant has been enriched through the performance of services intended for his benefit, has been the subject of much criticism. In this section of the paper, two important criticisms of the theory will be reviewed. The first criticism to be analysed is made by Burrows.<sup>38</sup> His approach considers free acceptance to be overly inclusive and replaces it with the "bargained for" principle. Second, Beatson's approach, which is that free acceptance cannot constitute a ground of enrichment on an economic approach to the meaning of that word, will be analysed.<sup>39</sup>

#### (b) Burrows' "Bargained For" Principle

Burrows identifies Birks' reliance on free acceptance to find some enrichment of the plaintiff as a problematic area in his theory of unjust enrichment. His primary objection is that free acceptance should not constitute an unjust factor in the analysis. The cases Birks employs to justify the use of free acceptance as an unjust factor are better explained, according to Burrows, on the basis that there has been a total failure of consideration.<sup>40</sup> Birks seems to have accepted this analysis.<sup>41</sup>

Burrows considers that the role of free acceptance in Birks' approach to enrichment, is to show that the defendant regards himself as having benefited by the performance of the service. Therefore that individual's right to choose how to spend his own money would not be undermined by an order of the court that the service which has been provided be paid for. Burrows' principal difficulty with Birks' approach is that it does not admit of the possibility that the defendant may have been entirely indifferent as to whether or not the service was performed at all. He states that rather than establishing that the defendant considered that the services were valuable by accepting them:<sup>42</sup>

On the contrary a defendant is just as likely to accept what the plaintiff is conferring on him where he considers it neither beneficial nor detrimental as where he considers it beneficial.

Burrows then uses Birks' window-cleaning example to illustrate that free acceptance by a householder of window-cleaning services does not by any means establish that the householder considers himself to have been enriched by the

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38 Burrows, "Free Acceptance and the Law of Restitution" (1988) 104 LQR 576.

39 Beatson, "Benefit, Reliance and the Structure of Unjust Enrichment" (1987) 40 CLP 71.

40 Supra at note 38, at 581.

41 Birks, "In Defence of Free Acceptance" in Burrows (ed), *Essays in the Law of Restitution* (1991).

42 Supra at note 38, at 580.

provision of the services. He states that:<sup>43</sup>

[E]ven if it is a fair inference that he would have stopped the window-cleaning if he had regarded the cleaning of his windows as detrimental to him, he is acting perfectly rationally if he allows the cleaning to continue on the grounds that he has neither been benefited nor harmed. In short, he may be indifferent to the cleaning of his windows.

What should have been asked, rather, was whether the defendant would have been prepared to pay for the services provided by the plaintiff had they not been performed. That is, would the defendant have sought the performance of the services? If so, the plaintiff has saved the defendant an expense he would otherwise have chosen to incur. Although this approach maintains a subjective element, there is a clear analogy with the concept of inconvertible benefit which will be dealt with later. Though the expenditure in the situation referred to by Burrows is not “necessary”, in the strict sense of that word, it is an expenditure the defendant would have chosen to undertake. The defendant must therefore be taken to consider the services valuable.<sup>44</sup>

Although Burrows considers that free acceptance does not provide a suitable basis for identifying when the defendant has been enriched by the plaintiff’s provision of services, he stays within the unjust enrichment paradigm. He also considers that the performance of services can, in some instances, constitute an enrichment. If the plaintiff has not received an incontrovertible benefit, then the only way to show that the defendant has been enriched is to prove that he personally values the provision of the services. This analysis does not depend on the plaintiff’s “acceptance” of the service, but shifts the focus to the defendant’s “request” that the services be performed in the first place. Burrows calls this the “bargained-for” principle of benefit.<sup>45</sup> Where the defendant has bargained for the services provided by the plaintiff and the plaintiff has performed those services, the defendant can be regarded as having been negatively benefited. One is negatively benefited when one is saved an expense one would otherwise have incurred.

### *(c) Analysis of Burrows’ Criticism of Free Acceptance*

It is submitted that Burrows’ criticism of the concept of free acceptance properly demonstrates that Birks’ approach is overly inclusive. Under that concept, a defendant who is ambivalent as to whether or not a service should be performed for her will be considered to have been enriched. This stretches the concept of “enrichment” beyond anything the term can reasonably bear. Such an approach clearly underestimates the role of subjective devaluation.

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43 Ibid.

44 Ibid.

45 Ibid, 578.

It is unfortunate that Burrows speaks of “bargains” and “promises”, language so reminiscent of unjust enrichment’s history in implied contract. This type of language may indicate that the defendant’s liability may be better analysed under the rubric of an obligation where the plaintiff’s claim is based on a request made by the defendant, or possibly where the plaintiff has acted in reliance on the defendant’s conduct rather than unjust enrichment.

Although Burrows’ “bargained-for” principle may be an appropriate mode of analysis in commercial cases, it seems to be far from appropriate in de facto cases. It seems wrong to classify the parties in the domestic situation as “bargaining” for their respective interests in the relationship. Though the parties may have expectations of how the relationship will progress, these will seldom be voiced. If the bargained-for principle was to be applied in the domestic context it could only be done on the basis of an implied bargain. This would have the effect that one fictional basis of enrichment, free acceptance, is simply replaced in the analysis by another, an implied bargain. This is clearly unsatisfactory. Further, Burrows’ analysis would seem to be open to the criticism levelled at free acceptance by Beatson

(d) *Beatson’s Exchange Value Theory*<sup>46</sup>

Beatson begins by noting that Birks’ purpose in providing his analysis of unjust enrichment is to provide a skeleton of principle on which to build the subject of restitution.<sup>47</sup> The aim of Beatson’s paper is to test whether Birks’ approach to enrichment satisfies his own requirements of finding a “sensible balance between conceptual purity and convenience”.<sup>48</sup>

Both Beatson and Birks equate enrichment with wealth.<sup>49</sup> Beatson’s first criticism of Birks is that, the requirement that the benefit conferred be valued in money terms in order that pecuniary restitution can be effected, does not place much of a qualification on the meaning of wealth at all.<sup>50</sup>

In view of the range and variety of interests to which the Courts give or have given money value (including disappointment, reputation, pain, opportunity and enjoyment of life’s amenities), a requirement that wealth be capable of monetary valuation does not in fact narrow the category of “enrichment” and is not particularly conducive to its homogeneity.

