F W GUEST MEMORIAL LECTURE

UNJUST ENRICHMENT

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The F W Guest Memorial Trust was established to honour the memory of Francis William Guest, MA, LLM, who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

> "All names of good and evil are images: they do not speak out, they only hint. He is a fool who seeks knowledge from them.
> Whenever your spirit wants to speak in images, pay heed; for that is when your virtue has its origin and beginning."[1]

In the idea of "unjust enrichment" lies the notion that if one person becomes the richer at another's expense, special legal considerations arise. The court should give relief to the one who has suffered loss, whenever the retention of the benefit would be "unjust". This broad notion corresponds with the law of "restitution", a term which covers a wide range of cases, including, for example, the merchant who makes a payment on a contract which is entirely inappropriate because of some vital fact of which he is unaware; the granny who trustingly builds a flat on her son-in-law's property; and the fiduciary who makes an unfair profit through secret deals.

The existence or non-existence of a "law of restitution" was much discussed in the 1930's, following the appearance of the American Law Institute's *Restatement of the Law of Restitution.*[2] This controversy[3] has had a resurgence, with the publication of Goff and Jones' major English text on the same subject,[4] which sparked off a further theoretical

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1 Nietzsche, *Thus Spoke Zarathustra* (Hollingdale trans 1969) 101.

2 American Law Institute, *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (1937); see Seavey and Scott, "Restitution" (1938) 54 LQR 29; Winfield, "The American Restatement of the Law of Restitution" (1938) 54 LQR 529; Winfield, *The Province of the Law of Tort* (1931) 131-141; Allen, "Fraud, Quasi-Contract and False Pretences" (1938) 54 LQR 201. See Dawson, *Unjust Enrichment: A Comparative Analysis* (1951) for a more general view.

3 Views opposed to those referred to in the previous note were expressed by Holdsworth, "Unjustifiable Enrichment" (1939) 55 LQR 37.

4 Goff and Jones, *The Law of Restitution* (2nd ed 1978).

debate.[5] Not only theorists but also judges, both in England[6] and New Zealand,[7] have found it necessary to enter the lists on one side or the other. The mere mention of the term "unjust enrichment" seems to play on deep chords of approval or disapproval in the legal heart. The main focus of attention is on claims which, until recently, were known as "quasi-contractual"; they involve the recovery of money paid, and recompense for services rendered and goods supplied. Are these claims illustrative of a broad legal theory of unjust enrichment, or are they differently based?

My purpose is first to ask what is meant by a claim that there is, or is not, a law of unjust enrichment in New Zealand? Secondly, I will put forward my own view of the proper place of the concept of "unjust enrichment" in common law legal systems today. Finally, I will take a New Zealand case which is generally considered to be one of extreme difficulty, and attempt to put my analysis to work. I would like to think that there is nothing mysterious or unfathomable about the concept of unjust enrichment, as long as one does not ask too much of it.

I A Law, a Social Goal, a Doctrine or a Principle?

Perhaps the largest claims for the concept of unjustifiable enrichment are made by Professor Samek.[8] He calls it a "legal conceptual scheme", which is "constructed and reconstructed through a process of trial and error by judges, and through a process of rationalisation by legal commentators".[9] A legal conceptual scheme is "a loose agglomeration of first order models" which have "certain family resemblances between them which may but need not include a common legal key concept";[10] these concepts are drawn from specific legal rules.

5 See eg (1978) 41 MLR 330; McKay, "Avondale Printers v Haggie: Mr Justice Mahon and the Law of Restitution" [1980] NZLJ 245. In Canada, a pitched theoretical battle is in progress: see Samek, "Unjust Enrichment, Quasi-Contract and Restitution" (1969) 47 Can Bar Rev 1; Fridman, "Reflections on Restitution: (1976) 8 Ottawa LR 156; Samek, "The Synthetic Approach and Unjustifiable Enrichment" (1977) 27 U Tor LJ 335; Fridman, "Restitution Revindicated, or the Wonderful World of Professor Samek" (1979) 29 U Tor LJ 160.

6 See eg *Greenwood* v *Bennett* [1973] 1 QB 195, 202 per Lord Denning MR. Cf *Morris* v *Tarrant* [1971] 2 QB 143, 160-162 per Lane J; *Orakpo* v *Manson Investments Ltd* [1978] AC 95, 104 per Lord Diplock.

7 *Van den Berg* v *Giles* [1979] 2 NZLR 111, 121-122 per Jeffries J. Cf *Carly* v *Farrelly* [1975] 1 NZLR 356, 363 per Mahon J; noted (1975) 6 NZULR 367; *Avondale Printers and Stationers Ltd* v *Haggie* [1979] 2 NZLR 124, 144-155 per Mahon J. These last two cases might instructively be considered in the light of the comment in Palmer, *The Law of Restitution* (1978) Vol 1, 6 that "instead of this rejection leading to a higher degree of certainty than is found in American law, the effect seems to have been almost the opposite. In ways largely unpredictable English judges, after rejecting an extension of quasi-contract, may give relief through the use of constructive trust, basing decision on ideas no more precise than those rejected at law." The discussion of the concept of "want of probity" in *Carly* v *Farrelly* at 367-368, and of "equitable fraud" in *Avondale Printers* at 159-160, indicates that no very high degree of precision is possible in these matters. See McKay, supra n 5 at 248-249. For a different approach to the constructive trust, see Seavey and Scott, supra n 2 at 40-45.

8 Supra n 5.

9 "The Synthetic Approach and Unjustifiable Enrichment" (1977) 27 U Tor LJ 335, 336.

10 "Unjust Enrichment, Quasi-Contract and Restitution" (1969) 47 Can Bar Rev 1, 3.

Once established, the legal conceptual scheme performs prodigious feats. According to Professor Samek, it has "a *systematising* function, a *developmental* function and a *social* function".[11] As I understand him, the conceptual scheme brings rationality and consistency to the law; it permits legal doctrines to be developed and extended without distortion of their original purpose; and it is related to one or more significant social purposes which the rules are designed to achieve. These functions are "interdependent", that is, carried out simultaneously and harmoniously.[12] A successful scheme (judged, it seems, not upon its acceptance by judges,[13] but by its "relevance to the legal rules with reference to which it is constructed, by its simplicity and elegance, and by its legal and social fruitfulness"[14]) receives the ultimate accolade: it is deemed fit to be regarded as a basis for a "branch of law".

As an ideal the conceptual scheme has much to commend it; no one would doubt that law should be systematised, flexible enough to meet new situations, and relevant to a recognisable social purpose. Systematisation is achieved through sound legal classification, and the enunciation of doctrines of general application. Flexibility is attained by the recognition of underlying principles with implications going far beyond the minutiae of individual decisions. Social goals are openly recognised by statutory or judicial statements of policy.

