

Tessa Cooksley

**THE ROLE OF UNJUST ENRICHMENT
IN NEW ZEALAND**

Submitted for LAWS 520 (Private Law: Shifting Boundaries)

Faculty of Law

Victoria University of Wellington

2018

Abstract

This paper argues that courts should recognise unjust enrichment as a cause of action, mainly due to the structure and discipline this can bring to New Zealand's private law. This paper explores the historical development of unjust enrichment, and its relationship to the general law of restitution. This involves an exploration of legal taxonomy, and the different roles the concept of unjust enrichment can play in a common law legal system. The current New Zealand position on unjust enrichment is unclear: it can be seen operating as a label, a legal principle and some argue it is a cause of action in its own right. This paper considers how other jurisdictions have treated the concept of unjust enrichment, before briefly outlining how the cause of action should be structured in New Zealand. Given its sometimes broad nature, this paper views unjust enrichment as a supplementary action, within the law of obligations: there to provide a remedy when one is necessary, even in the absence of a wrong or an agreement between the parties.

I.	Background.....	5
A.	What is unjust enrichment?	5
B.	Historical development.....	7
II.	Taxonomy.....	8
A.	The value of taxonomy	8
B.	Birks' taxonomy	9
III.	The possible roles of unjust enrichment.....	12
A.	A label.....	12
B.	A legal principle	13
1.	The constructive trust	13
2.	Statutes.....	13
C.	A cause of action	16
1.	Criticisms of the cause of action.....	16
2.	Strengths of the cause of action.....	18
IV.	Current New Zealand position.....	20
A.	The evolution of unjust enrichment.....	20
1.	Avondale Printers & Stationers Ltd v Haggie.....	20
2.	Waitaki.....	21
3.	Rod Milner Motors	22
4.	Stiassny.....	23
B.	Is unjust enrichment a cause of action in New Zealand?	24
V.	How should New Zealand proceed?.....	28
A.	Other jurisdictions	28
1.	Unconscionability (the Australian approach)	28
2.	Absence of basis (the approach of Canada and civil jurisdictions).29	
3.	Unjust factors (the English approach)	30
B.	Formulating the cause of action.....	32
1.	Was the defendant enriched?.....	32
2.	Was that enrichment at the expense of the plaintiff?.....	33
3.	Unjust factors.....	33
4.	Defences	36
C.	Subsidiarity.....	38

VI. Conclusion.....38
Bibliography41

The role of unjust enrichment in New Zealand “remains the subject of fierce debate.”¹ It has the potential to bring much needed clarity to this area of New Zealand’s private law, provided its development is careful and principled. Given its sometimes broad nature, this paper views unjust enrichment as a supplementary action, within the law of obligations: there to provide a remedy when one is necessary, even in the absence of a wrong or an agreement between the parties.

Part I of this paper seeks to explain what unjust enrichment is, its historical development, and its place within the law of restitution. Part II is an exploration of legal taxonomy, largely with reference to Professor Peter Birks. Part III considers the possible roles the concept of unjust enrichment could play in New Zealand. This highlights that part of the debate is about whether unjust enrichment is a legal principle, a cause of action, or a label within legal taxonomy.² This paper considers each of these roles, before concluding it works best as a cause of action.

Part IV then explores the New Zealand position on unjust enrichment, by charting the development of the concept through four of the most high profile cases, before attempting to confirm the current position. Part V considers how New Zealand should proceed, by exploring how other jurisdictions have treated unjust enrichment, before concluding the courts should recognise it as a cause of action in its own right. Although it functions well as a legal principle, and is useful as a label, unjust enrichment brings unity and cohesion to the law when recognised as a cause of action.

I. Background

A. What is unjust enrichment?

The classic formulation of unjust enrichment can be broken down into three simple elements:

- a defendant, who has been enriched by receiving some sort of benefit;
- that enrichment was at the expense of the plaintiff; and
- the enrichment occurred in circumstances that make it unjust for the defendant to retain that enrichment.

A classic example of unjust enrichment is a transfer of money, made by mistake, to the wrong bank account number. The mistake destroys the plaintiff’s consent to the transfer, meaning the just outcome is for the money to be returned to the plaintiff,

¹ Jessica Palmer “Unjust Enrichment: What Is It All About?” (paper presented to the New Zealand Law Society Issues in Unjust Enrichment Intensive Conference, July 2014) at 21.

² For the sake of clarity, this paper will refer to unjust enrichment generally as a ‘concept’.

rather than remaining with the defendant.³ Despite the defendant having good legal title to the money, the law imposes an obligation on them to restore the money to the plaintiff.⁴ This is not because the defendant has committed any wrong, or because there was any agreement between the parties, but because the circumstances simply require the money to be returned.⁵ The law of unjust enrichment “seeks to collect and understand” these cases, where the law imposes an obligation on a recipient to return a benefit they have received.⁶

The concept of unjust enrichment is connected to the law of restitutionary remedies. Unlike compensatory remedies, restitutionary remedies focus on the defendant’s gain, rather than the plaintiff’s loss.⁷ Charles Rickett and Jessica Palmer see the law of restitution as an area concerned with restoring wealth to a plaintiff, where the otherwise legally legitimate transfer of that wealth ought to be undone or reversed.⁸ Restitution may be available in relation to various events, such as unjust enrichment and breaches of contractual or equitable duties.⁹ A lot of common law claims will have more than one possible remedy available, depending on the specific facts. However, restitution is the only remedy available for a claim in unjust enrichment.¹⁰ This is because the aim of unjust enrichment is to restore benefits received by a defendant, not to compensate a plaintiff’s loss.¹¹

There have been various conceptual difficulties in understanding the law of restitution, and how the concept of unjust enrichment fits in with it. Rickett and Palmer identify two problems with the label of ‘the law of restitution’:

1. The label ‘restitution’ refers to remedies, not events (or causes of action). The labelling of the private law of obligations is usually based on the event to which the law responds; the cause of action.¹² For example, the label ‘torts’ is used to describe a collection of causes of action (for example, negligence or nuisance), for which various remedies are available (for example, damages or injunction). ‘Restitution’ is naming the law’s remedial response to different events.¹³

³ Charles Rickett and Jessica Palmer “Restitutionary Remedies” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (Brookers, Wellington, 2011) 383 at 385.

⁴ At 385.

⁵ Peter Birks “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 *UWAL Rev* 1 at 66.

⁶ At 66.

⁷ Rickett and Palmer, above n 3, at 384.

⁸ At 385.

⁹ Palmer, above n 1, at 21.

¹⁰ Rickett and Palmer, above n 3, at 389.

¹¹ At 389.

¹² At 385.

¹³ At 386.

Recognising the area of law of ‘unjust enrichment’ (for which the available remedy is restitution) helps resolve some of this confusion.¹⁴

2. The terms ‘unjust enrichment’ and ‘restitution’ are used interchangeably.¹⁵ Equating the two terms is false, and is a “categorical error”.¹⁶ Unjust enrichment relates to events, while restitution relates to remedies.¹⁷ Whatever role unjust enrichment plays,¹⁸ it is important to remain clear about how the concept is different from the law of restitution.

Given this confusion, and the different roles unjust enrichment can play,¹⁹ some argue for renaming the concept, depending on what role it is playing.²⁰ This could be useful and sensible, but this paper does not engage with this particular debate.

B. Historical development

It is difficult to understand the current New Zealand position on unjust enrichment, without some understanding of its historical development in England. Personal restitutionary remedies developed into three main forms, according to the type of enrichment involved:²¹

1. Money had and received. The main situations which give rise to a claim for money had and received are money paid by mistake, money paid as a result of compulsion or duress, or situations where there has been a failure of basis or consideration.
2. *Quantum meruit*, which seeks to recover remuneration for services performed by the plaintiff for the defendant.
3. *Quantum valebat*, which seeks to recover the value of goods supplied by the plaintiff to the defendant.

These remedies derive from the general claim of *indebitatus assumpsit* (a promise to pay).²² Over time, the courts allowed a claim without an express promise, instead

¹⁴ Peter Birks and Charles Mitchell “Unjust Enrichment” in Peter Birks (ed) *English Private Law* (Oxford University Press, New York, 2000) vol 2 525 at 526.

¹⁵ Rickett and Palmer, above n 3, at 386.

¹⁶ At 387.

¹⁷ At 387.

¹⁸ See Part III below, p 12.

¹⁹ See Part III below, p 12.

²⁰ See for example, Peter Watts “Foreward” (paper presented to the New Zealand Law Society Issues in Unjust Enrichment Intensive Conference, July 2014).

²¹ Rickett and Palmer, above n 3, at 390.

²² Kit Barker and Ross Grantham *Unjust Enrichment* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018) at 4.

allowing claims based on a fictional promise implied from the defendant's conduct.²³ In 1760, this promise giving rise to the obligation to make restitution was based upon the idea of a quasi-contract.²⁴ This theory of implied contract has now been rejected, and claims for restitution are based on unjust enrichment; "in the circumstances, the law imposes an obligation to repay, rather than implying an entirely fictitious agreement to repay."²⁵

II. Taxonomy

A. The value of taxonomy

Given the confusion about the role of unjust enrichment, legal taxonomy is a useful starting point; a framework in which to analyse its proper role. The benefits of rigid taxonomy are attractive (ensuring like cases are treated alike, highlighting inconsistencies in the law, monitoring the development of the law, providing clarity, and avoiding duplication).²⁶ In introducing *English Private Law*, Birks argues that lawyers will be better if they have a "map of the whole law and can take a firm grip on the concepts and principles which fit its various parts together."²⁷

However, the quest to create a definitive taxonomy of the common law has been a challenging and controversial project. Birks has drawn analogies between legal taxonomies and scientific taxonomies,²⁸ leading critics to point out that law is not science, and may not lend itself to neat classifications.²⁹ The dominance of legislation in New Zealand, and the difficulty identifying its place within the common law system, is an added complication. The common law (where law is developed slowly over time by judges, through the resolution of individual disputes) forms a sort of foundation to New Zealand's legal system.³⁰ Parliament has, over time, built on that foundation with legislation. The existing common law foundation often continues to play an important role, even in areas of law that have been legislated.³¹ In areas that

²³ Rickett and Palmer, above n 3, at 390.

²⁴ *Moses v Macferlan* (1760) 2 Burr 1005 at 1008 as cited in Rickett and Palmer, above n 3, at 391.

²⁵ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 710 as cited in Rickett and Palmer, above n 3, at 391.