Birks seems to realise that valuation in money is not sufficient in English law for an interest to constitute wealth. This recognition is evidenced by his use of the

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<sup>46</sup> Supra at note 39.

<sup>47</sup> Ibid, 73.

<sup>48</sup> See supra at note 7, at 72.

<sup>49</sup> Supra at note 39, at 74.

<sup>50</sup> Ibid.

argument from subjective devaluation. The role of subjective devaluation is to counter any inclination a court may have to say that, simply because a market exists for the rendering of a service, it must necessarily have a value and therefore constitute an enrichment to the defendant.

Beatson's second attack on free acceptance is more fundamental, and is based on the very nature of the services themselves. Beatson first amplifies the continuum of non-monetary benefits offered by Birks. He identifies four main categories of services, as follows:<sup>51</sup>

- (i) Those that *result* in improvements to property or in a marketable residuum in the defendant;
- (ii) Those where, although there is no marketable residuum, a necessary expense of the defendant is anticipated or avoided;
- (iii) Those with no marketable residuum in the recipient but an increase in her human capital; and
- (iv) Those where there is neither marketable residuum nor increase in human capital.

Categories (i) and (ii) are incontrovertibly beneficial to the recipient. Beatson considers that they must therefore be treated as enrichments. Categories (iii) and (iv) are more difficult to classify as an enrichment. Beatson calls the third and fourth categories on the continuum "pure services".<sup>52</sup> He considers that Birks treats certain pure services as coming within the category of enrichment solely due to the role played by free acceptance.<sup>53</sup> Birks' equation of enrichment with wealth and his implied admission that valuation in money is insufficient in English law for an interest to constitute wealth, leads Beatson to consider that to do this creates an artificially wide meaning of what would normally constitute wealth in economic terms.<sup>54</sup>

Beatson provides a careful and detailed analysis of what enrichment and wealth mean. His conclusion is that modern economic theory draws a distinction between things with a "use value", that is things which provide an entitlement to in specie enjoyment, and things with only an "exchange value", which provide an entitlement only to money value. Under this economic approach to the analysis of benefits, only the things with an exchange value qualify as wealth.<sup>55</sup> Beatson's exclusive use of the exchange value concept in identifying an enrichment, is called the "exchange value method".

The adoption of the exchange value approach means that pure services must be

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<sup>51</sup> Ibid, 72.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid, 78.

<sup>54</sup> Ibid, 76.

<sup>55</sup> Note that: "Value", according to Beatson, refers to the advantage that is expected to result from the ownership of a given object of wealth. "Cost", on the other hand, refers to the sacrifice involved in acquiring the benefit. Ibid.

excluded from the list of items which qualify as wealth, since pure services do not give rise to an incontrovertible benefit. Services in general can on Beatson's analysis only constitute wealth if the defendant is incontrovertibly benefited. To find that the defendant has been enriched under any other circumstances, such as where the defendant has freely accepted the benefit of a service which neither produces a marketable end product, nor anticipates a necessary expenditure, would be to falsely equate the "cost" of providing the service to the plaintiff with the "value" of the service to the defendant.<sup>56</sup> It becomes clear that the cost to the plaintiff of providing the service cannot be equated with the value of the service to the defendant. Neither Birks' concept of free acceptance, nor Burrows' "bargained for" principle, establish that the defendant's store of wealth has been increased by the performance of a pure service.

Beatson therefore considers that free acceptance as a test of enrichment is over-inclusive, and would consider that Burrows' bargained-for principle is similarly over-inclusive. Both approaches seek to constructively establish enrichment. This is the case regardless of whether the performance of the service results in something with an exchange value, or end product of any use to the defendant at all. As a consequence, the distinction between enrichment, reliance, and consent is blurred.<sup>57</sup> The free acceptance approach seems to focus on the consent of the defendant in taking the benefit of the service. The bargained-for method, on the other hand, seems to concentrate on the reliance placed by the defendant in the plaintiff's suggestion that he is willing to pay for the benefit of the service. Both of these factors are important in the context of the provision of services, but neither by itself is sufficient to identify when a defendant is enriched.

Beatson's conclusion that enrichment in the services cases is dependent on establishing a breach of another source of obligation has important consequences for the validity of Birks' theory as a whole. The plaintiff's reliance on a source of obligation other than unjust enrichment by subtraction makes the claim a dependent, rather than an independent, restitutionary claim. Birks would maintain that the grounds of the action for restitution for services rendered involve the reversal of an enrichment gained by subtraction. Such an action would constitute an independent claim.<sup>58</sup> The conclusion that the provision of pure services gives rise to both an independent claim, and a claim dependent on another source of obligation, on the same facts, is logically unacceptable given Birks' doctrinal separation of the two types of claim. The result must be due to the fact that the concept of free acceptance brings in items to the enrichment analysis which do not count as enrichments. The inclusion of these items unacceptably distorts the entire basis for making restitution.

A further symptom of the inconsistency caused by the role of free acceptance is that, though Birks treats claims for restitution for pure services as an independent

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<sup>56</sup> *Ibid.*, 78.

<sup>57</sup> *Ibid.*, 80.

