Lessons from a "conversation" about restitution

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In Australia, the law of restitution adheres to the approach exemplified by Lord Mansfield in Moses v Macferlan (1760) 2 Burr 1005; 97 ER 676. It does not recognise "unjust enrichment" as a definitive principle. In the late 20th century, the English courts recognised the principle and, shortly after, the defence of change of position. These developments may owe much to a "conversation" between English and German legal scholars. The German Civil Code (Bürgerliches Gesetzbuch, or BGB) has long recognised the defence, as a counterpoint to its broad "absence of basis" ground for liability. Notably, however, English law has not (yet) embraced such a broad ground for liability, and still requires a vitiating factor, such as mistake, to found a restitutionary claim. This article considers what implications the adherence to the considerations in Moses v Macferlan may have for the acceptance in Australia of the change of position defence as it is known to English and German law.

In *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378-379 the High Court held that the question whether moneys paid under mistake (of fact or of law) should be returned to the payer is not to be determined by reference to whether the recipient has been unjustly enriched at the expense of the payer. Unjust enrichment is not a definitive legal principle which can be taken as a sufficient premise for direct application in particular cases. That position has been consistently maintained by the High Court in subsequent cases,[1] most recently in *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 [86]. Recovery depends upon the existence of a qualifying or vitiating factor, of which mistake is one. Where such a factor is present, there is a prima facie liability in the recipient to make restitution. To displace that prima facie liability, the recipient must point to circumstances which the law recognises would make an order for restitution unjust. The recipient of moneys paid under a mistake is entitled to raise, by way of answer, any matter or circumstance which shows that his or her receipt, or retention, of the payment was or is not unjust.

These considerations, of a prima facie liability to repay moneys paid by mistake, and of the kind of defence which may rebut it, bring to mind Lord Mansfield's oft-quoted dictum in *Moses v Macferlan* (1760) 2 Burr 1005 at 1012; 97 ER 676 at 681.[2] Regarding the defence, he said that a defendant is entitled to "go into every equitable defence, upon the general issue … in short, he may defend himself by every thing which shews that the plaintiff, ex aequo & bono, is not intitled to the whole of his demand, or to any part of it" (at 1010; 679).

In *Sadler v Evans* (1766) 4 Burr 1984 at 1986; 98 ER 34 at 35, which was decided some six years after *Moses v Macferlan*, Lord Mansfield said that the action for money had and received "is a liberal action, founded upon large principles of equity, where the defendant can not conscientiously hold the money. The defence is any equity which will rebut the action". As explained by Justice Gummow, writing extra-judicially,[3] in endeavouring to find a solution to the problem presented by *Moses v Macferlan*, in that the relief sought did not fit into the actions recognised by the common law, Lord Mansfield looked to equity for an appropriate analogy upon which the common law could draw.

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[1] *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at 665 [85]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151]; *Friend v Brooker* (2009) 239 CLR 129 at 141 [7].

[2] That "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money".

[3] Gummow WMC, "Moses v Macferlan: 250 Years On" (2010) 84 ALJ 756 at 757 (also (2011) 68 *Washington and Lee Law Review* 881).

Hence his Lordship's general statements that the action for money had and received was an action "in the nature of a bill in equity where on the general issue the defendant was entitled to raise by way of answer matters showing that receipt or retention of the payment was not unjust".[4] As a result, notions of equity were worked into and became part of the fabric of the law in this area.[5]

It is well known that in the late 20th century, English law took a different turn. Largely through the influence of English scholars, liability for restitution came to rest upon a principle of unjust enrichment. That principle had regard to the position of the defendant as possibly enriched by a benefit gained at the plaintiff's expense and asked whether it would be unjust to permit its retention. An answer to what "unjust" means in this context was provided by the decision of the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, where the defendant's change of position following upon the receipt of moneys in circumstances such as mistake was accepted as a defence to a claim for restitution.