²⁶ Ewan McKendrick "Taxonomy: Does it Matter?" in David Johnston and Reinhard Zimmermann (eds) *Unjustified Enrichment - Key Issues in Comparative Perspective* (Cambridge University Press, Cambridge, 2002) 627 at 632-638.

²⁷ Peter Birks "Introduction" in Peter Birks (ed) *English Private Law* (Oxford University Press, New York, 2000) vol 1 xxxv at xxxv.

²⁸ Birks, above n 5, at 3.

²⁹ Geoffrey Samuel "Can Gaius Really be Compared to Darwin?" (2000) 49 ICLQ 291 at 311.

³⁰ Andrew Burrows "The Relationship Between Common Law and Statute Law in the Law of Obligations" (2012) 128 L.Q.R. 232 at 233.

³¹ At 234-236.

are legislated, the statute forms a new starting point for the law and reasoned decisions from judges create principles to interpret statutes and apply them to individual cases.³² This has led to the creation of a new category of law, which Andrew Burrows has called “statute-based common law.”³³ Parliament does not always have regard to detailed taxonomy when enacting statutes, and the relationship between these different sources of law adds to the difficulty in designing taxonomy. Unjust enrichment is therefore subject to one of the general criticisms of the common law method: its inability to develop the law coherently.

It may be that some scholars are asking too much of these taxonomies, expecting them to greatly change legal practice. Practising lawyers tend to navigate their way around the law comfortably, and know how best to plead a client’s case. This is part of the reason why lawyers are so important; to navigate a necessarily complex structure which attempts to regulate complicated human interactions.

However, taxonomies serve a useful function in two fundamental areas, which perhaps get overlooked or undervalued: teaching students, and making or reforming law. Some commentators have expressed concerns about the way private law is taught in law schools, and a potential inability of new lawyers to move flexibly around different areas of law and potential causes of action.³⁴ Taxonomy can be useful in explaining how the categories fit together, and the potential claims a plaintiff might have available to them.³⁵ Taxonomy also provides a valuable starting point when judges or legislators are looking to reform the law, or when new causes of action (such as unjust enrichment) are emerging. It is also worth noting that while practising lawyers are comfortable navigating existing areas of law, they might not always know the best approach in these new and developing areas of law. This can be seen in the uncertainty about the scope of the relatively new concept of unjust enrichment.³⁶

B. Birks’ taxonomy

Birks divided the law into public law and private law.³⁷ He described private law as concerning “the persons who bear rights, the rights which they bear, and the actions by which they protect those rights.”³⁸ He divided private law into the law of persons

³² P.S. Atiyah “Common Law and Statute Law” (1985) 48(1) MLR 1.

³³ Burrows, above n 30, at 240.

³⁴ Birks, above n 5, at 7.

³⁵ Birks, above n 27, at xxxvi.

³⁶ See for example, Victoria Stace “The Law of Contribution - an Equitable Doctrine or Part of the Law of Unjust Enrichment?” (2017) 48 VUWLR 471 at 471-472.

³⁷ Birks, above n 5, at 8.

³⁸ At 8.

and rights, with rights further divided into the law of property and the law of obligations.³⁹ Within the law of obligations, he saw four broad categories of events, which give rise to rights: wrongs, consent, unjust enrichment and “others”.⁴⁰ Birks himself identified the category of “others” as “a sort of cheat.”⁴¹

Rickett and Palmer’s analysis of the New Zealand position on unjust enrichment is consistent with Birks’ taxonomy. They have stated that restitutionary remedies are available in relation to claims in contract, tort and property.⁴² They note there is also a fourth category, for which restitution is available.⁴³ They explain there was historically a problem identifying an “underlying theme or principle” to explain why recovery is justified in this fourth category.⁴⁴ They consider the concept of unjust enrichment to be the solution to this problem, as it provides an “overarching and uniting principle, through which historically marginalised areas of law have been drawn together into a more easily understood and manageable unit.”⁴⁵ Unjust enrichment “explains and gives analytical unity” to the restitution of transfers made as a result of mistake, failure of basis, compulsion or incapacity of the plaintiff.⁴⁶

It may be telling that Birks (or many academics since, that the author is aware of) did not present this taxonomy in any form of diagram. A visual representation has benefits in clearly articulating the categorisation. But as soon as one attempts to produce a diagram, one immediately recognises how complex the task is, and how the common law refuses to fit neatly into pre-defined boxes. This paper nevertheless attempts to do so, to aid in discussion and debate about the proper role of unjust enrichment. The following diagram is a loose representation, largely based on the way *English Private Law* is structured.⁴⁷ It conceptualises three broad categories: the sources of legal rules, the rights parties have in private law, and the remedies available for breaches of those rights.

³⁹ Birks, above n 27, at xxxix.

⁴⁰ Birks, above n 5, at 8.

⁴¹ At 9.

⁴² Rickett and Palmer, above n 3, at 384.

⁴³ At 384.

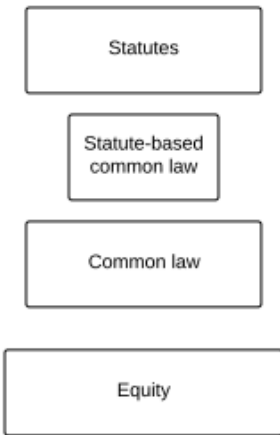
⁴⁴ At 384.

⁴⁵ At 384.

⁴⁶ At 384.

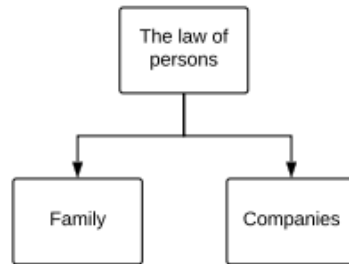
⁴⁷ Birks, above n 27.

SOURCES OF LAW

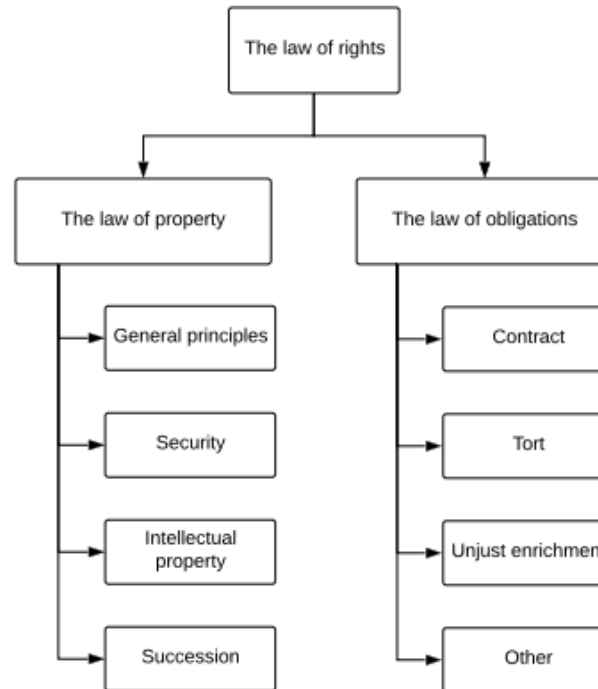


RIGHTS

Who can have rights?



What are the rights?



REALISATION OF RIGHTS

(Remedies)



III. The possible roles of unjust enrichment

Even once the concept of unjust enrichment has been located within Birks' taxonomy, it is still unclear exactly what role it is playing in New Zealand. Kit Barker has identified four possible roles the concept of unjust enrichment can play within a legal system (these roles can and do overlap):

1. A classificatory/taxonomic/organisational **label**, like 'contract' or 'torts'.⁴⁸ The concept of unjust enrichment is simply used to group cases which have similar characteristics.⁴⁹
2. An **extrinsic norm**.⁵⁰ The concept explains, from a normative perspective, why an enrichment should be returned to a plaintiff.⁵¹
3. A **legal principle**. The concept is a normative force with legal status, which "rationalises and guides the development of existing legal rules."⁵²
4. A legal **cause of action** in its own right.⁵³

This paper now expands on the three main roles of unjust enrichment (a label, a legal principle and a cause of action), explaining why New Zealand should develop it as a cause of action. The concept is already operating as a taxonomic label and a legal principle, and can continue to do so, whether recognised as a cause of action or not.

A. A label

Unjust enrichment is currently effective in New Zealand as a label. It groups together cases of a similar nature, and assists in discussion about them. This in itself is useful, and more work should be done to clarify its role in this capacity, especially given the confusion discussed above about the difference between unjust enrichment and restitution.⁵⁴ However, using the concept of unjust enrichment in this role alone is underutilising it, and does not provide the most clarity.

⁴⁸ Kit Barker "Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons" in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds) *Understanding Unjust Enrichment* (Hart, Oxford, 2004) 79 at 84.

⁴⁹ At 84.

⁵⁰ At 85.

⁵¹ At 85.

⁵² At 86.

⁵³ At 87.

⁵⁴ See Part I above, p 6.

B. A legal principle

As a legal principle, unjust enrichment can be described as “a general articulation of the various normative considerations lying behind sets of legal rules.”⁵⁵ Writing in 2004, Barker considered this to be the most “attractive and viable” option for unjust enrichment, “because it strikes a useful compromise between stability and development in legal reasoning.”⁵⁶ This role for unjust enrichment can currently be seen in New Zealand, for example in explaining constructive trusts and some statutory provisions for restitutionary remedies.

1. The constructive trust

Although not usually explicitly referenced in cases, unjust enrichment can be seen as a legal principle underpinning the equitable remedy of the constructive trust. Constructive trusts are most commonly found as the result of a claim in relationship property. A simple case might involve Party A, who is a beneficiary of The Trust. Party A is married to Party B, and they live together, in a home held by The Trust. Throughout the marriage, Party B makes contributions, which add to the value of the house. When Party A and Party B separate, Party B is not able to bring a claim directly against Party A for relationship property in relation to the house (which would otherwise be considered a joint asset, and be subject to even division under the Property (Relationships) Act 1976), as it is held by The Trust. A court could instead recognise a constructive trust over part of the house, for the benefit of Party B. The principle of unjust enrichment can explain why the courts have developed this remedy; it would be unjust for The Trust to benefit from the contributions made by Party B.⁵⁷

2. Statutes

Various statutes provide for restitutionary remedies, showing Parliament regularly recognises the return of wealth through restitution as an appropriate remedy. This paper explores some examples of the principle operating in statutes, and there will undoubtedly be more.

⁵⁵ J McCamus “Unjust Enrichment: Its Role and Limits” in D Waters (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1993) 129 at 144 as cited in Barker, above n 48, at 87.