What is difficult to accept, however, is Professor Samek's assumption that the same conceptual scheme can achieve all these things simultaneously and harmoniously. It seems more likely that the three desiderata will work in opposition to one another. If a rule and its associated concepts are clear, there will be little room to develop it rationally. If you develop a principle as reason dictates, you may lose sight of your social goals. If you allow your social goals to predominate, you may lose any vestige of a coherent logical system. Certainly, in the case of restitution, such tensions are a matter of everyday observation; we are constantly faced with problems of choosing between one of the desiderata and another. Armed only with Professor Samek's notion of a "legal conceptual scheme", we cannot even begin to make a choice.

I am reminded of a wall poster which portrays a most curious beast, its several parts assembled from a wide variety of creatures. The poster announces boldly, "Never be ashamed of what you are." It then asks plaintively underneath, "By the way, what are you?" So too with Professor Samek's legal conceptual scheme; by giving the concept of unjustifiable enrichment too many roles in the system, it depreciates its worth and gives it no effective role at all. If we are to make further progress in this enquiry, we have to ask much more specific questions about the functions of unjust enrichment and restitution.

1 *A Classification of Legal Rules?*

Goff and Jones begin their work with this statement: "The law of restitution is the law relating to all claims, quasi-contractual or other-

11 Ibid at 4; supra n 9 at 336.
12 Supra n 10 at 4.
13 Ibid at 3.
14 Idem.

wise, which are founded upon the principle of unjust enrichment."[15] This statement makes claims for restitution, the validity of which are not yet demonstrated. Can we identify particular rules of law as being "founded upon" the principle of unjust enrichment? If we can so identify them, is this a suitable characteristic on which to erect a legal classification?

Before I go further, I must pause to observe that the art of classification is in a very uncertain state in jurisdictions which adhere to the common law. English writings seem either tentative,[16] or strongly reminiscent of continental theorising on the subject.[17] Perhaps common lawyers are little given to the type of introspection which accompanies a deep concern for classification. When one turns to civil law, one finds that the standard classification does not have restitution as a separate head of law.[18] Perhaps it is seen more as a subsidiary doctrine which grows up around relatively circumscribed code provisions or even independently of the code.[19] These observations do not, I am afraid, augur well for the utility of the proposed classification.

At first sight, though, it is intellectually attractive to make a tripartite division of the law of personal obligations into contract (dealing with agreements, or the plaintiff's "expectation" interest), tort (dealing with his right not to be caused loss, his "damage" interest) and restitution (dealing with his right to recover property wrongfully retained by another, his "enrichment" interest). Should we not recognise this third type of legal claim, if only to redress the balance in academic theorising, where for too long emphasis has been given only to tort and contract?

Unfortunately, there is a darker side to the tripartite division. By making such a distinction, we may be obscuring fundamental links between tort, contract and restitution. Professor Perillo has contended forcefully that in America the artificial theoretical division between contract and restitution is logically untenable, and has impeded the courts from reaching satisfactory decisions.[20] It is no coincidence that we find ambiguity in Goff and Jones' various attempts to deal with this issue. They state that, "[i]f A confers a benefit on B under a valid contract, he must seek his remedy under that contract and not in restitution."[21] The plaintiff "can bring a restitutionary claim only if the contract can be brought to an end, rectified, rescinded or otherwise set aside."[22] But it would be wrong to assume from these statements that benefits conferred under a contract are immune from attack under the law of restitution. In a later part of

15 Supra n 4 at 3; cf Seavey and Scott, supra n 2 at 31.

16 Eg *The Division and Classification of the Law* (Jolowicz ed 1970).

17 Eg Keeton, *The Elementary Principles of Jurisprudence* (2nd ed 1949). See also Salmond, *Jurisprudence* (12th ed Fitzgerald 1966) Appendix 3; Paton *A Textbook of Jurisprudence* (4th ed 1972) ch 5.

18 Gareis, *Introduction to the Science of Law* (3rd ed Kocourek trans 1968) 162-175.

19 See eg Friedmann, "The Principle of Unjust Enrichment in English Law" (1938) 16 Can Bar Rev 243, 253-261; Gutteridge and David, "The Doctrine of Unjustified Enrichment" (1934) 5 CLJ 204; Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law" (1962) 36 Tul LR 605.

20 "Restitution in a Contractual Context" (1973) 73 Columbia LR 1208.

21 Supra n 4 at 26.

22 Ibid at 29.

the work, the authors make it clear that they see claims to rescind contracts as a "form of restitutionary relief".[23] If that is so, however, one reaches the very dubious proposition that whether a contract stands or falls is not the concern of the law of contract, but that of the law of restitution. In this context it does not pay to draw hard and fast lines of demarcation between contract and restitution. It puts the theorist in a quite needless dilemma in cases where both contractual and restitutionary considerations have to be interrelated.[24]

The concept of restitution or unjust enrichment is a comparative newcomer on the legal scene, both in common law and civil law jurisdictions.[25] It would be surprising if it could be accommodated as a separate classification without some distortion of existing principle and practice. Many problems have been solved without reference to it; we can see in hindsight that they raise restitutionary issues, but other legal principles have been called in aid. Examples are the tortious doctrines of trespass and conversion, and much of the law of contract. Even in modern law, we tend to turn to restitutionary ideas as a last resort, when more traditional methods of analysis have failed. We look at the law of succession, for example, and find the example of the murdering beneficiary who is deprived of his share under the will; should that salutary rule be classified as part of the law of restitution and not the law of succession? In the law of real property, we point to isolated examples such as granny flats, and improvements made by mistake on another's land, to show the need for restitutionary ideas. It is clearly beneficial for textbook writers to explore the full dimensions of these new ideas, and point to techniques which are commonly used in their application. A comprehensive and illuminating text such as Goff and Jones' work can only be welcomed, but its success does not on that account create a new and distinct head of law.