The defence of change of position, as explained in *Lipkin Gorman* and later cases, bears the hallmark of the defence to a claim for unjust enrichment in German law. The English defence was intended to widen the basis for liability for restitution. The question then raised was whether a factor such as mistake could continue to play a part in the application of the principle of unjust enrichment or whether it requires a more general ground of liability. Some have suggested that here too English law has shifted in the direction of German law.

These developments followed upon a considerable debate which was generated between English and German legal scholars in their writings. It has been described as a "conversation"[6] and it continues today. It is a conversation to which the English courts appear now to be attuned.

The purpose of this article is not to presume to determine the correctness of the path taken by the English courts. It must be acknowledged that there is no perfect solution to the problems posed by claims for the return of moneys which are not due. Each solution is likely to have some shortcomings. The basis upon which a payer might recover, and the recipient be liable for restitution involves policy choices. In the common law the choice of solution usually requires coherence with previous case law. The purpose of this article is to identify questions concerning the place, if any, for the defence of change of position in Australian law.

In *David Securities*, it was said that the defence of change of position had not been expressly accepted in this country.[7] However, it was accepted that if payments made under a mistake are prima facie recoverable, "a defence of change of position is necessary to ensure that enrichment of the recipient is prevented only in circumstances where it would be *unjust*". What did the Court mean, and to what circumstances did it point, by the term "unjust"? The later decision of *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525 [15], 553 [95] suggests Australian law will adhere to the kind of defences, recognised by equity, of which Lord Mansfield spoke. To this may be added the qualification, made in *Bofinger*,[8] that the principles of equity do not here operate at large and idiosyncratically.

Two points may then be made concerning defences of these kinds so far as concerns Australian law. The first is one of symmetry. It is that, conformably with these defences, the general ground for liability for restitution is also founded upon equitable notions. The second is that this is an approach which differs from that upon which the defence of change of position in English law is based.

In these circumstances, the question is whether the defence of change of position, as it is understood by English law, is suited to Australian law? Given that the scope and operation of the English defence appears to have been informed by German law, the answer may lie in what was said

[4] Gummow, n 3 at 757.

[5] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 554 [100] (Gummow J).

[6] Visser D, "Unjustified Enrichment in Comparative Perspective" in Rieman M and Zimmermann R (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) p 971.

[7] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 384-385.

[8] *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 301 [94].

by scholars in the "conversation" about the nature and purpose of the German defence, the ground of liability to which it is addressed and the historical foundations of both.

THE CONVERSATION: ENGLISH LAW LOOKS TO THE BGB

Two eminent German legal scholars and comparatists – Professors Zweigert and Kötz – have been credited with an important role in starting the conversation.[9] Their text, modestly entitled, *An Introduction to Comparative Law*, and translated by Tony Weir, another eminent comparatist, has been influential in the development of an interest in, and understanding of, civilian law by common lawyers. In its first edition, which was published in 1977, the treatment given to claims for restitution of moneys not due was surveyed. The authors compared the common law approach, exemplified by Lord Mansfield and the United States Restatement which followed it, with that taken under the German Civil Code, Bürgerliches Gesetzbuch ("BGB")[10] and other civilian codes.

The third edition of Goff and Jones' text, *The Law of Restitution*, was published in 1986.[11] In it, reference was made to Zweigert and Kötz and their explanation of the defence of change of position in German law. *Lipkin Gorman*, in which Lord Goff wrote the leading judgment, was decided in 1991. Whilst not expressly referring to the German defence, the examples given by Lord Goff of its operation disclose a strong affinity of the defence under consideration with the German defence. Acceptance of the defence by English law may be a rare example, not only of the influence of legal scholars upon the law, but also of the transplantation of an idea from civilian law directly into the common law. If English law is also moving closer to acceptance of the German ground of liability, the transplant will be complete.

The principle of unjust enrichment was said by Goff and Jones,[12] prior to *Lipkin Gorman*, to presuppose three things: that the defendant was enriched by the receipt of a benefit; that the benefit was gained at the plaintiff's expense; and that it would be unjust to allow the defendant to retain the benefit. This heralded a movement away from Lord Mansfield's approach.