⁵⁶ Barker, above n 48, at 90.

⁵⁷ Sue Tappenden “The Emergence of the Concept of Unjust Enrichment in New Zealand, its Relationship to the Remedial Constructive Trust and the Development of the Status of Joint Ventures in Equity” (2008) 1 *Journal of Politics and Law* 32 at 38.

Sections of the Contract and Commercial Law Act 2017 (CCLA) appear to be aimed at preventing one party from being unjustly enriched at the expense of another. Money paid under a frustrated contract must be returned,⁵⁸ less the value of any reasonable value obtained.⁵⁹ Restitution can be granted to parties under an illegal contract.⁶⁰ A court may grant restitution, as appropriate, to parties to a contract entered into with a minor.⁶¹

The CCLA also provides for situations where someone in possession of another's goods has (legally) sold those goods, in order to recover debts owed to them. Any surplus must be returned to the owner, thus preventing the unjust enrichment of the seller.⁶² This reflects the position in relation to land, when a mortgagee is exercising their power of sale; any surplus after debts have been satisfied is to be paid to the mortgagor.⁶³ The Residential Tenancies Act 1986 (RTA) provides similar protections for renters. A landlord is prevented from being enriched by goods left on a rented premises (abandoned goods), after termination of a tenancy. If a landlord sells abandoned goods, they are able to deduct storage and sale costs (and possibly other amounts owing as a result of the tenancy), but any excess must be returned to the tenant, or the Tribunal if the tenant cannot be contacted.⁶⁴ This means even if the money cannot be returned to the tenant, the landlord is not to be enriched by it.

The RTA also provides for recovery of money paid by mistake, the classic example of unjust enrichment. If a party to a tenancy agreement pays money to the other under a mistake of fact or law, they can apply to the Tenancy Tribunal to recover that money.⁶⁵ The Tribunal can decline to make an order requiring repayment if the commonly recognised defence to unjust enrichment is present: the other party received the money in good faith, and has altered their position in reliance on the payment, making restitution unfair.⁶⁶ Similarly, the Tribunal can make orders requiring a landlord to return overpaid rent to a tenant (which would otherwise be an enrichment, unjust most likely because it was a mistake, or perhaps failure of basis).⁶⁷

⁵⁸ Contract and Commercial Law Act 2017, s 61.

⁵⁹ Section 63.

⁶⁰ Sections 75-76.

⁶¹ Section 95.

⁶² Section 338.

⁶³ Property Law Act 2007, s 185.

⁶⁴ Residential Tenancies Act 1986, ss 62-62D.

⁶⁵ Section 135(1).

⁶⁶ Section 135(2).

⁶⁷ Section 77(2)(k).

The Property Law Act 2007 (PLA) references payments made under mistake of law or fact.⁶⁸ Section 74A allows for recovery of payments made under a mistake of law. This appears to be building on the accepted common law position that relief is available for payments made under mistake of fact, by clarifying relief can also be available for payments made under mistake of law. Section 74B provides a defence in relation to mistaken payments, if the recipient received the payment in good faith, and altered their position as a result of the receipt, in a way the court considers would make it inequitable to grant relief (either partially, or in full). While not explicitly recognising unjust enrichment as the underlying principle here, Parliament has made specific provision for mistake of law and a change of position defence, which makes sense if restitution is available with the common law action available for mistaken payment.

The Fair Trading Act 1986 (FTA) also clarifies the position on some questions relating to services (*quantum meruit*)⁶⁹ and goods (*quantum valebat*).⁷⁰ There is a specific type of unjust enrichment claim, arising from unsolicited goods or services. For example, Party A is driving their car, and is stopped at a red traffic light. Party B, without being asked or giving Party A the opportunity to decline, cleans Party A's windscreen. If Party A refuses to pay, they have been unjustly enriched by Party B's unsolicited service. According to s 21B of the FTA, Party A is not liable to pay Party B, meaning there is a statutory bar to a claim in unjust enrichment.

It could even be argued that some of the Resource Management Act 1991 (RMA) penalty provisions are underpinned by the principle of unjust enrichment. Section 316 allows anyone to apply to the Environment Court, for enforcement orders under s 314. Enforcement orders can "require a person to pay money to or reimburse any other person for actual and reasonable costs and expenses which that other person has incurred ... in avoiding, remedying, or mitigating any adverse effect on the environment" resulting from the person's failure to comply with their obligations under the Act.⁷¹ This ensures that if Party A breaches the Act, and Party B takes steps to correct that breach, Party A will not be unjustly enriched by Party B's efforts to correct their failure. Although this operates in a specific regulatory context within the sphere of public law, it could be analysed as ensuring people are not able to enrich

⁶⁸ Sections 74A-74B; previously Judicature Act 1908, ss 94A-94B.

⁶⁹ Section 21B.

⁷⁰ Section 21A.

⁷¹ Resource Management Act 1991, s 314(1)(d).

themselves at the expense of others, by breaching the Act and not bearing the cost of correcting their breaches.

It could be that these readily available restitutionary remedies through legislation, together with the bar on claims in unjust enrichment for unsolicited services, have rendered the common law cause of action unnecessary. These statutes could be part of the reason why the common law action of unjust enrichment has had such a slow and piecemeal development; there is simply less need for it. While the principle of unjust enrichment does valuable work underpinning these legislative responses to specific situations, there is still room for unjust enrichment as a cause of action in its own right. Mistaken payments in particular remain difficult to recover.⁷²

C. A cause of action

This paper now considers the criticisms of unjust enrichment as a cause of action, before explaining how its strengths outweigh these criticisms. The technical aspects of how the cause of action is formulated are discussed below.⁷³

1. Criticisms of the cause of action

One of the fundamental tensions in unjust enrichment is between the “sanctity of ownership” and security of receipt.⁷⁴ Due to the respect given to property rights in common law jurisdictions, it is important that people have the freedom to use and dispose of wealth in their possession as they wish to, without worrying about potential claims in unjust enrichment.⁷⁵ Most of this criticism can be addressed by adopting a strict formula approach which utilises unjust factors, and allows appropriate defences, such as change of position.⁷⁶ This achieves the correct balance between security of receipt, and providing a remedy when it is just to do so.

Another problem is the difficulty in formulating the cause of action itself, and satisfactorily identifying the boundaries of liability. Some academics argue there is no need to recognise unjust enrichment as a cause of action (as opposed to a label or a legal principle), in order to achieve the coherency that advocates of taxonomy desire.⁷⁷ Ironically, given Birks’ desire for coherency in the law, there is actually an argument that recognising unjust enrichment as a cause of action achieves the

⁷² Banking Ombudsman “Mistaken Payments ” <www.bankomb.org.nz>.

⁷³ See Part V below, p 32.

⁷⁴ Birks, above n 5, at 68.

⁷⁵ At 68.

⁷⁶ See Part V below, p 36.

⁷⁷ Steve Hedley “Is Private Law Meaningless?” (2011) 64 C.L.P 89 at 103.

opposite of this. There is a danger that the cause of action could be “dangerously over-expansive”.⁷⁸ Barker refers to metaphors including “sand on the beach, liable to get everywhere”, and a “placebo” to heal all wounds.⁷⁹ Writing in 2004, Barker considered it unlikely for unjust enrichment to prevail as a cause of action in the common law.⁸⁰

Similarly, Professor Peter Watts QC has argued that the common law is at risk of creating the idea that people need to justify every windfall they receive.⁸¹ He warns that unjust enrichment can lead to “an untenable prejudice against unearned gain.”⁸² Birks gave the example of heating in an apartment building, which highlights this concern.⁸³ The plaintiff heats their ground floor apartment. That heat rises, and also heats the defendant’s apartment on the floor above. Has the defendant been unjustly enriched, by the heating? Birks explained that the plaintiff is powerless to prevent the enrichment of the defendant, but does “obliquely intend the inevitable by-benefit to accrue gratuitously” to the defendant.⁸⁴ He considered there would be no right to restitution, as “the rising heat is thus a gift, although possibly not warmly wished.”⁸⁵ Watts argues that there “really is no question of gift at issue” in this example.⁸⁶ This type of artificial reasoning seems to be giving effect to common sense, without a strict legal reason underpinning it. Watts argues a better explanation for why the law does not impose an obligation to make restitution is simply that enrichment per se does not need justification.⁸⁷

This objection can be largely overcome by strict analysis of what enrichment at the expense of the plaintiff entails, specifically the recognition of the concept incidental benefits. If a plaintiff is acting primarily out of self-interest to benefit themselves, then an unintended benefit to a defendant can be characterised as an incidental benefit.⁸⁸ The heating example can be described as an incidental benefit, which means the enrichment has not been at the plaintiff’s expense, and the unjust enrichment cause of

⁷⁸ Barker, above n 48, at 88.

⁷⁹ At 89.

⁸⁰ At 90.

⁸¹ Peter Watts “Taxonomy in Private Law - Furor in Text and Subtext” (2014) 1 NZ L Rev 107 at 140.

⁸² Peter Watts “‘Unjust Enrichment’ - the Potion That Induces Well-meaning Sloppiness of Thought” (2016) 69 C.L.P. 289 at 289.

⁸³ Peter Birks *Unjust Enrichment* (Oxford University Press, Oxford, 2005) 105 at 158.

⁸⁴ At 158.

⁸⁵ At 158.

⁸⁶ Watts, above n 81, at 140.

⁸⁷ At 140.

⁸⁸ Graham Virgo *The Principles of the Law of Restitution* (Oxford University Press, Oxford, 2015) at 114.

action has not been made out.⁸⁹ Recognising unjust enrichment as a cause of action potentially reduces the risk of this type of case being awarded unnecessary restitution, as it focuses analysis and demands principled reasoning from judges.