<sup>58</sup> *Ibid.*

restitutionary claim, the approach he adopts to the remedy is subject to the same restrictions as are placed on the dependent claim. That is, the price that would have otherwise been awarded under the contract, if there was one, provides a ceiling for the award of damages. If the restitutionary claim was truly regarded as independent, the contract price should, *prima facie*, be irrelevant.<sup>59</sup> Beatson's criticism of Birks' theory of free acceptance clearly establishes that by trying to artificially broaden the scope of enrichment to include pure services, Birks has sacrificed the conceptual purity and functional homogeneity of unjust enrichment as the theoretical basis for restitutionary claims.

Thus, Dickson J's use of free acceptance to justify the conclusion that Mr Pettkus was enriched by the performance of services by Ms Becker is invalid. Rather than continuing to rely on free acceptance to overcome the subjective devaluation argument, another ground must be found. The answer, might lie in the concept of "incontrovertible benefit".

#### IV: INCONTROVERTIBLE BENEFIT — THE NO REASONABLE PERSON TEST

The argument from subjective devaluation provides a rational basis for the defendant to say that the service provided by the plaintiff does not have any value to him, even though it may be valued by reasonable people. In contrast, "incontrovertible benefit" suggests that the defendant is simply enriched because no reasonable person would say that he has not been. He need not, therefore, have chosen to accept the benefit of the services provided.<sup>60</sup>

There are two classes of case where the enrichment to a defendant is incontrovertible. They are the "anticipation of necessary expenditure"<sup>61</sup> and "realisation in money".<sup>62</sup> The anticipation of necessary expenditure covers situations where the plaintiff has conferred a benefit on the defendant which was necessary to the defendant in the sense that he would have had to seek it himself, or would have sought it if he had not been deprived of the opportunity to do so, for example by absence or disability. The necessity can arise because of either a legal obligation which the defendant is required to fulfil or where a service is required simply because of the nature of the factual situation. Because the defendant must necessarily have chosen to obtain the benefit for himself, he cannot say that it is of

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<sup>59</sup> Ibid, 84-85.

<sup>60</sup> Supra at note 7, at 116.

<sup>61</sup> See also the leading case of *Craven-Ellis v Canons Ltd* [1936] 2 KB 403.

<sup>62</sup> Ibid, 117. The existence of these categories has already been noted in the context of Beatson's continuum of services. They were categories (ii) and (i) respectively. Each satisfied the exchange value test.

no value to him.

Both Beatson and Burrows consider that the concept of incontrovertible benefit has an important role to play in identifying enrichment. Beatson considers that a service which is incontrovertibly beneficial to the defendant constitutes a negative enrichment because the defendant is saved an expense he would otherwise have incurred.<sup>63</sup> Burrows posits that a defendant can be incontrovertibly benefited where the end product of a service is readily realisable or its objective value has already been realised, rather than simply where the value has been realised. Further, there can be incontrovertible benefit where the provision of the service has saved the defendant a legally or factually necessary expenditure. This analysis seems to provide for a more important role for incontrovertible benefit than the role it fulfils in Birks' theory.

### 1. Application of Incontrovertible Benefit to De Facto Relationships

Given that the theory of free acceptance cannot establish that the defendant has been enriched where services have been provided in a de facto relationship situation, it has been suggested that incontrovertible benefit can fulfil the role.<sup>64</sup> Though domestic services may not bring any realisable financial gain to the defendant's wealth, the benefit to the defendant is patent. Because of the obvious nature of the benefit, Narev argues for an extension of the principle of incontrovertible benefit to include these types of benefit:<sup>65</sup>

In essence this is an extension of the incontrovertible benefit category, in the domestic context to include gains which are not financially realisable and which may not have saved A [the plaintiff], inevitable expenses. B will still benefit, and he may have no subsequent obligation to make recompense for services he would have been happy to provide for himself because it is likely that his contribution to the property of the relationship by way of earnings has more than matched that of A and therefore no award against him would be justified; this will depend on the facts of the case. Domestic relationships invariably include giving and receiving by both parties, whereas as when X cleans Y's shoes in a commercial context there is no benefit for X unless he can force Y to pay for the service. On this analysis, therefore, there should be an irrefutable presumption based on a concept of objective benefit that spousal services do enrich. As a result, domestic services will not be subject to commercial criteria, and will be elevated to their deserved status.

This approach gains support from the judgments of Cooke P in *Gillies v Keogh*<sup>66</sup> and Sherstobitoff JA in *Everson v Rich*<sup>67</sup> where the special nature of spousal services was judicially recognised. It would also explain why the Supreme Court of Canada simply assumes the value of domestic services to the defendant; the services are so obviously enriching to the recipient that the basis for the finding

<sup>63</sup> Supra at note 39, at 77.

<sup>64</sup> Narev, "Unjust Enrichment and De Facto Relationships" (1991) 6 Auckland U L Rev 504.

<sup>65</sup> Ibid, 522.

<sup>66</sup> Supra at note 1, 332.

<sup>67</sup> (1989) 53 DLR (4th) 470, 474.

of enrichment need not be justified by reasoned argument.<sup>68</sup>

Narev also suggests that there is little difficulty in classifying actual financial contributions by the plaintiff to outgoings on property owned by the defendant or improvements to the defendant's house funded by the plaintiff as incontrovertible benefits.<sup>69</sup> He considers this to be a limited application of Beatson's exchange value test.<sup>70</sup> It must be noted that such payments are not made to the defendant but simply amount to a service provided by the plaintiff to the defendant. The service "negatively enriches" the defendant by anticipating an expense she would have had to meet, and thereby constitutes an economic benefit under the exchange value analysis.<sup>71</sup>

## 2. Criticism of Incontrovertible Benefit

The claim that recognising domestic services as an incontrovertible benefit to the defendant acknowledges their value in contemporary society, attracts emotive support. It highlights the vital role that the providers of domestic services play. To call the benefit obtained from the services "incontrovertible" seems apt. It is submitted, however, that this sentiment should not be pursued when the effect is to distort the theory beneath it. Rather than truly recognising the value of the services provided by the plaintiff to the defendant, the approach merely continues the fictionalisation of enrichment in cases where no enrichment can be found on a strict application of theory. All that can be said is that society values the services, not that the defendant does.