This was not the first time that dissatisfaction with that approach had led English law to recast the basis for restitution. In the 19th century, the fictional promise necessary to the action which Lord Mansfield had utilised was elevated to an implied contract. But in Lord Mansfield's time, the fictional promise was a mere procedural device which made it possible to use the action in assumpsit to recover moneys paid in circumstances such as mistake. When the 19th century courts rebased the action, it was contract, and not vitiating factors such as mistake, which became the basis for liability.

When the implied contract theory (itself a fiction) fell into disfavour, English law did not redirect its attention to Lord Mansfield's solution. It has been observed that when English scholars looked to the principle of unjust (or as I shall shortly explain, "unjust*ified*") enrichment in the BGB, it could hardly have been because restitution on the basis of factors such as mistake is over-inclusive.[13] Rather a broader basis was sought. One comparatist wondered whether the attraction is that civilian codes, the BGB in particular, have a kind of elegance.[14] If so, the price to be paid is a greater level of abstraction.[15] This is considered something of a virtue in civilian law, but English law is not generally accustomed to it. English law prefers to develop principle by reference to concrete examples which have been worked out over time. This is what Lord Mansfield would have had in mind. The abstract nature of the principle of unjust enrichment may, in part, explain the hesitancy of present day English

[9] See Visser, n 6, p 971. Other influential participants in the conversation have included Professors Zimmermann and du Plessis.

[10] For English translation see German Law Archive, http://www.iuscomp.org/gla/index.html.

[11] Goff (Lord Goff of Chiveley) and Jones G, *The Law of Restitution* (3rd ed, Sweet & Maxwell, London, 1986) p 693.

[12] Goff and Jones, n 11, p 16.

[13] Krebs T, *Restitution at the Crossroads: A Comparative Study* (Cavendish Publishing Ltd, London, 2001) p 309.

[14] Krebs, n 13, p 309.

[15] Krebs, n 13, p 309.

law to give up the vitiating factors such as mistake, as a ground of liability. Nevertheless, English law has accepted the principle of unjust enrichment and in *Lipkin Gorman* the defence of change of position was also accepted.

Before turning to *Lipkin Gorman* and the defence it recognised, it is necessary to take account of the provisions of the BGB to which some English scholars and judges have been attracted.

UNJUST(IFIED) ENRICHMENT IN THE BGB

It must first be pointed out that German law does not have one discrete law of unjust enrichment by which restitution is provided, which is what English law seeks to do. Restitutionary remedies are to be found in German law in a contractual context, in the law of obligations, the law of property, family and succession law and elsewhere. This might suggest that a legal transplant of one aspect of a strongly interlinked system would be problematic. In any event, the provision for liability for unjust enrichment which is regarded as most important, and is the counterpoint for a defence of change of position, is s 812 par 1 of the BGB.

Zweigert and Kötz explain[16] that s 812(1) is derived from the Roman condictio, which was an action in personam designed to enforce an obligation. It was "abstract" in the sense that the formula for the action made no mention of the *basis* of the defendant's obligation. The condictio could be used whenever a specific sum of money or a chattel had to be handed over to the plaintiff, regardless of the source of the obligation to do so. As Zweigert and Kötz observe, the Roman jurists soon realised that the "abstractness" of the condictio meant it could be used in circumstances where the defendant was withholding something from the plaintiff without justification and ought to give it up. As Lord Goff was later to remark,[17] English law at an earlier point might have developed to recognise the Roman law action, but it did not do so. Whether it has moved in that direction in more recent times is a matter of present debate.

Restitution on the ground of mistake was allowed prior to the codification of law in Germany by means of the condictio indebiti. The central requirement of the action was that the plaintiff had paid on a non-existent obligation. In the process of codification the requirement of mistake was abandoned and the scope of the action widened.[18] The plaintiff could recover if he or she had transferred something "without legal ground" no matter what the legal ground lacking turned out to be.

The first part of s 812(1) of the BGB states that "a person who without legal ground obtains anything from a person at his expense, whether by transfer or otherwise, is bound to give it up to him". It will be recalled that the requirement that the recipient benefits at the expense of the other is found in the principle of unjust enrichment stated by Goff and Jones. What is missing from English law, at least at present, is the essential requirement that the transfer of a benefit be *without legal ground*.