With reference to equity, early New Zealand cases were suspicious of unjust enrichment, fearing it would “permit a litigant’s claim to justice to be consigned to the formless void of individual moral opinion”.⁹⁰ Palmer rejects this concern, by rejecting the Australian equitable approach, and instead preferring the four-part formula (utilising unjust factors) for establishing liability.⁹¹ She notes the question of what makes an enrichment unjust “must not be taken as an invitation to appeal to general and abstract notions of fairness and justice.”⁹² There is sufficient case law and academic writing on the topic of what makes an enrichment unjust to guide this development.⁹³

2. *Strengths of the cause of action*

Recognising unjust enrichment as a cause of action brings structure and clarity to the law. Despite having a well-recognised formula for unjust enrichment claims, England does not recognise unjust enrichment as a cause of action.⁹⁴ The dangers of this can be seen in *Yeoman’s Row Management Ltd v Cobbe*.⁹⁵ In similar facts to *Avondale Printers & Stationers Ltd v Haggie*,⁹⁶ the plaintiff spent money obtaining planning permission for development of land which they had an oral agreement to purchase.⁹⁷ The defendant later refused to execute the agreement.⁹⁸ The plaintiff successfully sought restitution for the benefit that the defendant had received from the planning permission.⁹⁹ The court recognised three causes of action: unjust enrichment, *quantum meruit* and failure of consideration.¹⁰⁰ Graham Virgo argues the court “was simply describing one claim but from three different perspectives: the underlying

⁸⁹ At 114.

⁹⁰ *Carly v Farrelly* [1975] 1 NZLR 356 at 387 as cited in *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124 (SC) at 155.

⁹¹ See Part V below, p 30.

⁹² Jessica Palmer “Restitution” (2016) 2 NZ L Rev 435 at 438.

⁹³ At 438.

⁹⁴ See Part V below, p 30.

⁹⁵ *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 as cited in Virgo, above n 88, at 59.

⁹⁶ *Avondale Printers & Stationers Ltd v Haggie*, above n 90, discussed below in Part IV, p 20.

⁹⁷ Virgo, above n 88, at 59.

⁹⁸ At 59.

⁹⁹ At 59.

¹⁰⁰ At 59.

principle, the remedy, and the ground of restitution.”¹⁰¹ Properly pled, it would have been a claim in unjust enrichment, seeking the remedy of restitution calculated with reference to the reasonable value of the services provided in obtaining the planning permission (*quantum meruit*), based on the unjust factor of failure of consideration.¹⁰² This then leads to clear structure in the law, with more predictable outcomes, as precedent is easier to identify and interpret.

The confusion about whether unjust enrichment is a cause of action in New Zealand has led to similar problems, in the way cases are pled. Palmer gives examples of cases where unjust enrichment was pled together with mistake,¹⁰³ *quantum meruit*,¹⁰⁴ and knowing receipt.¹⁰⁵ This has hampered unjust enrichment’s development, as it is either rejected in favour of the more specific claim, or rejected as it is not a recognised cause of action.¹⁰⁶ Palmer argues these are not alternative causes of action, but are unjust factors within the unjust enrichment cause of action.

Providing structure also promotes discipline. This helps address some of the criticisms of the concept, and its potential to be too broad. Due to its nature as a supplementary claim, there is a risk that unjust enrichment is pled when nothing else fits.¹⁰⁷ Palmer argues that claims in unjust enrichment should be based on a recognised ground of restitution (also known as unjust factors, discussed below).¹⁰⁸ This prevents unjust enrichment from being exploited “to claim a remedy where there is some uncertainty about the underlying claim.”¹⁰⁹ Without sufficient detail and discipline, there is a risk that liability will be imposed in confusing and inconsistent ways, which has serious consequences for the coherency and predictability of New Zealand’s private law.

Recognising unjust enrichment as a cause of action ensures a plaintiff can access a remedy when they deserve one, without upsetting other well settled areas of law. The reason it can be difficult to formulate is that by its very nature, unjust enrichment is responding to situations where a transfer of wealth has been objectively legitimate *prima facie*, but some other element means it should be reversed. Without some cause

¹⁰¹ At 59.

¹⁰² At 59.

¹⁰³ *Hi-Tech Investment Ltd v World Aviation Systems (Australia) Pty Ltd* [2009] NZCA 427.

¹⁰⁴ *Ian Johnson Pharmacy Ltd v Glaxosmithkline NZ Ltd* (Manukau DC, CIV-2010-092-1947, Wiltens DCJ, 26 September 2011).

¹⁰⁵ *Staitte and others v Kusabs and others* [2014] NZHC 1183.

¹⁰⁶ Palmer, above n 1, at 32.

¹⁰⁷ At 33.

¹⁰⁸ At 33.

¹⁰⁹ At 33.

of action available, plaintiffs deserving of a remedy will be left without one. This could lead to unprincipled developments in other areas of law. For example, the historical “quasi-contract” view of unjust enrichment discussed above (which could be described as unprincipled contract law reasoning) can be seen creeping into New Zealand cases.¹¹⁰ By containing this type of reasoning within unjust enrichment, the courts can develop recognised principles which lend themselves to predictability and certainty in the law, without disturbing other well settled areas of law.

It will be easier for the law of unjust enrichment to develop and evolve in New Zealand if it is recognised as a cause of action. Understanding what constitutes an enrichment at the expense of a plaintiff is simpler, if cases are all pled under the same cause of action. Recognising a new ‘unjust factor’ (discussed further below),¹¹¹ would be easier and more straightforward for courts, than recognising a whole new cause of action. This is evidenced by the courts’ general reluctance to recognise unjust enrichment itself, and its desire to be cautious in this developing area of law.¹¹²

IV. Current New Zealand position

A brief history of the evolution of unjust enrichment through four of the more high profile cases is necessary, to understand the current position in New Zealand.¹¹³ Analysis of more recent cases shows that unjust enrichment in New Zealand is currently acting as a label and a legal principle, with some arguing it is a cause of action.

A. The evolution of unjust enrichment

1. Avondale Printers & Stationers Ltd v Haggie

At first, the New Zealand courts were reluctant to recognise unjust enrichment, as a legal principle or a cause of action. The first real encounter was in 1979, in *Avondale Printers and Stationers Ltd v Haggie*.¹¹⁴ The case contained a claim of unjust enrichment, as the plaintiff spent money improving land which belonged to someone

¹¹⁰ See *Napier v Torbay Holdings Ltd* [2016] NZCA 608, [2017] NZAR 108 at [13] discussed in Part IV below, p 27.

¹¹¹ See Part V below, p 30.

¹¹² See *Phil & Teds Most Excellent Buggy Co Ltd v Out 'n' About ATP Ltd* [2016] NZHC 71 discussed in Part IV below, p 27.

¹¹³ Note: For the sake of clarity (and potentially at the risk of technical accuracy), the enriched party is always referred to as the defendant, and the transferor of wealth as the plaintiff, to enable clear discussion and comparison.

¹¹⁴ *Avondale Printers & Stationers Ltd v Haggie*, above n 90.

else, reasonably anticipating they would become the legal owner in the future. The court held that “on the law as it stands ... a general doctrine of unjust enrichment is not part of the law of New Zealand.”¹¹⁵ England had not yet recognised unjust enrichment at this stage either, so it was not surprising that the New Zealand courts rejected it.

2. *Waitaki*

By 1991, the English courts had recognised the principle of unjust enrichment.¹¹⁶ New Zealand seemed more open to the idea of the existence of unjust enrichment, but its exact role was still very uncertain. In 1999, the Court of Appeal seemed close to recognising it in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd (Waitaki)*,¹¹⁷ but emphatically rejected it as a cause of action in *Rod Milner Motors Ltd v Attorney-General (Rod Milner Motors)*.¹¹⁸

In *Waitaki*, the defendant was a customer of the plaintiff (National Bank), and the two were involved in foreign currency transactions together.¹¹⁹ The plaintiff mistakenly thought that it held US\$500,000 belonging to the defendant, and requested payment instructions from the defendant.¹²⁰ For three months, the defendant disputed the money was theirs, before eventually taking it and investing it.¹²¹ By the time the plaintiff realised their mistake, the investment had failed, and the money was lost.¹²²

The Court of Appeal heard the case, based on an allegation of unjust enrichment.¹²³ The Court stated:¹²⁴

It is unnecessary to embark upon a dissertation on the concept of unjust enrichment as a ground for restitution or restoration of benefit. The present claim clearly falls within accepted and well-established principles which allow recovery, whether it is to be classed as a claim in restitution, a payment made by mistake, or a claim for money had and received does not matter.

¹¹⁵ At 155. The plaintiff was successful however, as the court found a constructive trust based on the defendant’s fraudulent conduct (in disputing the right the purchase the land).

¹¹⁶ See Part V below, p 30.

¹¹⁷ *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA).

¹¹⁸ *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568.

¹¹⁹ *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, above n 117, at 213.

¹²⁰ At 214.

¹²¹ At 214.

¹²² At 215.

¹²³ At 215.

¹²⁴ At 215.

The Court held that the elements the bank had to establish, in order to be entitled to recovery, were: enrichment of the defendant by the receipt of a benefit; which was at the expense of the plaintiff; in circumstances that made it unjust for the defendant to retain that enrichment.¹²⁵

The Court of Appeal upheld the High Court's finding that the defendant had been unjustly enriched, but that the defence of change of position applied. The High Court held full restitution would be unjust, and ordered the defendant return 10 per cent to the plaintiff.¹²⁶ In applying the defence, the Court of Appeal undertook an exercise of "balancing the equities": the defendant's knowledge of the mistake, but also their good faith; the plaintiff's insistence on transferring the money; and the plaintiff's delay.¹²⁷

Although the recognition of unjust enrichment as a unifying principle for claims for restitution is helpful, the passage quoted above is concerning. The court was not concerned with labels or categories, or explaining exactly why liability might arise. This is dangerous, as it makes the case law difficult to understand and predict, and adds to the confusion about what unjust enrichment actually is. This highlights the importance of treating it as a cause of action, as it provides structure and clarity.

3. *Rod Milner Motors*

In *Rod Milner Motors*, the defendant (the Attorney-General, on behalf of the Ministry of Trade and Industry) had the power to grant import licences for motor vehicles, by way of tender scheme.¹²⁸ The plaintiff claimed to suffer a loss, due to a change in this licencing process after a successful tender round.¹²⁹ The plaintiff pled several causes of action, mainly in relation to contract, as well as unjust enrichment.¹³⁰ The judgment does not elaborate on the unjust enrichment claim, simply stating that "the principle does not yet have the status of a cause of action."¹³¹

¹²⁵ At 215.

¹²⁶ *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1997] 1 NZLR 724 (HC) at 734.

¹²⁷ *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, above n 117, at 220 per Henry J and 233 per Tipping J.

¹²⁸ *Rod Milner Motors Ltd v Attorney-General*, above n 118, at 570.

¹²⁹ At 575.

¹³⁰ At 575.

¹³¹ At 575.