Although the plaintiff may have provided the defendant with a benefit through domestic services, this does not mean that it is legitimate to classify the benefit as an enrichment or accretion to the defendant's wealth. Even where the services supplied by the plaintiff have saved the defendant from incurring a necessary expense, there will be no identifiable accretion to the wealth of the defendant. Hence, an incontrovertible benefit will not count as wealth. This approach to wealth seems intuitively correct. In such cases it is inappropriate for the court to grant the restitutionary remedy, which requires the defendant to disgorge the benefit. She has effectively not been "engorged" in the first place. Muir provides a logical basis for this intuitive argument.<sup>72</sup>

Muir states that even the economic concept of benefit, which seems to be an equivalent of Beatson's exchange value test, is too wide a definition of benefit to be applied in the law of unjust enrichment. The concept of legal benefit should rather be regarded as having all of the following characteristics:<sup>73</sup>

<sup>68</sup> See *Petikus v Becker*, *Sorochan v Sorochan*, *Peter v Beblow*, *supra* at note 3.

<sup>69</sup> *Supra* at note 64, at 522.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Supra* at note 39, at 77.

<sup>72</sup> Muir, "Unjust Sacrifice and the Officious Intervenor" in Finn (ed), *Essays on Restitution* (1990) 297, 299-309.

<sup>73</sup> *Ibid.*, 300.



- (i) The defendant must have benefited from the plaintiff's actions. This reflects the economic perception of benefit that the defendant would have been prepared to pay something for the benefit, and provides the broad starting principle which the subsequent criteria will be seen as restricting.
- (ii) The benefit must be one which involves the transfer of wealth to the defendant, or according to some theories, involves an "expense" to the plaintiff.
- (iii) Generally, the benefit must be one which the defendant not only would be prepared to pay for if she had the choice to accept or not, but she must manifest that willingness by actually choosing to accept the benefit with the knowledge that it was intended to be paid for.

The first characteristic is similar to Beatson's exchange value requirement. This is not enough to constitute wealth in Muir's conception. The third characteristic is similar to free acceptance or perhaps more properly the "bargained-for" principle. The second characteristic is new. It requires that there is a transfer of wealth between the plaintiff, and the defendant who is the recipient. The fundamental nature of the restitutionary action, which is to require the defendant to disgorge a benefit obtained at the expense of the plaintiff, is lost sight of when the economic conception of benefit and the legal conception of benefit are conflated. Once the theory of free acceptance or "bargained-for" benefit is done away with, unjust enrichment theorists are forced to use incontrovertible benefit as a basis for saying that the defendant has been enriched in such situations. An incontrovertible benefit though can only ever be a case of "value created". That is, the performance of the service may have the effect of creating value to the performer if he or she has paid for it, or it may create value in the recipient if the value of an asset is improved, but the service itself can never be a mode by which value is transferred. There is therefore no accretion to the wealth of the defendant which has been transferred from the plaintiff's store of wealth through the performance of a service. The plaintiff's claim, even where an incontrovertible benefit is identified, must therefore be one for compensation rather than disgorgement. The underlying notion of quantum meruit, which provides a fair price for the work done, acknowledges that it is not the enrichment which is focused on in assessing the quantum, but the cost of performing the services to the plaintiff.

Muir suggests that Stoljar's framework for a remedial approach to compensate the plaintiff for its unjust sacrifice is a more appropriate mode of dealing with cases concerning the provision of services. Muir seems to prefer the view that services requested or acquiesced to should be dealt with in contract or something akin to contract.<sup>74</sup> It is submitted, however, that the theory proffered by Stoljar and

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<sup>74</sup> Ibid.

Muir for dealing with cases of unrequested services can also be successfully used to analyse cases where the provision of services has been requested or acquiesced in. Such an approach ought to be preferred to the fiction of an implied contract between the parties. Particularly in the context of de facto relationships, the implication of a contractual intention is entirely inappropriate. The application of this theory to that scenario is the subject of the next part of this paper.

## V: UNJUST SACRIFICE

### 1. Introduction

It has been demonstrated that the doctrine of unjust enrichment is inappropriate for dealing with cases concerning the provision of services. The concepts of free acceptance and incontrovertible benefit have a distorting effect on the basic principles underlying the theory of unjust enrichment. In cases where no enrichment can be found, an alternative remedial doctrine is needed. That doctrine cannot be restitutionary as “[t]he idea of restitution becomes unintelligible if it is separated from the notion of unjust enrichment”.<sup>75</sup> One alternative doctrine which has been advanced to take that role in commercial cases is Stoljar’s doctrine of recompense for unjust sacrifice.<sup>76</sup>

### 2. Elements of the Cause of Action

Pegoraro, following Stoljar, identifies three elements which must exist to enable a party to seek a recompensatory remedy:<sup>77</sup>

- (i) The plaintiff has suffered some financial loss/sacrifice;
- (ii) That loss is attributable to a provision of services to the defendant; and
- (iii) It would be unjust to prevent the plaintiff from being recompensed.

The first factor to establish is that the plaintiff has suffered some financial loss or has made a sacrifice of his time and effort, in providing the defendant with the services requested or acquiesced in. Now that the problems of finding a defendant’s enrichment are dispensed with, the loss to the plaintiff can be identified objectively. Usually, the loss will be quantified by assessing what a

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75 Birks, “Unjust Enrichment and Unjust Sacrifice” in *Restitution - The Future* (1992) 105.