2 *A Social Goal?*

Under the last heading, I contrasted the restitution interest with (a) the "damage" interest (associated particularly with the law of tort) and (b) the "expectation" interest (associated particularly with the law of contract). This contrast was discussed in an influential article written by Fuller and Perdue, [26] describing the underlying policies where damages are awarded for breach of contract.[27] In that context the damage interest is better described as "reliance", that is to say, it is concerned with losses incurred by a contracting party because he relied on the future performance of the contract. The authors suggested that all three objectives lie behind the award of damages,[28] notwithstanding the general rule that contract damages are designed to put the plaintiff in the same position as

23 Ibid at 121 (in the context of rescission for misrepresentation).
24 Cf Samek, supra n 9 at 345-347, 348-362; for a criticism of this approach see Fridman, "Restitution Re-indicated, or the Wonderful World of Professor Samek" (1979) 29 U Tor LJ 160, 162-163, 166.
25 Cf Dawson, supra n 2 at 107-109.
26 "The Reliance Interest in Contract Damages" (1937) 46 Yale LJ 52, 373.
27 Ibid at 53-54; see Goff and Jones, supra n 4 at 13.
28 Ibid at 62.

he would have been if the contract had been carried out (that is, to give effect to his expectation interest, rather than his reliance or restitution interest).

What is especially significant about this thesis is the emphasis given to the "restitution interest", as the interest most deserving of judicial intervention. In a passage which even today gladdens the heart of the latent restitutionalist,[29] the authors state:[30]

> It is obvious that the three "interests" we have distinguished do not present equal claims to judicial intervention. It may be assumed that ordinary standards of justice would regard the need for judicial intervention as decreasing in the order in which we have listed the three interests. The "restitution interest", involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit, but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.

Surely the day will come when the restitutionalist can come out and claim his rightful place under the legal sun?

I am afraid, however, that we have to ask some more searching questions before we can reach this happy conclusion. The proposition is one, not of mathematics, but of justice; positing a purposive legal system, it asserts that the claim to restitution is a stronger social interest than others which are likely to be pressed upon the judicial mind.

Is it really more important to society to see that stray, casual gains are restored, in preference to ensuring the due observance of agreements, and the fair allocation of losses? I find such a claim implausible. The extract from Fuller and Perdue's article has to be seen in context; they assume in each case that the occasion for the enrichment or loss is the defendant's breach of contract. In that context, the thesis makes sense. But it cannot be carried over into a wider area, without regard to the particular actions and situations which have led up to the acquisition of a gain. If we are looking for social considerations, they must surely arise out of the particular transactions in question, rather than the mathematics of enrichment and loss.

I even wonder whether there is any such thing as a "restitution interest". Clearly, we have an interest in getting back something we have lost; but do we have a separate and distinct interest to prevent others from keeping it? Such considerations do, of course, affect the conscience of the recipient. In the ancient debate between the Doctor and Student, we are told "[i]t is necessary that thou ever hold a pure and clean conscience specially in such things as concern restitution for the sin is not forgiven; but [unless] the thynge is wrongfully taken be restored."[31] Such

29 I am indebted to Mr D F Dugdale for this graphic phrase.

30 Supra n 26 at 56. The reference to Aristotle is to *Nichomachean Ethics* 1132a-1132b; see *Nichomachean Ethics* (Ostwald trans 1962) 120-123. Aristotle suggested this somewhat narrow and mathematical approach to justice as only one of a number of ways of doing justice; "distributive" and "reciprocal" justice depended upon more complex considerations.

31 St Germain, *1 Doctor and Student* (1527) ch 10.

considerations also make it easier for the court to be adventurous in allowing relief, secure in the knowledge that orders can be made which will not impose loss or hardship on a defendant, since he merely has to restore something he would otherwise never have acquired. These are no doubt social values of a kind, but hardly pre-emptive or predominant ones.[32]

While the fact that one person has been enriched at the expense of another is a significant factor in any legal equation, it is misleading to suggest that the courts are, or should be, tied to any special policy or social goal in dealing with such cases. The fact of loss, rather than the retention of enrichment, will in many cases remain the crucial feature.[33] The correction of unjust enrichment is not a purpose which is enjoined upon us by holy writ, nor is it one for which we should necessarily sacrifice other legal and social concerns.

3 *A General Right to Restitution?*

Under the present law, at least in England and New Zealand, we do not find any broad doctrine of restitution. The law is contained in a series of specific rules, for example, dealing with money paid under mistake or duress, or with the right of recovery when one person pays another's debt, or improves another's land. Each has its own separate legal requirements. Such a fragmented state of doctrine is sometimes unfavourably compared, for example, with the law of negligence, which is couched in the most general terms and applies to a wide variety of different situations. Should not the law also recognise a general rule that no person should be unjustly enriched at the expense of another?

This challenge is taken up by Goff and Jones, who write of the possible development of the law towards such a general doctrine. They state:[34]

> The cases provide good evidence that this growth is in fact taking place and will continue. Indeed they suggest that the law is now sufficiently mature for the courts to recognise a generalised right to restitution. It is proper that the courts should do so. The combination of unjust impoverishment and unjust gain presents the strongest case for judicial intervention and relief.

They go on to give the general outline of such a general rule.

Goff and Jones' general approach to restitution is strongly influenced

32 See generally Macaulay, "Restitution in Context" (1959) 107 U Pa LR 1133.

33 Samek, supra n 10 at 27-29 seems to be working towards this conclusion. There may, however, be special situations, eg where a fiduciary is obliged to restore a gain which his beneficiary could not have made, in which public policy demands that a wrongdoer who has inflicted no loss surrender his benefit: cf *Boardman* v *Phipps* [1967] 2 AC 46. In such cases, the beneficiary has an interest in the due performance of the fiduciary's duty, and accounting for the gain may be one way of compensating for intangible losses caused by breach of that duty, as well as setting a good example. Compare also the case of the beneficiary who is found to have murdered his testator and loses his share in the estate to someone who may be unconnected with the wrongdoing: cf *Re Pechar deceased; Re Grbic deceased* [1969] NZLR 574..

34 Supra n 4 at 13. Cf Coleman, "The Concept of Unjust Enrichment in English Law" (1979) 10 Cambrian LR 8, 17.

by American jurists, who postulate that "[a] person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust."[35] But in American theory, the fundamental concept of restitution "requires an extensive set of individual rules to spell out what is meant by 'unjust', especially since we are met with the fact that in certain situations, due in part to historical accident, a person who has obviously benefited another is not entitled to recover".[36] Professor Palmer, who has recently published a major treatise in this area, speaks of unjust enrichment as "a wide and imprecise idea",[37] perhaps a "general theory",[38] something which is associated with a particular "working method"[39] leading to the "development of a workable system of principles and rules".[40] In their assertion that such a system of rules can be by-passed in favour of a generalised right to restitution, and that such a move is both desirable and imminent, Goff and Jones go well beyond the present state of American theory.