Rickett and Palmer, writing in 2011, noted that unjust enrichment had not “unequivocally ... gained the status of a cause of action per se”,¹³² with reference to *Rod Milner Motors*.¹³³ They considered the proper claim seeking restitution due to an unjust enrichment to generally be money had and received, which imposes an obligation on the defendant to repay the money in response to the unjust enrichment of the defendant.¹³⁴

4. *Stiassny*

By 2012, the Court of Appeal appeared even closer to accepting unjust enrichment as a cause of action. In *Commissioner of Inland Revenue v Stiassny (Stiassny)*, the plaintiffs were the appointed receivers of a forestry partnership.¹³⁵ The plaintiffs sold assets of the partnership, which generated a GST liability of \$127.5 million.¹³⁶ The proceeds of the sale were insufficient to repay both the secured creditors and the GST owed to the defendant (Inland Revenue).¹³⁷ The secured creditors asserted their claim ranked ahead of the defendant’s.¹³⁸ The plaintiffs were concerned they would be personally liable for the GST, so paid the \$127.5 million to the defendant.¹³⁹ Upon learning they would not be personally liable for the GST, the plaintiffs sought to recover the payment, on the basis that it was paid under a mistake of law.¹⁴⁰ It was argued that although there was a basis for the payment (the GST liability), and a consideration from the defendant (discharge of the liability), the defendant was unjustly enriched because but for the mistake, the plaintiff would not have made the payment.¹⁴¹ This was described as a “mistake as to distributional priority.”¹⁴²

The Court held that the “conceptual basis” for a restitutionary remedy for money paid under a mistake of fact or law, is that the recipient has been “unjustly enriched.”¹⁴³ The Court relied on *Goff & Jones: The Law of Unjust Enrichment*¹⁴⁴ (therefore

¹³² Rickett and Palmer, above n 3, at 385.

¹³³ *Rod Milner Motors Ltd v Attorney-General*, above n 118, at 55.

¹³⁴ Rickett and Palmer, above n 3, at 391.

¹³⁵ *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, [2013] 1 NZLR 140 at [3].

¹³⁶ At [4].

¹³⁷ At [4].

¹³⁸ At [6].

¹³⁹ At [7].

¹⁴⁰ At [10].

¹⁴¹ At [89].

¹⁴² At [89].

¹⁴³ At [92].

¹⁴⁴ Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [1.09] as cited in *Commissioner of Inland Revenue v Stiassny*, above n 135, at [92].

showing a preference for the English approach, discussed further below),¹⁴⁵ stating that:¹⁴⁶

once the necessary elements are established, a remedy is prima facie available unless there are defences to the grant of the remedy or some overriding legal principle which may justify the payee's enrichment and negate the claimant's right to restitution.

The Court held that the defendant had not been unjustly enriched, as they had given good consideration for the payment.¹⁴⁷ The Court noted that this reflects the idea that if the defendant is entitled to the enrichment, it cannot be unjust for them to keep it.¹⁴⁸

The case was subsequently appealed to the Supreme Court, which upheld the decision of the Court of Appeal. The Supreme Court's analysis did not focus on unjust enrichment, or explicitly state whether it is a cause of action, but it did endorse the Court of Appeal's reasoning.¹⁴⁹ The Supreme Court cited various English precedents on unjust enrichment relating to recovery of mistaken payments,¹⁵⁰ before concluding "there was no unjust enrichment of the [defendant] at the expense of the [plaintiff]."¹⁵¹

B. Is unjust enrichment a cause of action in New Zealand?

There is still confusion among judges and lawyers about the operation of unjust enrichment.¹⁵² The concept has developed to the stage where it is sometimes recognised as a cause of action in its own right, but not consistently.¹⁵³ Palmer and others argue that unjust enrichment is (or should be) a cause of action in New Zealand.¹⁵⁴ Conversely, Watts doubts whether *Waitaki*¹⁵⁵ or *Stiassny*¹⁵⁶ affirm unjust

¹⁴⁵ See Part V below, p 30.

¹⁴⁶ *Commissioner of Inland Revenue v Stiassny*, above n 135, at [92].

¹⁴⁷ At [96].

¹⁴⁸ At [94].

¹⁴⁹ *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [64]-[66].

¹⁵⁰ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) as cited in *Stiassny v Commissioner of Inland Revenue*, above n 149, at [42]; *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] 1 QB 677 as cited in *Stiassny v Commissioner of Inland Revenue*, above n 149, at [64].

¹⁵¹ *Stiassny v Commissioner of Inland Revenue*, above n 149, at [67].

¹⁵² Palmer, above n 1, at 32.

¹⁵³ Stace, above n 36, at 485.

¹⁵⁴ Palmer, above n 1, at 32; Benedict Tompkins "Mistaken Transfer and Failure of Conditions" (paper presented to the New Zealand Law Society Issues in Unjust Enrichment Intensive Conference, July 2014) at 61.

¹⁵⁵ *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, above n 117.

¹⁵⁶ *Commissioner of Inland Revenue v Stiassny*, above n 135.

enrichment as a cause of action in New Zealand.¹⁵⁷ On a practical level, he notes that neither case mentioned or directly overruled *Rod Milner Motors*,¹⁵⁸ which emphatically stated that unjust enrichment is not a cause of action available in New Zealand.¹⁵⁹ On a more principled level, he has expressed concern about whether New Zealand courts should recognise unjust enrichment as a cause of action, as discussed above.¹⁶⁰

Cases heard in the six years since *Stiassny*¹⁶¹ continue to show the confusion about the proper role of unjust enrichment, and the need for clarity on this issue. This paper examines a snapshot of selected cases, to show the type of reasoning the courts are utilising. It is worth noting that, despite the confusion, it is possible that the courts often reach the same substantive outcome, whether unjust enrichment is a cause of action or not. However, this type of analysis is internally incoherent, which shows an unsatisfactory confusion in the law, and creates difficulty in predicting outcomes.

The courts sometimes recognise the concept of unjust enrichment as a cause of action in its own right. In *Lykov v Wei* the plaintiff purchased an apartment in a leaky building.¹⁶² The defendant knew of the leaky building issues, and was party to proceedings (issued by the body corporate) to recover damages.¹⁶³ Despite this, they warranted they had no knowledge of any possible liability under the Unit Titles Act 1972, or of any proceedings instituted by the body corporate.¹⁶⁴ After the plaintiff completed the purchase, they discovered the problems, and were required to pay \$118,366 for remedial works.¹⁶⁵ The leaky building proceedings were later settled, and the defendant (as a party to the proceedings, although no longer the owner of the apartment) received \$91,562.¹⁶⁶ The plaintiff brought a claim for breach of warranty under the agreement for sale and purchase, with an alternate claim on the basis of unjust enrichment.

With reference to the four-part formulation of unjust enrichment, the High Court found the defendant had been unjustly enriched, for two reasons. First, because the

¹⁵⁷ Watts, above n 20, at 1.

¹⁵⁸ *Rod Milner Motors Ltd v Attorney-General*, above n 118, at 55.

¹⁵⁹ Watts, above n 20, at 1.

¹⁶⁰ See Part III above, p 17.

¹⁶¹ *Commissioner of Inland Revenue v Stiassny*, above n 135.

¹⁶² *Lykov v Wei* [2015] NZHC 3009, [2016] NZAR 28.

¹⁶³ At [4].

¹⁶⁴ At [9].

¹⁶⁵ At [19].

¹⁶⁶ At [20].

money the money was intended to cover the repair costs, which had been incurred by the plaintiff, not the defendant.¹⁶⁷ Alternatively, the body corporate was mistaken in paying the money to the defendant, instead of the plaintiff.¹⁶⁸ Palmer expresses concerns about this analysis, noting the first ground is a “moral one”, arguing the “analysis must be more comprehensive than that.”¹⁶⁹ She notes that, as a matter of law, it was reasonable for the defendant to receive the money. In relation to the second ground, she noted there was no evidence of mistake.¹⁷⁰

The Court rejected an argument that the defendants were being compensated for the decreased value of their property, because the defendant made a profit on the sale of the property, “which commonsense would dictate would not be achievable with a leaky home stigma.”¹⁷¹ However, had the price of the house been adequately discounted to reflect the decreased value, this argument would be correct, and the defendants would be entitled to the settlement money. This highlights that the correct claim was for the breach of warranty. The Court found there was a breach of the warranty,¹⁷² and damages were available for that breach.¹⁷³ The claim should have succeeded on the warranty claim alone, which would be consistent with the view of unjust enrichment as subsidiary to claims in contract.¹⁷⁴ Consistent recognition of the cause of action, and the resulting discipline in judicial reasoning, could prevent this type of analysis.

The Court of Appeal appeared to follow *Stiassny*¹⁷⁵ in *Suisse International Ltd v Monk*:¹⁷⁶

The conceptual basis for the recovery of money paid under mistake was discussed in detail in this Court’s decision in *Commissioner of Inland Revenue v Stiassny*. It is unnecessary to repeat all that was said on that occasion. It is sufficient to note that if a person pays money to another under a mistake of fact which causes him or her to make the payment, he or she is prima facie entitled to recover it as money paid under a mistake of fact. Conceptually this is on the basis that the recipient has been unjustly enriched.

¹⁶⁷ At [54]-[55].

¹⁶⁸ At [56].

¹⁶⁹ Palmer, above n 92, at 439.

¹⁷⁰ At 439.

¹⁷¹ *Lykov v Wei*, above n 162, at [57].

¹⁷² At [29].

¹⁷³ At [48].

¹⁷⁴ See Part V below, p 38.

¹⁷⁵ *Commissioner of Inland Revenue v Stiassny*, above n 135.

¹⁷⁶ *Suisse International Ltd v Monk* [2015] NZCA 46 at [32].

This analysis is consistent with unjust enrichment as a cause of action, utilising the unjust factor of mistake. But referring to unjust enrichment as a conceptual basis also suggests the Court may only be using the concept as a legal principle.

In *Phil & Teds Most Excellent Buggy Co Ltd v Out 'n' About ATP Ltd*, the High Court noted:¹⁷⁷

The question of whether unjust enrichment is a free-standing cause of action is a developing area of the law, and accordingly one in which the Court must be cautious to exercise summary jurisdiction.

In *Torbay Holdings Ltd v Napier*, in analysing a claim for money had and received, the High Court held:¹⁷⁸

A claim for monies had and received is a personal restitutionary remedy based on the concept of unjust enrichment. ... Although based on the doctrine of unjust enrichment, the claim is not the same as a cause of action for unjust enrichment. Unjust enrichment is simply a term for the underpinning doctrine of law behind various restitutionary remedies.