76 See Pegoraro, “Recovery of Benefits Conferred Pursuant to Failed Anticipated Contracts - Unjust Enrichment, Equitable Estoppel or Unjust Sacrifice?” 23 ABLR 117.

77 Ibid, 117 and 135.

reasonable payment for the services rendered would be.<sup>78</sup> The ease with which the sacrifice element can be fulfilled requires that some limitation be placed on the situations in which the plaintiff can claim recompense. Without any limitation the plaintiff would be able to obtain payment for services foisted upon the defendant without any request on his part.<sup>79</sup> Rather than concentrating on the nature of the plaintiff's intention to transfer the benefit of the services to the defendant, the focus of the enquiry into the unjust factor must be determined by reference to the defendant's culpability. Thus, the doctrine of free acceptance appears to be the only unjust factor in the unjust enrichment analysis which can be used in the unjust sacrifice action. The doctrine of free acceptance, once freed of its role in proving enrichment, can operate to show that the plaintiff's sacrifice was unjust because the defendant freely accepted the provision of the services knowing that they were not being offered gratuitously.<sup>80</sup>

### 3. Application of Unjust Sacrifice to Commercial Cases

*Sabemo Pty Limited v North Sydney Municipal Council*<sup>81</sup> provides an example of a case where the unjust sacrifice principle could be recognised as the basis for granting a remedy where services have been provided and the defendant has known that the provider of the service had a non-gratuitous intent.

#### (a) *Sabemo v North Sydney Municipal Council*

In *Sabemo*, the defendant Council invited tenders for the construction of a civic centre on council land. The Council's preferred tender was that offered by the plaintiff. Although the Council did not accept the tender, the parties continued towards finalising a contract by jointly planning the project. The plaintiff undertook, at the Council's request, a good deal of preparatory work. This included engaging expert consultants to prepare three possible schemes for the development project. All of these schemes were rejected by the relevant building authorities. The Council asked the plaintiff to facilitate the preparation of new plans, which were subsequently approved by the building authorities. Throughout this period discussions between the parties' legal advisers failed to lead to an agreement and no contract was ever executed. The contract was still being negotiated when the Council unilaterally decided to abandon the project. The plaintiff sued to recover approximately \$500,000, representing the expenses it had incurred in preparing for the development project.

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<sup>78</sup> This coincides with the traditional remedial approach which awarded the plaintiff a quantum meruit.

<sup>79</sup> Limitations may be considered appropriately in connection with the "unjust" factors in the analysis.

<sup>80</sup> *Supra* at note 7, at 265.

<sup>81</sup> [1977] 2 NSWLR 880.

Justice Sheppard held, correctly if the approach in this paper is accepted, that unjust enrichment was not the appropriate principle to impose an obligation on the defendant to pay for work done outside a contract, as there had been no enrichment of the defendant.<sup>82</sup> Rather, Sheppard J based his decision on the notion of good faith in pre-contractual negotiations:<sup>83</sup>

Where two parties proceed upon the 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 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.

*(b) Re-analysis of Sabemo v North Sydney Municipal Council as an Action for Recompense for Unjust Sacrifice*

The sacrifice element in this case is made out simply by focusing on the plaintiff's objectively identifiable losses. Though the judge felt unable to quantify the amount of the loss, he indicated that work done to satisfy the plaintiff as to whether they should take the contract was excluded.<sup>84</sup> There was no need to constructively find any enrichment of the defendant. The unjust factor is supplied by a combination of the free acceptance of the services by the defendants, in that the Council requested that the plans be made, and failure of consideration, as the Council failed to grant the plaintiff the contract in the end. Justice Sheppard's notions of joint assumptions and unilateral abandonment are easily analysed under these two heads. A quantum meruit is the appropriate remedy, as it awards the plaintiff a reasonable amount for the services rendered at the defendant's request, and this was effectively the nature of the remedy ordered by Sheppard J.

#### 4. Application of Unjust Sacrifice to the De Facto Cases

The recent Canadian case of *Peter v Beblow*<sup>85</sup> provides an example of a case where, although the Court purported to award a constructive trust to a de facto partner on the basis of unjust enrichment, the facts failed to disclose an enrichment. The issue of enrichment was simply assumed by all three of the courts which dealt with the case. Like *Sabemo*, the case admits of reanalysis based on the principle of recompense for unjust sacrifice.

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<sup>82</sup> Ibid, 889-890.

<sup>83</sup> Ibid, 902-903 (emphasis added).

<sup>84</sup> Ibid, 903.

<sup>85</sup> (1993) 101 DLR (4th) 621.

(a) *Peter v Beblow*

Ms Peter and Mr Beblow lived together for twelve years, behaving ostensibly as though they were legally married. Both brought children to the relationship into Mr Beblow's home. He entered into the relationship with the sole intention of securing a housekeeper and step-mother for his children. Mr Beblow contributed a majority share to the purchase of groceries and household supplies, but Ms Peter looked after everything else relating to the home.

The trial judge found that Mr Beblow had been unjustly enriched at the expense of the plaintiff, since he had obtained the services of a housekeeper, homemaker, and stepmother for his children, without paying her in return for those services. The trial judge awarded her a constructive trust valued on the basis of a quantum meruit. He set the quantum at a sum equivalent to what Mr Beblow had been paying a housekeeper per month, prior to inviting Ms Peter into his home, for every month of their relationship. This amount was halved to allow for the benefit of free board and accommodation which Ms Peter had received from Mr Beblow. That amount happened to rather closely equate to the value of the house.