The traditional criticism of such a doctrine is that no general doctrine of law should include such a soft concept as "unjust":[41] "No stable system of jurisprudence could permit a litigant's claim to justice to be consigned to the formless void of individual moral opinion."[42] Thus baldly stated, the criticism puts the proponent of a generalised right in an impossible dilemma. If he fails to respond, the critic's worst fears are amply confirmed. If he attempts to respond by showing how particular types of cases are dealt with in a predictable way, he ends up with a set of rules which refute his own theory. It is small wonder that the answer most often given to the criticism is an affirmation of faith in the ability of judges to work things out, coupled with dark hints about other generalised doctrines which, in the view of the restitutionary theorist, are really no better. Our understanding of the issues is not, I am afraid, much enhanced by such debates.

It is instructive to see how Goff and Jones attempt to extricate the generalised doctrine from these difficulties. For them, the doctrine has three elements or requirements: (1) the enrichment or benefit; (2) its acquisition at the plaintiff's expense; (3) the injustice of allowing the benefit to be retained.[43] Little difficulty arises with the first two of these elements which a reasonably elastic treatment will not solve.[44] When they

35 Seavey and Scott, supra n 2 at 32. Cf *Restatement of the Law of Restitution,* supra n 2 section 1.
36 Ibid at 36.
37 Supra n 7 at 5.
38 Ibid at 2.
39 Ibid at 40-44. Cf Dawson, supra n 2 at 117-118.
40 Ibid at 41.
41 Holdsworth, supra n 3 at 51, 53.
42 *Carly* v *Farrelly* supra n 7 at 367.
43 Supra n 4 at 13-14.
44 Ibid at 14-23. However terms such as "benefit" are also vague, having several possible meanings: cf Palmer, supra n 7 at 44-47. Logically, the "principle of unjust enrichment" cannot determine which of these meanings of "benefit" are selected in any particular case, since "benefit" is one of the elements of the principle itself. So some other policy or principle must also be at work here, the term "benefit" being left ambiguous to allow for this.

get to the problem of injustice, the authors make a clever transposition. Instead of saying what injustice is, they define it in negative terms,[45] by pointing to the outer limits of restitutionary theory. Time does not permit an exhaustive analysis of these limiting principles, but two in particular deserve mention. One is the rule that restitution is excluded where the plaintiff has acted officiously in conferring the benefit. The other is the exclusion of restitution for benefits conferred under a valid common law obligation. The authors' theory is evidently that as long as a case is clear of these and the few other limiting principles, retention of a benefit is to be considered "unjust" and recovery should be allowed accordingly.[46]

For my part, I wonder whether the traditional criticism can be met so easily. On investigation, the so-called limiting principles lead us to further difficult issues and restrictions on relief; very few restitutionary cases will not be caught up somewhere and have to be disentangled. Are they really mere limiting or exclusionary principles, or do they touch on matters which are central to the application of restitutionary principle?

Consider the exclusion of benefits officiously conferred: "A person who *officiously* confers a benefit upon another is not entitled to restitution."[47] The policy reasons, offered by Goff and Jones, are somewhat obscure. The authors state that "[s]uch expressions as 'officiousness' or 'mere volunteer' are simply a 'form of legal shorthand' which conceals the conclusion that a defendant should not be required to pay for benefits which he neither solicits nor desires."[48] That is a matter relating to the mind of the defendant, not the plaintiff; yet the way in which a plaintiff meets the charge of "officiousness" is by showing that he himself made a mistake, or acted under pressure.[49] If indeed there is any policy against restitution of unsolicited benefits, the authors themselves argue most cogently and persuasively against it earlier in the chapter[50] when advancing their theory of "incontrovertible benefit". The underlying justification for this principle is therefore puzzling.

It is not easy, either, to see the advantages to be gained by calling the "officiousness" doctrine a limiting principle. It will be recalled that under existing law, one has to put one's claim under some recognised heading — mistake, compulsion, false expectation and the like. The new doctrine, with its limiting principles, has the virtue of making this unnecessary. However, the process of reasoning now runs: "You will not obtain restitutionary relief if you have been officious; to prove you were not officious, you must show that you were mistaken, or coerced, or

45 Ibid at 24. Dawson, supra n 2 at 119-127, doubts whether such an approach would work in the American system without a distinction being drawn between "direct" and "indirect" enrichment, with considerable restrictions on recovery in the latter case.

46 Ibid at 24. Cf French systems of law, where the principle is described as one of enrichment "without cause": see eg Gutteridge and David, supra n 19 at 212, 215-218; Fine, "Cause in the Quebec Law of Enrichment Without Cause" (1973) 19 McGill LJ 453; Nicholas, supra n 19 at 624-633.

47 Ibid at 35.

48 Idem.

49 Ibid at 35-36.

59 Ibid at 16.

acted in anticipation of some transaction which did not materialise." Is the state of legal doctrine very much advanced by this double-jointed way of going about things? The authors have simply skirted around the real issue — what are concepts such as mistake or duress doing in the new theory, and what function did they perform in the old?

Similar problems arise with the other limiting principle I mentioned, that the defendant is not unjustly enriched if the plaintiff "conferred the benefit . . . in pursuance of a valid common law . . . obligation which he owed to the defendant",[51] in particular, where "A confers a benefit on B under a valid contract".[52] Goff and Jones point out, consistently with established law, that the contract must first be "brought to an end, rectified, rescinded or otherwise set aside."[53] Even this preliminary is apparently not always required; some contracts can be treated as "unconscionable" and simply not enforced.[54] Nevertheless, it would seem that the unrescinded contract is in general a solid bulwark against restitutionary relief.

Again, further investigation demonstrates that this is not so. Using the same robust approach the authors employed when dealing with "officiousness", we can say that the concept of "rescinding" or "setting aside" a contract is merely a compendious way of indicating that the court does not propose to treat it as binding on the parties, and intends to substitute a different regime to order their mutual affairs. When we discover that the process of rescission is not the function of the law of contract, but is itself a restitutionary remedy, then the "limiting principle" becomes meaningless. It does not serve to keep restitutionary principle out; it simply directs the reader's attention away from more important theoretical questions.

The problem of defining the term "unjust" still remains, for all the authors' efforts to will it away. We are, I suspect, talking about issues which are central to the justice of the restitutionary claim. Has the plaintiff so conducted his actions that he should be able to get back money which he, apparently willingly, paid? Should an existing contract govern the parties' relationship, or should the matter be considered afresh? Mistake, coercion, false expectation, all are vital facts in making our assessment. Perhaps one day we will reach the point where we can link all this together within the confines of a single doctrine, but it seems that day is still a long way off. These most recent efforts to set up a more general doctrine do not, unfortunately, stand up to close examination.