Although it is positive to see the Court utilising unjust enrichment as a legal principle, it could go further and recognise the cause of action. It is also veering towards conflating unjust enrichment as a causative action with restitution as a remedial response. On appeal, the Court of Appeal considered a claim in money had and received to be the correct claim for mistaken payments.¹⁷⁹ The Court described this as a situation where “an action will lie in quasi-contract for money had and received”.¹⁸⁰ This is despite the rejection of the quasi-contract analysis in England in 1996.¹⁸¹

The High Court has recently referred to a claim relating to unauthorised payments by a trust as being based on the “equitable doctrine of unjust enrichment, or restitution”.¹⁸² It is concerning that the Court appears to be locating the concept of unjust enrichment within the equitable jurisdiction (given Palmer’s concerns about this approach, discussed below¹⁸³), and also seems to be treating ‘unjust enrichment’

¹⁷⁷ *Phil & Teds Most Excellent Buggy Co Ltd v Out 'n' About ATP Ltd*, above n 112, at [144].

¹⁷⁸ *Torbay Holdings Ltd v Napier* [2015] NZHC 2477, [2015] NZAR 1839 at [164].

¹⁷⁹ *Napier v Torbay Holdings Ltd*, above n 110, at [18], with reference to *Thomas v Houston Corbett & Co* [1969] NZLR 151 (CA) and *Kelly v Solari* (1841) M & W 54 (Exch of Pleas).

¹⁸⁰ *Napier v Torbay Holdings Ltd*, above n 110, at [19].

¹⁸¹ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 25, at 710 as cited in Rickett and Palmer, above n 3, at 391.

¹⁸² *Wellington Tenth Trust v Skiffington* [2018] NZHC 1261 at [41].

¹⁸³ See Part V below, p 29.

and ‘restitution’ as interchangeable terms. The High Court has also continued to conflate the reasoning of claims in money had and received and unjust enrichment, in cases where it would be clearer to simply treat the claim as one for unjust enrichment, founded on the unjust factor of failure of basis or mistake.¹⁸⁴

V. How should New Zealand proceed?

New Zealand should formally recognise unjust enrichment as a cause of action in its own right. Of course, it would help if Parliament chose to legislate unjust enrichment. A simple statute could clarify the position, outline the four part structure, and list the currently recognised unjust factors. The statute would need to expressly leave it open to the courts to develop the cause of action, especially new unjust factors, as necessary. However, it is always a challenge to get the necessary engagement from Parliament about new legislation, especially in less visible areas of private law.¹⁸⁵

Therefore, the courts will need to take the lead. This requires the courts to consistently call unjust enrichment a cause of action, and structure their analysis accordingly. This paper argues unjust enrichment is one of the areas of private law where it is time for New Zealand courts to “bite the bullet” and clarify the position by explicitly recognising the cause of action.¹⁸⁶

A. Other jurisdictions

Having established that New Zealand should treat unjust enrichment as a cause of action, analysis will now focus on what that could look like in practice. Given the criticisms of unjust enrichment, it is important (and difficult) to correctly formulate the technical aspects of the cause of action.¹⁸⁷ There are three main options, adopted by other jurisdictions, for explaining and formulating liability in unjust enrichment. This paper briefly explores each of these, before concluding that the English approach of ‘unjust factors’ is best suited to New Zealand.

1. Unconscionability (the Australian approach)

Australia has rejected unjust enrichment, instead resolving this type of case within the equity jurisdiction, giving a remedy in situations where the defendant retaining an

¹⁸⁴ *Moffat Road Ltd v North Harbour Motors Ltd (In Liq)* [2018] NZHC 2023 at [76].

¹⁸⁵ Bevan Marten and Geoff McLay “Should New Zealand Shirk Its Obligations? A Critical Perspective on Private Law Scholarship” (2016) 47 VUWLR 429 at 437.

¹⁸⁶ At 437.

¹⁸⁷ See Part III above, p 16.

enrichment would be unconscionable.¹⁸⁸ The High Court of Australia does not consider it a legal principle,¹⁸⁹ and is at most using it as a taxonomical label,¹⁹⁰ to group similar cases together.¹⁹¹

Palmer rejects this approach, arguing “references to abstract notions of unconscionability or indeed injustice need to be eschewed in favour of identifying clearly what is being counted as unconscionable or unjust.”¹⁹² The Court in *Stiassny* described the “touchstone” for the grant of restitutionary relief for mistaken payment to be “whether it would be unjust or against conscience in the circumstances to allow the defendant to retain the benefit of the payment”.¹⁹³ Given Palmer’s concerns, it is important that New Zealand courts do not become too focused on unconscionability. This can be achieved by injecting discipline through the unjust factors, discussed below.

2. *Absence of basis (the approach of Canada and civil jurisdictions)*

The absence of basis approach, favoured by Canada and civil jurisdictions, considers an enrichment to be unjust if there is no legal basis for it.¹⁹⁴ This approach focuses more on the enrichment alone in deciding when to award restitution.¹⁹⁵ It can be summarised as follows:

1. Was the defendant enriched?
2. Was that enrichment at the expense of the plaintiff?
3. Was that enrichment unjust, as there was no legal basis for the transfer?

This approach prioritises restitution over security of receipt, which can be either a strength or a weakness, depending on opinion. Palmer considers it a weakness, arguing the balance between restitution and security of receipt is better struck by the English approach, which utilises unjust factors. She argues simply establishing an absence of basis for a transfer (in other words, not requiring plaintiffs to fit their claim within a recognised ground of restitution), “presents a threat to our present

¹⁸⁸ *Virgo*, above n 88, at 53; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14 as cited in Palmer, above n 92, at 436; *Roxborough v Rothmans Pall Mall Australia Ltd* (2001) 208 CLR 516 as cited in Palmer, above n 1, at 23.

¹⁸⁹ *Bofinger v Kingsway Group Ltd* [2009] HCA 44 as cited in Palmer, above n 1, at 23.

¹⁹⁰ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 as cited in Palmer, above n 1, at 23.

¹⁹¹ *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3)* [2012] HCA 7 at [45] as cited in Stace, above n 36, at 485.

¹⁹² Palmer, above n 92, at 437.

¹⁹³ *Commissioner of Inland Revenue v Stiassny*, above n 135, at [108].

¹⁹⁴ *Virgo*, above n 88, at 127.

¹⁹⁵ Palmer, above n 1, at 26.

understanding and use of property.”¹⁹⁶ She notes the importance of property owners being able to rely on their ownership rights.¹⁹⁷

Virgo also considers this approach “unsatisfactory”, as it gives courts too much discretion, which will lead to uncertainty.¹⁹⁸ This approach is also most vulnerable to the criticisms discussed above, of the law requiring a justification for every enrichment a person receives.

3. *Unjust factors (the English approach)*

England has rejected the idea that retaining an enrichment made without legal basis is *prima facie* unjust.¹⁹⁹ This means an enrichment is left undisturbed, unless the plaintiff can show it is unjust, by fitting it within a recognised ground of restitution (also known as an ‘unjust factor’).²⁰⁰ There are four broad questions to be asked, in determining whether restitution should be awarded for unjust enrichment.²⁰¹

1. Was the defendant enriched?
2. Was that enrichment at the expense of the plaintiff?
3. Was that enrichment unjust; does it fit within one of the recognised unjust factors?
 - a. For example, a mistaken payment.
4. Are there any defences?
 - a. For example, change of position.

This four-part framework is expanded on below, in the New Zealand context.²⁰²

The House of Lords first recognised the principle of unjust enrichment in 1991.²⁰³ However, its validity is still questioned by academics.²⁰⁴ Virgo argues it is not a cause of action in its own right,²⁰⁵ noting the courts have stated it is “simply another way of

¹⁹⁶ At 26.

¹⁹⁷ At 26.

¹⁹⁸ Virgo, above n 57.

¹⁹⁹ *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 (HL) at [155] as cited in Virgo, above n 88, at 127.

²⁰⁰ Virgo, above n 88, at 56.

²⁰¹ At 51.

²⁰² See below, p 32.

²⁰³ *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548.

²⁰⁴ Virgo, above n 88, at 52.

²⁰⁵ At 60.

describing the same thing” (for example, a claim for money had and received).²⁰⁶ If a plaintiff wishes to bring a claim for restitution based on unjust enrichment, they must still plead one of the existing forms of action (money had and received, money paid to the defendant, *quantum valebat*, or *quantum meruit*).²⁰⁷ Virgo notes the inclusion of the old forms of action in pleadings is confusing, and should stop.²⁰⁸ The English approach therefore utilises the concept of unjust enrichment predominantly in its third role, as a legal principle.²⁰⁹ It also utilises the first role of the concept of unjust enrichment, by using it as a label to group together similar cases.²¹⁰

This framework, by utilising unjust factors, harnesses the strengths of unjust enrichment as a cause of action. Restitution is only available if a plaintiff can show the defendant was enriched in circumstances that fall within one of the recognised grounds.²¹¹ This brings structure to the law, making outcomes more coherent and predictable. It injects discipline in the way cases are pled and decided. The unjust factors are also important to the development of unjust enrichment. This approach “has been successful at developing a body of law that is, for the most part, internally coherent and externally cohesive.”²¹²

This formulation also addresses some of the major criticisms of the cause of action. Virgo argues the this framework means the remedy of restitution for unjust enrichment “is not tied to vague notions of conscience, enabling the judge to exercise an arbitrary choice depending on perceived notions of justice on the facts of the case.”²¹³ This approach also prioritises security of receipt. As discussed above, people need to be able to utilise their wealth, without worrying about potential claims in unjust enrichment.²¹⁴ Requiring a plaintiff to fit their case into an unjust factor means a defendant’s enrichment is “secure, save in the exceptional cases where the claimant establishes the defendant’s enrichment is unjust.”²¹⁵ Ensuring proper respect is given to the principle of security of receipt is important to the validity of unjust enrichment,

²⁰⁶ *South Tyneside MBC v Svenska International plc* [1995] 1 All ER 545 at 557 as cited in Virgo, above n 88, at 58.

²⁰⁷ Virgo, above n 88, at 60.

²⁰⁸ At 59.

²⁰⁹ At 59.

²¹⁰ At 50-60.

²¹¹ At 61.

²¹² Palmer, above n 1, at 28.

²¹³ Virgo, above n 88, at 54.

²¹⁴ Birks, above n 5, at 68.