"Enrichment" in German law traditionally means an economic increment to a person's wealth.[19] An enrichment must be capable of legal justification. In German law any transfer of wealth which occurs without a juristic reason can be recovered.[20] Thus, although ownership of a chattel sold passes under the conveyance in German law, s 812(1) allows the vendor to demand restitution of the benefit

[16] Zweigert K and Kötz H (translation by Weir), *Introduction to Comparative Law* (3rd ed (rev), Clarendon Press, Oxford, 1998) p 539.

[17] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 172.

[18] To a general condictio sine causa: Zimmermann R and Meier S, "Judicial Development of the Law, Error Iuris, and the Law of Unjustified Enrichment – A View from Germany" (1999) 115 LQR 556 at 561.

[19] Zweigert and Kötz, n 16, pp 582-583.

[20] Dannemann G, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (Oxford University Press, 2009) p 37; Mächtel, "The Defence of 'Change of Position' in English and German Law of Unjust Enrichment" (2004) 5 *German Law Journal* 23 at 27.

conferred, ownership, where it later appears that the contract is void. The action is available so long as the person conferring the benefit did not know that he or she was not bound to do so (s 814 of the BGB).[21]

The title of the subchapter in which s 812(1) appears translates not as "unjust" enrichment, but as "unjust*ified*" enrichment. Therein lies the principal distinction with English law. Under German law an enrichment is prima facie unjustified unless a legal ground existed for it. There is no need to resort to specific factors which may make retention unjust. English law is diametrically opposed. Unless there is an "unjust factor", no transfer of wealth can be restored. English law looks to the *reason* money was paid or goods transferred. That reason, in theory, is irrelevant in German law.

Section 812(1) is a very wide basis for liability for restitution compared with English law. It is so wide that efforts have been made to narrow it. The defence provided to a claim for unjustified enrichment by s 818(3) of the BGB is equally wide. It is referred to as the defence of change of position,[22] although it more correctly translates as a loss of enrichment.[23] A defendant is liable only for the enrichment which remains when the plaintiff claims restitution. So long as the defendant did not know of the absence of a legal ground for the payment or transfer, the defence can be relied upon whenever the enrichment has been lost or reduced. The defence is said to operate more as a rule than a defence[24] and because it operates so widely, it effectively alters liability.

Because "enrichment" in German law is equated with an addition to a person's wealth, the duty which might arise under s 812(1), to return money or other benefit because it is not legally justified, is extinguished or reduced if the benefit no longer exists, is destroyed, or is stolen. An example given[25] is of a person who buys a car with the money received. If the car is equal in value, there is no loss of enrichment. But if the value is less, he is no longer enriched to the same extent and does not have to pay back all of the money. A defendant does not have to manage the money well. The defence is applied to unprofitable sales and bad investments. It is applied in the case of theft, as when an agent steals the money. No reliance upon the receipt of the money is required. All that is required is that there be a causal connection between the change of position and the receipt of the moneys. For that reason it is not available for ordinary living expenses or for something that would have been purchased anyway. In these cases the "loss" of the enrichment is not causally related to the receipt and therefore no change of position has taken place.

With this understanding of the defence at German law, we should consider what was adopted by the House of Lords in *Lipkin Gorman*.

LIPKIN GORMAN: THE DEFENCE OF CHANGE OF POSITION

In *Lipkin Gorman*, a partner of a law firm, who had a gambling addiction, presented a cheque fraudulently drawn on the firm's bank account to a casino, which cashed it for chips. Because the casino had not given valuable consideration to the firm for the cheque, there was a prima facie entitlement in the firm to restitution. On the traditional approach to liability this caused no difficulty. However, the casino claimed that it had acted in good faith and it would be unjust or unfair to order restitution. Lord Goff characterised this submission as one of "change of position". The consensus of opinion at that time, he considered, was that English law ought to recognise such a defence.[26]

His Lordship recognised that change of position had not received general recognition as a defence. Indeed it was inconsistent with some earlier English cases.[27] And, as was later to be observed

[21] Zweigert and Kötz, n 16, p 541; Zimmermann and Meier, n 18 at 557.