4 *A General Principle?*

Through a process of elimination, we are left with unjust enrichment as a general principle — if, indeed, it has any place in the law at all. Objections of vagueness have much less force; legal principles are necessarily vague, and capable of varied application according to the

51 Ibid at 25.
52 Ibid at 26.
53 Ibid at 29.
54 Idem.

exigencies of particular situations. Equitable maxims such as "equity is equality" and "he who comes to equity must come with clean hands"[55] are typical illustrations of principles which are diffuse and perhaps a little conclusory, but which nevertheless serve a useful function.

There are, however, other possible principles which vie for consideration as the underlying basis of quasi-contractual claims. Sir William Holdsworth, while accepting that the underlying motive for the law of quasi-contract might well be restitutionary in character,[56] still doubted whether a principle of unjust enrichment should be recognised in English law. Taking issue with Lord Wright's views on this subject,[57] he preferred to adopt what is known as the "implied contract" theory: "I think that the English principle based upon a contract implied by the law makes it more possible to work out some definite rules than the continental system and the system advocated by Lord Wright."[58]

In the 1960's, Dr Stoljar advanced an alternative theory for the law of quasi-contract. Drawing on profound historical studies, he argued that quasi-contractual claims have an intrinsically proprietary character; this is to be contrasted with the subsidiary or alternative role allotted to the proprietorship of Holdsworth.[59] Stoljar maintained that there is no room for notions of unjust enrichment, or fictional implied contracts, in the law of quasi-contract; at root, all such claims must depend either upon the assertion of ownership in money or other property which has been handed over to another, or else upon an actual contract between the parties.[60]

It is not my intention to dissect these outworn theories; both are now regarded as discredited, though the proprietary theory in particular still seems to have its adherents.[61] I do not think, however, that we should neglect altogether what they have to offer, in case a pure restitutionary principle proves insufficient to bear the weight we would like to put on it. They do draw attention to particular aspects of the problem which tend to be overlooked if we concentrate only on the principle of unjust enrichment, as I hope to show later in this lecture.

There is one view of the theory of restitution, however, which occasionally surfaces in the case law, and with which I would like to take issue here and now. That is the view that there are no principles or theories at all which are worth pursuing when we are talking about quasi-

55 See *Snell's Principles of Equity* (27th ed Megarry and Baker 1973) ch 3.

56 Supra n 3 at 37, 40, 53.

57 Wright, *"Sinclair* v *Brougham"* (1938) 6 CLJ 305; see also *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61-62 per Lord Wright.

58 Supra n 3 at 51.

59 Ibid at 37-40. It seems that the proprietary remedy is much more closely linked with quasi-contract than Holdworth recognised; see Sutton, "Tracing" [1982] NZLJ 67 (paper delivered to New Zealand Law Conference, 1981); *Chase Manhattan Bank NA* v *Israel-British Bank (London) Ltd* [1980] 2 WLR 202.

60 Stoljar, *The Law of Quasi-Contract* (1964) ch 1. See Wade, Review (1965) 16 U Tor LJ 473; Samek, supra n 10 at 18-22.

61 Scott, "The Right to 'Trace' at Common Law" (1966) 7 UWALR 463; Goode, "The Right to Trace and its Impact in Commercial Transactions" (1976) 92 LQR 360, 528.

contract and restitution. I quote a recent example from a judgment of Lord Diplock, where he observed:[62]

> [T]here is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law . . . . This makes particularly perilous any attempt to rely upon analogy to justify applying to one set of circumstances which would otherwise result in unjust enrichment a remedy of subrogation which has been held to be available for that purpose in another and different set of circumstances.

I would have thought that analogy (operating along the fluid channels of legal principle) is essential if there is to be "a system of logical and interrelated principles and rules."[63] As the law changes (as change it must) we will be left with little system or consistency if we rely only on the links forged by past generations of lawyers. Without constant reference to principle and analogy, the law will cease to live, and we will be left with the irrational vestiges of past legal thinking.[64] It is one thing for the law to be "cut adrift from its historic past";[65] quite another to remain forever a slave to it.

Will the principle of unjust enrichment perform this function? I must admit that I share some of the scruples of those who have rejected the concept of unjust enrichment, for being insufficiently pragmatic to accord with the traditions of the common law. Perhaps I am being unduly Nietzschean, but I distrust the image of "unjust enrichment" which modern theory projects in front of me. A great deal more elaboration may be needed before it becomes a practical principle, a vehicle of knowledge and not a mere indication of striving towards an unseen goal.

II Towards a Theory of Unjust Enrichment

The various theories of restitution I have just referred to have one thing in common — they assume that there is a single, unifying principle upon which we can draw to explain and justify the decisions within its ambit. Whether the theory be one of implied contract, property, or unjust enrichment, the same assumption is made. Once the principle is identified, it is then only a question of elaborating upon the various elements of the principle. In the case of unjust enrichment, for example, we explore the notions of "benefit", "loss to the plaintiff" and "unjust retention", as they are applied in the decided cases, and we will have our answer. My earlier comments on Goff and Jones' forays in this area give some idea of the degree of success such a method has attained. While stimulating and vital, it leaves a great many questions unanswered, often the ones which in my own researches I have found to be critically difficult.

The theory I would like to put forward is predicated upon a different

62 *Orakpo* v *Manson Investments Ltd* supra n 6 at 104. See (1978) 41 MLR 330; (1977) 93 LQR 494.

63 Holdsworth, supra n 3 at 52.

64 Cf *Re Cleadon Trust Ltd* [1939] 1 Ch 286, 314 per Scott LJ.

65 Holdsworth, supra n 3 at 52.

approach. It derives more from observation than *a priori* rationalisation, and departs from current theorising about the principle of unjust enrichment;[66] it is perhaps a reaction to it rather than a further step along the same road. What I would propose is that underlying cases on restitution, there is not one principle, but at least three and possibly more. These principles are fairly straightforward and require little elaboration to be applied directly to the facts of each case. The acute problems arise where these principles conflict. Because they do conflict, and because there are at present only pragmatic solutions to such conflicts, theorists have to hide behind words such as "unjust" or "without cause", when describing the type of enrichment which the courts will remedy.

In expressing these principles I have dressed them up in flowery language, as befits principles, and given them serious names. I hope that will not detract from their common and everyday significance. Here they are:

1 People who enter into transactions (contractually or otherwise) are entitled to have the expectations thereby engendered adequately protected *(the principle of transactional integrity).*

2 People who own property are entitled to have that property protected even when it passes into and through the hands of others *(the principle of security of property).*

3 People who, through their actions or as a result of the loss of their property, enrich others and are claiming compensation or some other remedy, do not need to establish wrongdoing or fault in order to recover; the enrichment alone may be sufficient grounds for recovery *(the principle of enrichment).*

   Conversely, if the defendant has not been enriched, or has lost the benefit he acquired, the plaintiff cannot rely on the principle of enrichment, though he may have other rights.