²¹⁵ Graham Virgo “The Law of Unjust Enrichment in the House of Lords: Judging the Judges” in J Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, Oxford, 2011) 169 at 194 as cited in Palmer, above n 1, at 27.

as it operates in the absence of wrongs or agreements, meaning its scope needs to be somewhat limited. This is especially true in the commercial context, where parties need to be able to rely on transfers.²¹⁶ By limiting the scope of unjust enrichment, this approach also encourages people to “act carefully and attentively to dealings with their property.”²¹⁷

B. Formulating the cause of action

New Zealand should continue on its current path, and adopt the English four-part framework, with unjust factors. However, New Zealand should go further than England, and explicitly and consistently refer to unjust enrichment as the cause of action. This paper gives a brief overview of how that would work, in practice. The framework is largely adopted from Virgo’s *The Principles of the Law of Restitution*.²¹⁸ This is very similar to the approach adopted in the latest editions of *Goff and Jones: The Law of Unjust Enrichment*,²¹⁹ and *English Private Law*,²²⁰ which could work just as well.

1. Was the defendant enriched?

This element of the claim is usually simple to establish.²²¹ When a claim is for money, it is easy to identify that as the enrichment.²²² Identifying goods or services as an enrichment is slightly more complicated.²²³ The “essential feature” under this element is that the enrichment must be able to be measured in money.²²⁴ This means that benefits which cannot be valued (for example, happiness), cannot be the subject of a claim in unjust enrichment.²²⁵ The enrichment is valued objectively (rather than subjectively, based on whether the defendant considers themselves to be enriched), with reference to market value.²²⁶

²¹⁶ Virgo, above n 215, at 194 as cited in Palmer, above n 1, at 27.

²¹⁷ Palmer, above n 1, at 27.

²¹⁸ Virgo, above n 88.

²¹⁹ Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016).

²²⁰ Charles Mitchell “Unjust Enrichment” in Andrew Burrows (ed) *English Private Law* (3rd ed, Oxford University Press, Oxford, 2013) 1031.

²²¹ Virgo, above n 88, at 62.

²²² At 62.

²²³ At 62.

²²⁴ At 64.

²²⁵ At 64.

²²⁶ Palmer, above n 92, at 442.

2. *Was that enrichment at the expense of the plaintiff?*

This element requires the plaintiff to show “a connection or nexus” between the defendant’s enrichment and the plaintiff’s loss.²²⁷ It is generally accepted that the enrichment must be obtained directly from the plaintiff (as opposed to being obtained through a third party), with some qualifications.²²⁸ There is a more complex question of whether the benefit gained by the defendant needs to exactly reflect a corresponding loss suffered by the plaintiff.²²⁹ Generally speaking, a restitutionary remedy for unjust enrichment should not exceed the amount of the plaintiff’s loss.²³⁰

As discussed above, it is important to factor into this analysis the concept of incidental benefit. A defendant will not be enriched at the claimant’s expense if the enrichment was the result of the plaintiff acting primarily out of self-interest, and the defendant benefitted as a result (as in Birks’ heating example).²³¹

3. *Unjust factors*

This paper outlines the more prominent and well-settled unjust factors. These factors are all underpinned by the concept of consent: the presence of the unjust factor vitiates the plaintiff’s consent to the transfer. It is important that, while respecting the need to fit cases into an unjust factor, New Zealand courts do not treat the existing unjust factors as a closed list. While the amount of discretion given to judges under the Canadian approach is undesirable, it is necessary for judges to retain the ability to recognise new factors as appropriate.²³²

It is also necessary to note that unjust enrichment claims for restitution from public authorities “raise distinct issues of policy and principle in the law of restitution”, which the courts will need to consider as they arise.²³³

Mistake

A claim to recover a mistaken payment is one of the classic examples of unjust enrichment.²³⁴ Currently, this is most commonly done through a claim in money had and received. This ground is applicable to both mistake of law and mistake of fact,

²²⁷ Virgo, above n 88, at 104.

²²⁸ At 105-116.

²²⁹ At 104.

²³⁰ At 118.

²³¹ At 114.

²³² At 57.

²³³ At 389-412.

²³⁴ At 157.

which is consistent with England,²³⁵ and existing legislative provisions in New Zealand.²³⁶

There are three broad categories of mistaken payments: liability mistakes, where the plaintiff mistakenly believed they were liable to pay the defendant (for example, *Stiassny*); fundamental mistakes, where the plaintiff's underlying assumption about the transaction is fundamentally wrong (for example, *Waitaki*,²³⁷ or making a transfer to the wrong bank account number); and causative mistakes, where a claimant's mistake resulted in a transfer of a benefit to the defendant.²³⁸

This ground is targeted at mistakes related to facts, not "mispredictions".²³⁹ A misprediction occurs when a plaintiff takes action based on an incorrect prediction of a future event. This is risk-taking, and will not result in an award of restitution.²⁴⁰ For example, a tenant predicts their lease will be renewed for two years and does extensive landscaping work. The tenant cannot claim their landlord has been unjustly enriched if the lease is not renewed, and they do not get to enjoy the benefits of their landscaping.

Compulsion

The principle of compulsion gives rise to two unjust factors: duress and undue pressure. The principle of compulsion is applicable when a plaintiff has been pressured to transfer a benefit to a defendant.²⁴¹

Duress will be applicable as an unjust factor if the plaintiff has made a transfer to the defendant due to the defendant exerting illegitimate pressure, or making an illegitimate threat (express or implied).²⁴² Undue pressure will be applicable if a defendant pressures a plaintiff to enter or renegotiate a contract, or pay money that is not owing, by threatening to do something which is otherwise lawful.²⁴³ Virgo also argues for the more complex unjust factor of legal compulsion.²⁴⁴

²³⁵ *Kleinwort Benson Ltd v Lincoln City Council*, above n 150, as cited in Virgo, above n 88, at 162.

²³⁶ Property Law Act, s 74A; Residential Tenancies Act, ss 67 and 135.

²³⁷ *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, above n 117.

²³⁸ Virgo, above n 88, at 165-186.

²³⁹ At 152.

²⁴⁰ At 163.

²⁴¹ At 203.

²⁴² At 206-229.

²⁴³ At 229-233.

²⁴⁴ At 233-253.

Exploitation

The principle of exploitation gives rise to two unjust factors: undue influence and unconscionable conduct. The principle of exploitation is applicable when a defendant has taken advantage of a plaintiff's weaker position.²⁴⁵ Unlike compulsion, a plaintiff does not need to show they were threatened or pressured; they just need to show that the defendant had the ability to influence them.²⁴⁶

Undue influence will be applicable as an unjust factor if the defendant is in a relationship of trust and confidence (as defined by equity) with the plaintiff, and exploits that relationship to gain a benefit from the plaintiff.²⁴⁷ Unconscionable conduct is an equitable ground of restitution based on exploitation, which applies only when a defendant is at fault.²⁴⁸ Unlike undue influence, there is no need to show an existing relationship between the parties.²⁴⁹

Failure of basis

A failure of basis occurs when a plaintiff makes a transfer to a defendant, on the condition of some other event occurring, but that condition is never satisfied (also known as failure of consideration).²⁵⁰ There are three sub-categories of failure of basis: total failure, partial failure and void transactions.²⁵¹ As this often arises in the context of a contract between the parties, unjust enrichment's subsidiary position (discussed below) is especially relevant, as a claim in unjust enrichment cannot proceed if a claim is available in contract.²⁵²

Incapacity

If a plaintiff lacks capacity to enter into a transaction, this can be an unjust factor, justifying a claim in unjust enrichment.²⁵³ Restitution is required either because the incapacity vitiates consent (or shows it was never present in the first place),²⁵⁴ or policy reasons require the plaintiff to be restored to their previous position.²⁵⁵ *Virgo*

²⁴⁵ At 255.

²⁴⁶ At 255.

²⁴⁷ At 257.

²⁴⁸ At 278-286.

²⁴⁹ At 278.

²⁵⁰ At 308.

²⁵¹ At 308-378.

²⁵² At 308.

²⁵³ At 379.

²⁵⁴ At 379.

²⁵⁵ At 379-380.

identifies five categories of incapacity: mental incapacity, intoxication, somnambulism, minority and incapacity of public authorities.²⁵⁶

A bar on claims in unjust enrichment: lawful basis

If there is a lawful basis for a transfer, a claim in unjust enrichment should fail.²⁵⁷ A lawful basis for the payment is often analysed as a defence, but should correctly be analysed as a bar, so the burden remains on the plaintiff to show the bar does not apply.²⁵⁸ Lawful bases for a transfer include money paid pursuant to a contract, discharge of a debt, money paid pursuant to a statutory obligation, money paid pursuant to an order of the court, and gifts.²⁵⁹

For example, although the money paid *Stiassny* was made under a mistake of law, it did discharge a debt owed pursuant to a statutory obligation, and the claim in unjust enrichment therefore failed. The Court analysed this as good consideration.²⁶⁰ Although the Court founded this on the correct principles underlying the bar, given the specific meaning of the term ‘consideration’ in the contract context, it is preferable that courts use the language of lawful basis when barring a claim in this type of situation.²⁶¹

4. Defences

The defences exist because sometimes the particular facts of a case might mean “the justice of the defendant retaining a benefit outweighs the justice of the claimant recovering it.”²⁶² More generally, they promote the concept of security of receipt.²⁶³

Change in the defendant’s circumstances

The primary defence available to claims in unjust enrichment is change of position. The House of Lords has described the defence as being available to a defendant “whose position has so changed that it would be inequitable in all the circumstances

²⁵⁶ At 379-388.

²⁵⁷ At 133.

²⁵⁸ At 189.

²⁵⁹ At 133-149.

²⁶⁰ *Commissioner of Inland Revenue v Stiassny*, above n 135, at [94]-[96].

²⁶¹ *Virgo*, above n 88, at 145.

²⁶² At 664.

²⁶³ At 664.

to require him to make restitution, or alternatively to make restitution in full.”²⁶⁴ Two elements must be satisfied, for the defence to be available:

1. The defendant must show a causative link between the enrichment and their change in position. This is a ‘but for’ test: but for the enrichment, the defendant’s position would not have been changed.²⁶⁵
2. The change in position must make it inequitable for the defendant to make restitution to the plaintiff. Factors relevant when considering whether restitution would be inequitable include whether the defendant acted in bad faith, wrongdoing and relative fault of the parties.²⁶⁶

This is consistent with existing legislative provisions relating to restitution.²⁶⁷ It is also consistent with the Court of Appeal’s analysis of the defence in *Waitaki*, although Palmer does express reservations about the role of equity in the defence.²⁶⁸

The defence of estoppel can also be available.²⁶⁹

Limitation periods

The Limitation Act 2010 requires claims for money to be filed within six years of the act or omission on which the claim is based.²⁷⁰ A defence under the Act will be applicable for most claims in unjust enrichment.²⁷¹ Given the absence of wrongdoing or agreement between the parties, it could be argued that the limitation period should be shorter for unjust enrichment claims, but this paper does not explore this any further.