The Court of Appeal considered that neither the unjust factor, nor the requirement that there be no juridical reason for the enrichment, were made out. Their reason for this was that Ms Peter and her children had lived in Mr Beblow's home rent-free for twelve years. Further, Mr Beblow had contributed more to the family's grocery bill than Ms Peter had. Mr Beblow had never given any indication that he intended to pay for the services or to marry her. The Supreme Court of Canada, however, agreed with the trial judge that all elements of the unjust enrichment cause of action were made out on the facts.<sup>86</sup> A constructive trust was thereby ordered for the benefit of Ms Peter over the house legally owned by Mr Beblow. The Supreme Court considered that the services provided by Ms Peter to Mr Beblow had a sufficiently close connection with the property to enable such a remedy to be awarded.

(b) *Re-analysis of Peter v Beblow as an Action for Recompense for Unjust Sacrifice*

Given the Court's finding that the quantum should reflect the value of the domestic services provided by Ms Peter, this case can be analysed on the basis of unjust sacrifice. The sacrifice made by Ms Peter was of her domestic services, valued on the basis of a quantum meruit. There is no hint of the artificiality involved in identifying a defendant's enrichment. The essence of the action is openly recognised to be the sacrifice of time and effort, her human capital, by the plaintiff in performing the domestic services. The unjust requirement is satisfied, as in *Sabemo*, by a combination of free acceptance and failure of consideration.

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<sup>86</sup> Ibid, 631 and 644.

Mr Beblow not only acquiesced in the performance of the services by Ms Peter, which would be enough to constitute free acceptance when it is used only to fulfil the unjust element, but probably requested that she do so. His motivation in having her move in was after all held to be that he needed a housekeeper and he thought she would do the job. Further, it was held by the courts that Ms Peter's reasonable expectations in the context of the relationship was that she would obtain an interest in the property as a result of performing the services. Mr Beblow's conduct, in not recognising that interest meant that there had effectively been a failure of consideration. Granting Ms Peter an interest in the property proportionate to the value of her domestic services reflects the economic value of her contribution to the relationship.

## 5. Criticism of Unjust Sacrifice

The doctrine of unjust sacrifice does seem to provide a doctrinal basis for the award granted in *Sabemo v North Sydney Municipal Council* and *Peter v Beblow*, which is immune from the criticisms of the unjust enrichment analysis. There is no need to constructively identify a defendant's enrichment. The principle of unjust sacrifice does not, however, sit well in the context of de facto relationships. It does not fully recognise the true nature of the contribution made by the plaintiff to the relationship and her consequential interest in the property acquired in the course of the relationship. That interest cannot be properly recognised on a strict accounting basis where only the labour element of the plaintiff's contribution to the relationship is recognised. To focus solely on that contribution would effectively reduce the relationship to one of employer and employee, rather than one which is based on mutual support and trust. Such a conclusion is clearly unpalatable.

The operation of the unjust sacrifice principle faces another problem due to the very nature of de facto relationships. The plaintiff, though contributing to the relationship through the provision of domestic services, will also have received the "benefit" of "free" board and accommodation, and may well have enjoyed a higher standard of living than she would have otherwise. In the restitutionary, or more correctly recompensatory, paradigm in which unjust sacrifice falls, the plaintiff must account for these benefits prior to claiming that her sacrifice has been unjust. As Cooke P has suggested:<sup>87</sup>

[A] second and equally obvious major factor to be weighed is the value of the broadly measurable contributions of the claimant by comparison with the value of the broadly measurable benefits received. Contributions to household expenses, or to maintenance, repairs or additions, may amount to no more than fair payment for board and lodging and the advantages of a home for the time being. More than that is commonly needed to justify an award.

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<sup>87</sup> *Supra* at note 1, at 334.

This sort of apportioning process can be manifestly disadvantageous to a plaintiff whose only “economic” contribution has been labour in the form of domestic services. There is a tendency of the courts, and this is also reflected in the market value, to place a low value on domestic services. Further, the economic approach in these situations fails to credit the plaintiff with the opportunity cost of the sacrifice she may have made in leaving full time employment to have children, or support her partner in his career, with the reasonable expectation that the relationship would not fail.

It should be no surprise to anyone with experience of interpersonal relationships in the nature of marriage, that an approach which focuses strictly on either the defendant’s benefit, or the plaintiff’s sacrifice, will not truly recognise the interests of the parties in the context of the relationship. Perhaps the Australian approach which analyses the relationship as a joint venture better reflects the nature of the interests of the parties in the domestic rather than commercial sphere through taking the middle ground.<sup>88</sup> This approach is the concern of the next part of this article.

## VI: UNCONSCIONABILITY IN THE CONTEXT OF A JOINT RELATIONSHIP

### 1. Introduction

Given the inability of either of the unjust enrichment or unjust sacrifice analyses to adequately recognise the real nature of the parties’ interests on the dissolution of a de facto relationship, an alternative mode of analysis is required. The failure of each of those approaches has been shown to be rooted in the unitary focus on the interests of one of the parties to the relationship. To better reflect and protect the interests of the parties the analysis ought to recognise the special nature of the relationship as a whole, including the interdependence of the parties on each other, rather than simply the enrichment or sacrifice made by just one of the parties.

In *Muschinski v Dodds*<sup>89</sup> and *Baumgartner v Baumgartner*<sup>90</sup> the High Court of Australia appears to have gone some way to adopting such an approach. In those cases, the High Court discarded the traditional English approach of attempting to identify a common intention on the part of the parties to the relationship that property be shared in order that a constructive trust can be imposed over the defendant’s property in favour of the plaintiff. Rather than taking an approach

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<sup>88</sup> Supra at notes 4 and 5.

<sup>89</sup> Supra at note 4.

<sup>90</sup> Supra at note 5.

based on the unjust enrichment analysis used by the Supreme Court of Canada, the High Court of Australia purported to treat the dissolution of a de facto relationship analogously to the dissolution of a commercial joint venture where neither of the joint venturers can be said to be at fault.<sup>91</sup> Two cases in which this approach was initially adopted will now be reviewed.