It is, of course, no coincidence that the first principle, with its emphasis on the transaction between the parties, corresponds with the implied contract theory of quasi-contract; the second, with the proprietary theory; and the third, with the unjust enrichment theory. Often theories have to be abandoned, not because they contain unsound ideas, but because too large a claim is staked out for them; when synthesised with other approaches, they still have much to offer.

There are one or two preliminary comments I would like to make about these three principles before applying them to concrete situations. To begin with, the first and second principles are of a different order from the third. They are based on well-established social interests, protecting, as they do, expectations and property rights. But as I have already suggested,[67] it seems doubtful whether people have a strong social interest that others be not enriched. The third principle is therefore no more than a way of going about things, which a court may choose to adopt in the absence of other compelling considerations.[68] In this, it is

66 For another "non-unitary" attempt at rationalisation see Waters, "Restitution: The Need for Reform" (1964) 17 Current Legal Probs 42.

67 Supra p 192.

68 Cf *Sinclair* v *Brougham* [1914] AC 398, 458 per Lord Sumner; Wright, supra n 57.

akin to the maxim "equity is equality"; it is a moral or juristic principle which is socially neutral, and may easily give way to countervailing considerations, but in the meantime provides a principle of action where other stimuli are absent or in balance.[69]

My other preliminary comment is that the absence of reference to the "injustice" of the enrichment does not mean that concept has been conveniently banished from the scene. In some cases all three principles will point in the same direction, and the answer will be clear. But in others, conflict may arise between the three principles; in such cases it may be necessary to determine which shall prevail. So it is premature to assert that the adoption of the three-principle theory would cure the uncertainty and difficulties associated with unjust enrichment.

I am inevitably reminded of Professor Fuller's bumbling King Rex,[70] who virtuously gave up his habit of issuing vague and obscure commands, and thereafter made his orders clear and to the point — but contradictory! His long-suffering subjects were no better off, and neither would we be if we made no attempt to analyse problems where the courts are confronted with a choice between competing principles. In fact, much is already known about these conflicts, if we were prepared to look at decisions with that in mind, rather than trying to fit them into a unitary theory of restitution.

Let me now turn to a series of simple examples. All are drawn from the law about the recovery of money paid by mistake, and the answers are in accordance with New Zealand law on that subject.

Case 1 X pays Y money when he does not owe it; he knows this, but is tired of getting letters from Y demanding the money.

Here, Y is enriched and, in the absence of other considerations, might be made liable under the enrichment principle. But that would be to overlook the force of the transactional principle; X has paid the money to close off his dealings with Y, and Y could reasonably expect that X will not go back on that decision. The property principle is in harmony with this result, since it is not inconsistent with principles of ownership, that property in the money should pass as a result of a voluntary decision of the owner. So X cannot recover.

Case 2 X pays money to Y, not realising that he does not owe it.

Now the transactional principle works the other way; X would have seen the transaction as the payment of a debt, when its real effect was to provide a windfall for Y. To make that transaction (and similar future ones) "secure", it is necessary to give X a right to recover money paid on this false assumption. The property principle is in harmony with this result, or at least neutral; and the enrichment principle supports it. So X recovers the money.

69 *Snell's Principles of Equity,* supra n 55 at 36: "It has long been a principle of equity that in the absence of sufficient reasons for any other basis of division those who are entitled to property should have the certainty and fairness of equal division". So too, those who have to bear the burden of a loss? See *Thomas* v *Houston, Corbett & Co* [1969] NZLR 151, 171 per Turner J.

70 Fuller, *The Morality of Law* (1964) 35-36, 39.

Case 3 The same as case 2, except that Y immediately passes the money on to Z, without getting anything in return.

The transactional principle still points to recovery, since Y's subsequent actions are irrelevant to his transaction with X. So too, it seems, does the property principle. But if Y has nothing in his hands with which to meet the claim (for instance, if he is acting throughout as an agent for Z, to whom the money is paid), he cannot pay the money back without himself suffering a loss.[71] Adopting the converse of the enrichment principle, we might suggest that X ought not to recover in this example.[72] Both at common law and under New Zealand statutory provisions, the answers we get from the courts seem to be disparate and confused, as I shall show later.

A further problem arises if for any reason (for instance, the insolvency of Y) X elects to proceed against Z. There was no transaction between X and Z, so X must appeal to the property principle. Y had no right to the money, and X can in some circumstances "trace" his property into Z's hands.[73] But if Z had nothing to do with the transaction between X and Y, and received the money in good faith as settlement of a debt owed by Y, he will not be liable. In these circumstances, the security of the transaction entered into between Y and Z is a more compelling consideration than the source of the funds Y used.

Case 4 The same as case 2, except that the money is paid under a compromise agreement between X and Y, X having been wrongly advised of his chances of resisting Y's action.

The transactional principle is a critical feature here. A contract of this nature will not be set aside simply because X was mistaken, if that mistake was not known to, or shared by, the other party Y.[74] The law sets more stringent tests for operative mistake, reflecting the increased level of expectation where the relationship is a contractual one, compared with a mere payment of money. The element of compromise is inconsistent with attempts to avoid the contract on grounds that should have been investigated properly at the time.

The approach I am suggesting certainly puts more emphasis on the transactional element in restitutionary claims, though it will not, I hope, be interpreted as a revamped "implied contract" theory. It helps explain the significance of concepts such as mistake, duress, false expectation and the like; such concepts focus attention on the transaction which gives rise to the enrichment, and on factors which show that the transaction should not be taken at face value. The approach also justifies the differing standards which are often adopted as pre-requisites for relief, depending on whether it is a payment or a contract which is to be set aside.

By working through the application of the three principles, we can see

71 He may have a right of indemnity against Z; but what if Z is insolvent?

72 See Sutton, "Restitution — Change of Circumstance", *The Impact of American Law on English and Commonwealth Law* (Elkind ed 1978) 145-178.

73 For the proprietary implications of many apparently quasi-contractual actions see Sutton, supra n 59.

74 Contractual Mistakes Act 1977, s6(1)(a).

the reasons for the variety of results the courts reach, without having to say meekly that each case is dependent upon its own special facts. Indeed, the range of relevant facts remains fairly simple and uncluttered. The difficulty is not how to cope with a mass of unordered fact;[75] it is how to choose between competing orders of those facts. I would suggest that proper analysis of the choices the courts make at this level will lead to a broader understanding of the subject as a whole.