²⁶⁴ *Lipkin Gorman (a firm) v Karpnale Ltd*, above n 203, at 580 as cited in *Virgo*, above n 88, at 679.

²⁶⁵ *Virgo*, above n 88, at 682-690.

²⁶⁶ At 690-695.

²⁶⁷ Residential Tenancies Act, s 135(2); Property Law Act, s 74B.

²⁶⁸ Palmer, above n 92, at 449-452.

²⁶⁹ *Virgo*, above n 88, at 667-674.

²⁷⁰ Section 11.

²⁷¹ Although the previous Act did not explicitly cover restitution, interpreting the 2010 Act to include restitution is consistent with the Law Commission’s preliminary work: see Law Commission *Limitation Defences in Civil Cases: Update Report for Law Commission* (NZLC MP16, 2007) at 21; Law Commission *Limitation of Civil Actions* (NZLC PP39, 2000) at 18.

Other possible defences

The defences of passing on and mitigation of loss have been rejected in England.²⁷² Virgo argues against the recognition of a defence of incapacity.²⁷³ Virgo argues for an illegality defence, but not if the plaintiff is less responsible than the defendant.²⁷⁴

C. Subsidiarity

Even once unjust enrichment is recognised as a cause of action, there are still questions about its relationship with other bodies of private law (mainly torts, contract and property).²⁷⁵ It can be either an “equal partner”, or it can be “subsidiary” to them.²⁷⁶ The general theory of subsidiarity means that if a particular fact situation gives rise to a claim in both unjust enrichment and one of the other areas of private law, then unjust enrichment is excluded as a possible claim.²⁷⁷

As there is a general reluctance to impose liability in the absence of wrongs or agreement, it is important to be clear about, and potentially limit, the scope of unjust enrichment. Given the above concerns about unjust enrichment,²⁷⁸ one way to contain its potentially broad reach is to only make it available when no other cause of action fits. This essentially leaves it to “grow only in the gaps left logically unattended by other principles.”²⁷⁹ Treating it as a subsidiary action is consistent with the view of it as a supplementary cause of action. New Zealand courts should therefore treat it as subsidiary.²⁸⁰

VI. Conclusion

Despite a large amount of academic writing on the subject, and some cases in New Zealand’s highest courts, it is still not clear exactly what role the concept of unjust enrichment plays in New Zealand’s private law. This paper has identified it operating as both a taxonomic label and as a legal principle explaining liability in various areas of law. It also appears that the courts are just on the cusp of recognising it as a cause

²⁷² Virgo, above n 88, at 702-707.

²⁷³ At 726-733.

²⁷⁴ At 708-725. This would need to be consistent with the Contract and Commercial Law Act, ss 75-76.

²⁷⁵ Barker and Grantham, above n 22, at 63.

²⁷⁶ At 63.

²⁷⁷ At 63.

²⁷⁸ See Part III above, p 16.

²⁷⁹ Barker and Grantham, above n 22, at 63.

²⁸⁰ Ross Grantham and Charles Rickett “On the subsidiarity of unjust enrichment” (2001) 117 LQR 273 at 273.

of action in its own right. Following England's four-part framework, requiring plaintiffs to fit claims into recognised unjust factors, is the best way forward for New Zealand. Recognising unjust enrichment as a cause of action offers structure, clarity and discipline to an area of law vulnerable to exploitation and murky boundaries.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 10,372 words.

Bibliography

A. Cases

1. New Zealand

Avondale Printers & Stationers Ltd v Haggie [1979] 2 NZLR 124 (SC).

Carly v Farrelly [1975] 1 NZLR 356.

Commissioner of Inland Revenue v Stiassny [2012] NZCA 93, [2013] 1 NZLR 140.

Hi-Tech Investment Ltd v World Aviation Systems (Australia) Pty Ltd [2009] NZCA 427.

Ian Johnson Pharmacy Ltd v Glaxosmithkline NZ Ltd (Manukau DC, CIV-2010-092-1947, Wiltens DCJ, 26 September 2011).

Lykov v Wei [2015] NZHC 3009, [2016] NZAR 28.

Moffat Road Ltd v North Harbour Motors Ltd (In Liq) [2018] NZHC 2023.

Napier v Torbay Holdings Ltd [2016] NZCA 608.

National Bank of New Zealand Ltd v Waitaki International Processiing (NI) Ltd [1999] 2 NZLR 211 (CA).

National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd [1997] 1 NZLR 724 (HC).

Phil & Teds Most Excellent Buggy Co Ltd v Out 'n' About ATP Ltd [2016] NZHC 71.

Rod Milner Motors Ltd v Attorney-General [1999] 2 NZLR 568.

Staite and others v Kusabs and others [2014] NZHC 1183.

Stiassny v Commissioner of Inland Revenue [2012] NZSC 106, [2013] 1 NZLR 453.

Suisse International Ltd v Monk [2015] NZCA 46.

Thomas v Houston Corbett & Co [1969] NZLR 151 (CA).

Torbay Holdings Ltd v Napier [2015] NZHC 2477, [2015] NZAR 1839.

Wellington Tenth Trust v Skiffington [2018] NZHC 1261.

2. Australia

Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd [2014] HCA 14.

Bofinger v Kingsway Group Ltd [2009] HCA 44.

Equuscorp Pty Ltd v Haxton [2012] HCA 7.

Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3) [2012] HCA 7.

Roxborough v Rothmans Pall Mall Australia Ltd (2001) 208 CLR 516.

3. *England and Wales*

Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd [1980] 1 QB 677.

Deutsche Morgan Grenfell Group plc v IRC [2007] 1 AC 558 (HL).

Kelly v Solari (1841) M & W 54 (Exch of Pleas).

Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 (HL).

Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548.

Moses v Macferlan (1760) 2 Burr 1005.

South Tyneside MBC v Svenska International plc [1995] 1 All ER.

Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 (HL).

Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55, [2008] 1 WLR 1752.

B. *Legislation*

Contract and Commercial Law Act 2017.

Fair Trading Act 1986.

Judicature Act 1908.

Limitation Act 2010.

Property Law Act 2007.

Property (Relationships) Act 1976.

Residential Tenancies Act 1986.

Resource Management Act 1991.

Unit Titles Act 1972.

C. *Books and chapters in books*

P.S. Atiyah "Common Law and Statute Law" (1985) 48(1) MLR 1.

Kit Barker “Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons” in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds) *Understanding Unjust Enrichment* (Hart, Oxford, 2004) 79.

Kit Barker and Ross Grantham *Unjust Enrichment* (2nd ed, LexisNexis Butterworths, Chatswood (NSW), 2018).

Peter Birks “Introduction” in Peter Birks (ed) *English Private Law* (Oxford University Press, New York, 2000) vol 1 xxxv.

Peter Birks *Unjust Enrichment* (Oxford University Press, Oxford, 2005).

Peter Birks and Charles Mitchell “Unjust Enrichment” in Peter Birks (ed) *English Private Law* (Oxford University Press, New York, 2000) vol 2 525.

J McCamus “Unjust Enrichment: Its Role and Limits” in D Waters (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1993) 129.

Ewan McKendrick “Taxonomy: Does it Matter?” in David Johnston and Reinhard Zimmermann (eds) *Unjustified Enrichment - Key Issues in Comparative Perspective* (Cambridge University Press, Cambridge, 2002) 627.

Charles Mitchell “Unjust Enrichment” in Andrew Burrows (ed) *English Private Law* (3rd ed, Oxford University Press, Oxford, 2013) 1031.

Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011).

Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016).

Charles Rickett and Jessica Palmer “Restitutionary Remedies” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (Brookers, Wellington, 2011) 383.

Graham Virgo “The Law of Unjust Enrichment in the House of Lords: Judging the Judges” in J Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, Oxford, 2011) 169.

Graham Virgo *The Principles of the Law of Restitution* (Oxford University Press, Oxford, 2015).

D. *Journal articles*

Peter Birks “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 UWAL Rev 1.

Andrew Burrows “The Relationship Between Common Law and Statute Law in the Law of Obligations” (2012) 128 L.Q.R. 232.

Ross Grantham and Charles Rickett “On the subsidiarity of unjust enrichment” (2001) 117 LQR 273.

Steve Hedley “Is Private Law Meaningless?” (2011) 64 C.L.P 89.

Bevan Marten and Geoff McLay “Should New Zealand Shirk Its Obligations? A Critical Perspective on Private Law Scholarship” (2016) 47 VUWLR 429.

Jessica Palmer “Restitution” (2016) 2 NZ L Rev 435.

Geoffrey Samuel “Can Gaius Really be Compared to Darwin?” (2000) 49 ICLQ 291.

Victoria Stace “The Law of Contribution - an Equitable Doctrine or Part of the Law of Unjust Enrichment?” (2017) 48 VUWLR 471.

Sue Tappenden “The Emergence of the Concept of Unjust Enrichment in New Zealand, its Relationship to the Remedial Constructive Trust and the Development of the Status of Joint Ventures in Equity” (2008) 1 Journal of Politics and Law 32.

Peter Watts “Taxonomy in Private Law - Furor in Text and Subtext” (2014) 1 NZ L Rev 107.

Peter Watts “‘Unjust Enrichment’ - the Potion That Induces Well-meaning Sloppiness of Thought” (2016) 69 C.L.P. 289.

E. Parliamentary and government materials

Law Commission *Limitation Defences in Civil Cases: Update Report for Law Commission* (NZLC MP16, 2007).

Law Commission *Limitation of Civil Actions* (NZLC PP39, 2000).

F. Internet resources

Banking Ombudsman “Mistaken Payments ” <www.bankomb.org.nz>.

G. Other resources

Jessica Palmer “Unjust Enrichment: What Is It All About?” (paper presented to the New Zealand Law Society Issues in Unjust Enrichment Intensive Conference, July 2014).

Benedict Tompkins “Mistaken Transfer and Failure of Conditions” (paper presented to the New Zealand Law Society Issues in Unjust Enrichment Intensive Conference, July 2014).

Peter Watts “Foreward” (paper presented to the New Zealand Law Society Issues in Unjust Enrichment Intensive Conference, July 2014).