(a) *Muschinski v Dodds*

The “unconscionability principle” was first adopted in *Muschinski v Dodds*.<sup>92</sup> Mrs Muschinski and Mr Dodds, who were in a de facto relationship, purchased a property on which to build a home and carry on a craft business. Mrs Muschinski paid the full purchase price and Mr Dodds undertook to complete and pay for extensive improvements to the property which included the renovation of the buildings currently on the property and the construction of a new home for the couple. The transfer was registered in the names of them both as tenants in common in equal shares. The relationship ended after only some of the improvements had been made by Mr Dodds. Any chance of the business going ahead ended with the relationship. Mrs Muschinski claimed that Mr Dodds held his interest in the property in trust for her either on the basis of a resulting, or constructive, trust.

The High Court of Australia unanimously held that the presumption of a resulting trust was rebutted as the parties had agreed that Mr Dodds should own his share beneficially from the beginning as a consequence of his promise to do the work required on the property.<sup>93</sup> It was held by the majority that Mr Dodds had to account to Mrs Muschinski for her contribution to the acquisition of the asset, as it would be inequitable for Mr Dodds to have a half share in a piece of property to which he had made very little contribution.<sup>94</sup> The members of the majority differed on their grounds for making the award. Chief Justice Gibbs held that Mrs Muschinski should receive half of the purchase price from Mr Dodds because he considered they were both liable for it under the contract of sale and purchase.<sup>95</sup> Justices Mason and Deane considered that a constructive trust should be imposed in favour of Mrs Muschinski on the basis of equitable principles applicable to cases of failed joint ventures.<sup>96</sup> In those cases, where a joint venture ended, without fault being attributable to either party, but one of the joint-venturers retained the benefit of property which was contributed to by the other for the purposes of the joint endeavour, it was considered unconscionable for the party holding the benefit to retain it without first recognising the contribution made by the other.<sup>97</sup>

91 Supra at note 87.

92 Supra at note 4.

93 Ibid, 593 per Gibbs CJ; 607 per Brennan J; 612 per Deane J.

94 Gibbs CJ, Deane and Mason JJ. Brennan and Dawson JJ dissenting.

95 Supra at note 4, at 596-599.

96 Ibid, 618-620.

97 Ibid, 620.



The intervention of equity was considered necessary to prevent Mr Dodds from unconscionably retaining his legal interest in the property when he had only made a minor contribution to it:<sup>98</sup>

It is the assertion by Mr Dodds of his legal entitlement in the unforeseen circumstances which arose on the collapse of the relationship and planned venture which lies at the heart of the characterisation of his conduct as unconscionable.<sup>99</sup> It follows that equity requires that the rights and obligations of the parties be adjusted to compensate for the disproportion between their contributions.

Justice Deane did, however, note that the identification of unconscionable conduct was not to be achieved through “random notions of what was fair and just as a matter of abstract morality” but should be confined to recognised and specific principles of equity.<sup>99</sup> In this case, the specific principles were those applicable to the premature collapse of joint relationships in the commercial context.<sup>100</sup> The commercial element in the relationship between Mrs Muschinski and Mr Dodds, together with Deane J’s limitation of the circumstances in which unconscionability could be identified, led to some uncertainty as to how the law would apply to relationships of a more strictly domestic nature. This uncertainty was partially resolved by the High Court of Australia in *Baumgartner v Baumgartner*.<sup>101</sup>

*(b) Baumgartner v Baumgartner*

Mr and Mrs Baumgartner were living in a de facto relationship for approximately four years. Prior to the relationship Mr Baumgartner had purchased a home unit. The home unit was financed by a mortgage which he continued to pay off during the beginning of the couple’s relationship. From the beginning of the relationship the couple pooled their earnings and their expenses, including the home unit mortgage payments, were paid from this pool. The couple later decided to sell the home unit, which was registered solely in Mr Baumgartner’s name, and purchase a block of land on which to build a house. The purchase was made in Mr Baumgartner’s sole name, and together with the subsequent building costs was financed through the sale of the home unit and a mortgage also taken in Mr Baumgartner’s name. Payments of the mortgage were made out of the common pool of income. Mr Baumgartner contributed fifty-five percent of the income to this pool, Mrs Baumgartner forty-five percent, though for three months she made no financial contribution as she left work to have and care for their child. Mrs Baumgartner left the relationship and instituted proceedings claiming that Mr Baumgartner held the property on trust for her.

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<sup>98</sup> Ibid, 622, per Deane J.

<sup>99</sup> Ibid, 621.

<sup>100</sup> Ibid.

<sup>101</sup> Supra at note 5.

The High Court of Australia held unanimously for Mrs Baumgartner. Chief Justice Mason, Wilson and Deane JJ found in Mrs Baumgartner's favour by applying the judgment of Deane and Mason JJ in *Muschinski v Dodds*.<sup>102</sup> The equitable principles applying to failed joint ventures were interpreted so as to apply to a failed personal relationship:<sup>103</sup>

[T]he parties [had] pooled their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child. Their contributions, financial and otherwise, to the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.

Their Honours opined that the parties had entered into what was the domestic equivalent of a commercial joint venture by pooling their resources in order to provide for their future security as a family.<sup>104</sup> As the joint venture, that is, the domestic relationship, failed, it was equitable that Mr Baumgartner hold an amount of the property equivalent to Mrs Baumgartner's contribution on trust for her. To allow him to deny Mrs Baumgartner's interest would have been unconscionable.

## 2. Criticism of the Unconscionability Approach

Though the analysis directed at preventing unconscionable conduct by a party to a joint venture more closely appreciates the importance of the nature of the relationship itself in the *de facto* cases, it does not seem to have been used by the High Court to come to any greater understanding of the interests of the parties. Rather, the High Court has continued to focus on the economic value of the contributions made by the parties in assessing the quantum of the remedy. In doing so the Court has analysed the interests of the parties similar to the Canadian courts in the unjust enrichment paradigm.<sup>105</sup> The joint venture analysis amounts to little more than an artifice used to justify the imposition of a proprietary remedy by way of a constructive trust in a situation where indirect contributions have been made and no other traditional trust analysis is available to attach to the property.