III The Theory Applied

The case I have chosen to illustrate how courts choose between these competing principles is *Thomas* v *Houston, Corbett & Co,*[76] a decision of our Court of Appeal in 1968. This seems to me to be a difficult case; Goff and Jones think the same way,[77] and show no desire to explain it. It is certainly an inconvenient case for a committed advocate of the unjust enrichment theory to have to deal with. Nevertheless, as the only appellate decision on the New Zealand statutory change of circumstance defence, and the only Court of Appeal judgment on mistaken payments in recent years, it cannot be ignored by New Zealand lawyers. It must surely set the scene for any further developments which occur in the law of quasi-contract.

The facts of the case are not particularly complex. Thomas is a trusting young medical practitioner with £400 to invest. He has a friend named Cook, who is a law clerk in a legal firm, Houston, Corbett & Co. Cook agrees to invest the money for Thomas, on the understanding it will be repaid in a few months' time. At that time, Cook is engaged in embezzling his employer's money, and the £400 is, it seems, all grist to the mill. Then the time comes to repay the money. With notable ability to turn a potentially dangerous situation to advantage, Cook finds the money — and much more — by practising another deception on his employer.

He tells his employer that Thomas is a client who is owed £1,381 by the firm, as a result of a transaction which Cook has supposedly handled — though this is pure fiction on Cook's part. The firm pays a cheque for that amount into Thomas' bank account. In the meantime, Cook goes to Thomas and advises him that his investment has proved successful; that a large sum of money has been paid into his account. However, part of it belongs to others who are interested in the investment transaction. On Cook's instructions, Thomas hands Cook a cheque for £840, leaving £400 principal and £141 profit in his account, out of the £1,381 paid in. At this point, Thomas is repaid, and Cook has acquired £840 in a way which will not excite a bank manager's suspicions.

Eventually all is discovered. Cook is prosecuted, and presumably he is insolvent and cannot respond to any judgment given against him. Houston Corbett sues Thomas for the recovery of the £1,381 paid into

75 The fears expressed by Mahon J in *Avondale Printers and Stationers Ltd* v *Haggie* supra n 7 at 154-155, would not be well founded on this view of unjust enrichment.

76 [1969] NZLR 151; noted (1969) 3 NZULR 323.

77 Supra n 2 at 546.

Thomas' account. Thomas defends upon a variety of grounds, all of which are closely linked to the three principles I have mentioned.

1 *A Transactional Approach*

Thomas argues that Cook was at all times acting as an agent for Houston Corbett, under powers actually or ostensibly conferred on him by that firm. The effect of this argument, if accepted by the Court, would be to cover all the events with a kind of contractual blanket, justifying a reliance or expectation on Thomas' part that Houston Corbett would make good any losses.

On the facts presented to the Court, this argument has to be rejected[78] because there is insufficient proof that Cook was acting as agent for the firm. It appears that Thomas dealt with Cook personally as his friend, rather than with Houston Corbett through the agency of Cook. It is quite clear, however, that if the facts had been different the defence would have succeeded, and the transactional principle would have been paramount.[79]

2 *Another Transactional Approach*

Thomas next contends that there has never been a relationship between Houston Corbett and himself. He did not even know whose cheque was paid into his account. There was no "privity" between payer and payee.

Under an implied contract theory, this argument would have had some chance of success: how can you imply a contract to repay as between two people who have never dealt with each other? If recovery is based upon a desire to protect the parties' common expectations, the case for recovery vanishes; there is no transaction on which to base such expectations. But the Court is not impressed:[80] "The relationship between the parties arises from the fact of payment by the plaintiff, and the fact of its receipt by the defendant."[81] It seems that all the judges think those facts constituted some kind of transaction between Houston Corbett and Thomas, though in reality it was a very tenuous one. For present purposes it would be more convincing to admit frankly that there was no transaction, but that the Court was protecting Houston Corbett's interest in its own property, which had come into Thomas' hands through Cook's fraud.

It is instructive to note that transactional considerations could have arisen if the money had been paid to Cook, and then handed over to Thomas; or if the cheque had been a negotiable instrument made payable to Cook, and subsequently endorsed in Thomas' favour.[82] Thomas would have been a bona fide recipient of money paid by Cook to discharge a debt, and his interest in that transaction would override Houston Corbett's property interest.

78 Supra n 76 at 161 per North P; 166 per Turner J; 172 per McGregor J.
79 Ibid at 175-176 per McGregor J.
80 Ibid at 161-163 per North P; 166-167 per Turner J; 172-174 per McGregor J.
81 Ibid at 162.
82 But here the cheque was marked "not negotiable": ibid at 163 per North P.

As it is, however, the decision on this point establishes a significant principle of New Zealand law. Recovery in quasi-contract, for money paid under mistake, does not depend solely upon what the parties have expressly or impliedly undertaken to do. It has a broader basis than that — but how broad? The Court's treatment of Thomas' next submission may give some idea of the answer.

3 *An Enrichment Approach*

Relying on the converse of the enrichment principle, Thomas argues that recovery should be confined to what he is left with — £541 — after paying the surplus to Cook.[83] As expressed by Turner J:[84]

> [T]he submission was that the transaction by virtue of which a cause of action in quasi-contract arose was in reality one in which the appellant received a gross payment of £1,381 13s 3d on terms which required him to give "change" thereout of £840 to him through whom he received the gross payment; that he did this, and that the effective transaction was accordingly one by virtue of which he received £541 13s 3d net; that consequently this sum, and no more, was the amount for the refund of which he was liable to the respondents.

This defence is recognised in a few cases. For instance, where an agent receives money for a principal, and pays it to the principal before the mistake is discovered, the payer has a remedy against the principal, but not the agent.[85] In such a case, if the principal becomes insolvent, the payer bears the loss.

The analogy to agent and principal was, however, rejected by all three judges. North P and McGregor J thought that such a defence was limited to known agents and could not be relied upon by others.[86] Here, Houston Corbett paid the money to Thomas as principal, and had no idea that any part would be passed on to Cook.[87] Turner J, after thinking "long about the tenability of such an argument", could not accept it because the money did not come "through" Cook at all, but direct from Houston Corbett.[88] In a way, of course, Cook was an intermediary, but not in respect of the actual transmission of the money, which went straight from Houston Corbett into Thomas' bank account.

For better or for worse, the clear consequence of the Court's holding on this point is that the enrichment principle is not the sole underlying basis for relief in these cases. If it was, then Thomas would have had an automatic defence to the extent that he was no longer the richer for the receipt of the £1,381. As Turner J points out,[89] one can look at the matter either from the point of view of the payer (who has parted with

83 Cf Wright, supra n 57 at 307: "The governing consideration is the superfluity in the defendant, which may differ from the expense to the plaintiff." See also Sutton, supra n 72.