In concentrating on the economic value of the contributions made by the parties to the relationship, the approach must fail in the same way as the unjust

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<sup>102</sup> Justices Toohey and Gaudron substantially concurred with the majority, though the former considered that the judgment could equally have been made on the basis of the unjust enrichment analysis used by the Supreme Court of Canada.

<sup>103</sup> *Supra* at note 5, at 149.

<sup>104</sup> *Ibid.*

<sup>105</sup> Albeit illegitimately, as outlined in Part II of this article.

sacrifice analysis. An economic approach sits well in the context of commercial relationships but not de facto relationships, where the contributions of the parties are not purely economic.

*(a) Problems with the Economic Analysis of Contributions*

The contributions made by de facto partners in their relationship do not always contain an economic value and at times even when such a value can be ascertained, it may undervalue the true worth of services performed in the context of the relationship. For example, the domestic services performed by one partner in raising the partnership's children may have the effect of freeing the other from the requirement to care for the children thus enabling him to maximise his earning capacity for the benefit of the family. It will, however, also have the necessary effect of ending her financial contribution to the family. That being the only value recognised in the economic analysis, her interest will be marginalised.

Further, it cannot be said that partners who are truly committed to a de facto relationship, especially one which includes children, act independently of each other accepting the economic risk of their actions. Their lives and interests are intimately bound together with each being presumed to act for the benefit of the other. The partner who makes the commitment to care for the children can reasonably only be taken to have done so in the expectation that his or her partner will continue to have the partnership's interests in mind.

*(b) Continuum of De Facto Relationships*

To say that the economic approach does not sit well in the de facto arena does not mean it is entirely inapplicable. De facto relationships vary in the degree of trust and commitment the parties show towards each other. These elements distinguish de facto relationships in general from commercial relationships. The degree to which these factors are present also provides the grounds for distinguishing between different "grades" of de facto relationship. For example, where the de facto relationship at issue is one characterised by the same values of independence and the acceptance of economic risk as a commercial relationship,<sup>106</sup> an approach to the quantification of the constructive trust remedy based on the contributions of the parties was appropriate. However, where the nature of the relationship is one where the lives and expectations of the parties are closely intertwined economically and personally, the economic approach seems to break down. The purpose of the relationship is not the enrichment of one partner at the expense of the other, but to ensure the future wellbeing of them both through trust and mutual support, each contributing to the pool of resources as they are able. The role the law should play upon the dissolution of a relationship at this end of the

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<sup>106</sup> As in *Muschinski v Dodds*, *supra* at note 4.

continuum is to ensure that the parties' reasonable expectations for the future are protected. As the relationship was one characterised by trust and mutual support those expectations ought somehow to be realised.

To ensure the parties' reasonable expectations for the future are protected in interdependent relationships, the constructive trust should be continued with as a remedy. The constructive trust would be imposed on the legal owner of the property, not to reflect the parties' individual economic contributions to it, but to require that the legal owners hold the property for the benefit, not only of themselves, but also for the other parties to the relationship as well.

## VII: CONCLUSION

The Canadian courts have used the principle of unjust enrichment to justify an award of a constructive trust over the property of one partner in a defacto relationship for the other partner's benefit where domestic services have been provided. This principle has also attracted support in both Australia and New Zealand. The unjust enrichment analysis fails, however, because the services provided by the plaintiff in a de facto relationship can never constitute an enrichment of the defendant. Attempts to identify the performance of a service as an enrichment have resulted only in the creation of fictions which have the effect of distorting the principles which underlie the law of restitution in general. The unjust enrichment analysis should therefore be abandoned as the basis for awarding remedies in cases concerning the dissolution of de facto marriages.

The doctrine of unjust sacrifice was suggested as an answer to the problems confronted in the unjust enrichment analysis. This approach solves the problem of artificiality in constructively identifying an defendant's enrichment, through its focus on the plaintiff's sacrifice. However, it too fails to protect the interests of the parties in the relationship, and is yet to be judicially recognised. Its strictly economic approach, focusing only on the economic value of the labour provided by the plaintiff does not recognise the value of the services to the relationship. Further it effectively reduces the relationship between the plaintiff and the defendant to one of employee and employer. This does not reflect the true nature of the relationships of interdependence in a de facto marriage.

In extending the equitable principles used in commercial joint venture cases, first to relationships with a commercial and domestic element as in *Muschinski v Dodds*, and then to purely domestic cases in *Baumgartner v Baumgartner*, the High Court of Australia has, perhaps unconsciously, realised that the interests of the parties lie in the co-operative nature of the relationship. However, in continuing to focus on the nature of the parties' respective "contributions" to the relationship rather than the relationship itself, it is submitted that the High Court

has failed to reach an answer which appropriately recognises the interests of the parties in the full spectrum of de facto relationships.

It has been suggested that the reasonable expectations of the parties in the relationship might better be realised through a close analysis of the nature of the relationship itself. Where the parties consider themselves to be economically independent of each other this should be acknowledged. In such cases the remedy provided should protect the parties' expectations by ensuring that each party retains the benefit only of its personal economic contribution to the relationship. Where those contributions include the provision of domestic services, the market value attributable to them will have to suffice. Where the relationship is one of trust and mutual support and the parties have organised their affairs in a way which indicates a co-operative approach towards providing for their future together, the economic analysis is no longer appropriate. Instead, the law of equity ought to provide a remedy which reflects the parties' reasonable expectations by requiring that the legal owners of property acquired for the purposes of the relationship, hold that property for the mutual benefit of the parties to the relationship.



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