84 Supra n 76 at 168.

85 See Sutton, supra n 72 at 155-156.

86 Supra n 76 at 163 per North P; 175 per McGregor J (without reference to the reformulated argument mentioned by Turner J).

87 Ibid at 163 per North P; 174 per McGregor J.

88 Ibid at 169.

89 Ibid at 168.

£1,381) or of the defendant (who has only got £541). By upholding the claim for the full £1,381, the Court chose to look at it rather from the point of view of the payer, and to protect his property interest in the money. The absence of an enrichment was not decisive in the defendant's favour.

4 *The Statutory "Change of Circumstance" Defence*

In New Zealand, the position is further complicated by the existence of a "change of circumstance" defence in cases of money paid under mistake, which the Court of Appeal now had to apply. Section 94B of the Judicature Act 1908[90] provides:

> Relief . . . in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

Despite the fairly narrow ambit of this particular section, the concept of "change of circumstance" is of more general significance, since the legislature has made similar provision in a number of statutes, all of which deal with restitutionary claims where property has come into the wrong hands.[91] As North P points out,[92] the section permits the Court to "look at the equities from the point of view of both sides", in contrast with the common law.

The existence of the statutory defence afforded the Court an opportunity to re-assess the inter-relationship of the three principles. There were three possibilities:

(i) To reaffirm the *property principle* as paramount in cases of this kind. A payer such as Houston Corbett continues to have a right to his money, except in special circumstances, such as extreme hardship on the payee if the money has to be repaid.

(ii) To interpret the *transactional principle* somewhat more flexibly, so that (looking at the matter from the point of view of the payee) all detriments arising out of the transaction should be taken into account, in diminution of claims based upon the gross payment.

(iii) To regard the defence as a statutory enactment of the *enrichment principle,* so that any diminution of the benefit received by the defendant, as a result of receiving it (not necessarily directly related to the original transaction, as in (ii)) would diminish the

90 As amended by Judicature Amendment Act 1958, s2.

91 See eg Administration Act 1969, s51; Contractual Remedies Act 1979, s9(6); Insolvency Act 1967, s58(6). Cf *Restatement of the Law of Restitution* supra n 2 at para 142; Sutton, "Mistake of Law — Lifting the Lid of Pandora's Box", *AG Davis Essays in Law* (Northey ed 1965) 218, 237-242, For the change of circumstance defence in England see Goff and Jones, supra n 4 at ch 42; Sutton, supra n 72; *Barclays Bank Ltd* v *W J Simms Son & Cooke (Southern) Ltd* [1980] 2 WLR 218. In the United States, see Palmer, *The Law of Restitution* (1978) Vol 3, 510-529.

92 Supra n 76 at 164.

> plaintiff's claim. This would, for all practical purposes, provide a simple mathematical test — is the defendant (presuming he has acted in good faith) any the richer for receiving the money, at the time when the payment is reclaimed?[93]

This analysis, of course, puts the choice in clear-cut terms.

The Court was not prepared to deal with the issues before it in such a direct way. It settled instead for an ungainly compromise between all three principles. The judges considered that the section gave power to limit the remedy available to the payer, having regard to a wide range of circumstances.[94] On the facts before them, the most significant factor appears to have been the respective abilities of Houston Corbett and Thomas to avoid the loss, arising from the mistaken payment.

In practical terms, the result was that Thomas had to pay back all of the £541 which he had retained out of the original payment. Although the Court's reasoning was not explicit on this point, we can infer that at the time Houston Corbett paid the money, Thomas had nothing more than a worthless right to sue Cook for the lost investment. The £541 he received was therefore a benefit he would not have gained but for the mistaken payment, and in respect of that he suffered no detriment. The change of circumstance defence therefore applied only to the £840 paid to Cook as "change". As to that money, the Court of Appeal, reversing Speight J on the point, held that Houston Corbett had the greater opportunity to avoid the loss. The firm had an interest in ensuring the fidelity of Cook as their employee, and was in a far better position to judge his character,[95] as well as being under a duty to see to the proper application of moneys in their trust account.[96] Apportioning the loss, the Court ordered Thomas to pay back only one third of the £840, together with the whole of the £541.

The case seems a typical judicial resolution of an acute theoretical conflict. Courts these days are unlikely to accept sweeping doctrinal propositions which will settle a host of problems in advance. Perhaps at the risk of being accused of "ad hockery", they relate their decisions to the particular facts of each case, and while operating within the framework of general principle, leave themselves free to adjust the parties' rights according to a variety of considerations, and the underlying justice of the case. The statutory change of circumstance defence, by explicitly conferring a discretion on the courts, invites them to find a balance between protecting the property interests of the payer, and ensuring that a payee who has not been substantially at fault is freed from any losses sustained in the transaction. The concept of "fault" is one way in which compromise can be achieved between the property principle and the enrichment principle. No doubt there are other expedients, including the

93 In a recent comparative study, Professor Dawson has shown that the attempt to pursue the concept of enrichment from a single-minded, mathematical point of view has not produced happy results in Germany: see Dawson, "Erasable Enrichment in German Law" (1981) 61 Boston ULR 271.

94 Supra n 76 at 164-165 per North P; 169-171 per Turner J; 176-178 per McGregor J.

95 Ibid at 165 per North P.

96 Ibid at 178 per McGregor J.

maxim "equity is equality", which Turner J was tempted to adopt as a governing principle.[97] Different criteria may well be called in aid in different cases, to strike a similar balance.[98]

IV Conclusion

I have tried to show that the law of restitution — if it is correct to call it a "law" — is not unprincipled. Indeed, it suffers from too many principles rather than too few. Nevertheless, legal principle alone, especially the kind of simplistic, mathematical logic which is sometimes associated with the concept of enrichment, will not guide us through the maze of possibilities in a restitution case. Whatever logic there is, is sophisticated and complex. Assertions made dogmatically about unjust enrichment tend to distort that logic, and provide answers which are clear but fallacious.

But, then, what more can you expect of an "image"? Perhaps unjust enrichment will prove to be a mirage, but it leads us on in the hope that just solutions to difficult problems will be found, and reliable working methods developed. I am sure we will be surprised, not always pleasantly, by what we find. Dare I suggest that it is better to move on in faith, than to abstain from all movement because the final outcome is not clear?

97 Ibid at 171. This principle clearly influenced the result in *Menzies* v *Bennett* unreported, Supreme Court, Napier, 14 August 1979, Beattie J; noted [1970] NZLJ 5.

98 Cf Sutton, "Reform of the Law of Mistake in Contract" (1976) NZULR 40, 56.