[22] Visser, n 6, p 991.

[23] Or "falling away of enrichment" ("Wegfall der Bereicherung"): Krebs, n 13, p 30.

[24] Dannemann, n 20, p 139.

[25] Mächtel, n 20 at 30-31.

[26] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 578.

[27] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 579.

by the High Court in *David Securities*,[28] although the defence was recognised in *Lipkin Gorman*, the House of Lords did not define its scope. Lord Goff said only that the principle on which it rests should be stated no less broadly than: "that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."[29]

The requirement that repayment must, in all the circumstances, be inequitable, may not appear to be so far removed from what Lord Mansfield had said. But it would not seem that the defence of change of position was intended to be applied in this way. The circumstance of a change of position is obviously intended to carry the defendant a long way, if not all the way, towards a conclusion that repayment would be inequitable. So much is evident from the examples given by Lord Goff:[30] of a defendant who receives money paid under a mistake of fact and acting in good faith pays it away to charity; of a thief who steals money and pays it to a third party who then pays it to a charity. Lord Goff said that in cases like these, "bona fide change of position should of itself be a good defence".

So described, the defence bears the hallmark of the BGB defence, in its focus upon the defendant's economic state following upon receipt of moneys paid under mistake. So too does Lord Goff's exception from the operation of the defence of payments made by the defendant for ordinary living expenses.[31] It will be recalled that the German courts do not consider such a payment to have the necessary causal connection to receipt of the benefit.

On the topic of causation, a later decision of the Court of Appeal in *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at 827 [31] took Lord Goff in *Lipkin Gorman* to say that the defence required only that the defendant's change of position be causally linked to ("but for") the receipt of the mistaken payment. It rejected the narrower view of the defence, which suggested detrimental reliance as necessary. That the defendant's misfortune need only be causally linked to the receipt was subsequently confirmed by the Court of Appeal.[32] In the House of Lords, Mance LJ has assumed the view to be correct.[33] This approach mirrors that taken by German courts.[34]

In *Scottish Equitable*, Walker LJ considered that this wide view of the defence facilitated the "more generous approach" of which Lord Goff had spoken.[35] Lord Goff said:

> [T]he recognition of change of position as a defence should be doubly beneficial. It will enable a more generous approach to be taken to the recognition of the right to restitution.[36]

This statement is important. It acknowledges the necessary linkage between the defence and the width of the ground of liability. When the ground of liability is wide, the defence must also be wide, as those drafting the BGB realised. English law approached the matter in reverse, but to the same result. Lord Goff was saying that a change of position defence required a wider ground of liability than before.

DEVELOPMENTS IN THE GROUND FOR LIABILITY IN ENGLISH LAW

Although the basis for this wider conception of liability was not stated in *Lipkin Gorman*, the prospect that it might involve a broader general principle, rather than specific factors such as mistake, is evident. Whilst later cases suggest that some English judges may be clinging to the wreckage of

[28] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385.

[29] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580.

[30] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 579.

[31] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 580.

[32] *National Westminster Bank plc v Somer International (UK) Ltd* [2002] 3 WLR 64 at 75 [25].

[33] *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775 at 2792 [41].

[34] Mächtel, n 20 at 31.

[35] *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at 827 [31].

[36] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 581.

mistake, others recognise that the direction English law has taken may necessitate its alignment with a basis for liability such as that of the German law, which is to say absence of legal ground.

In *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, which was decided some two years after *Lipkin Gorman*, it was held that moneys paid under an ultra vires demand by the IRC must be returned regardless of the absence of one of the specific factors, such as mistake or compulsion. Lord Goff said:

> In the end, logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should prima facie be enough to require its repayment.[37]

Later, in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 374, Lord Goff noted, with some interest, that in German law recovery is not dependent upon proof of mistake by the claimant and that s 812(1) of the BGB confers a right to recover benefits obtained without a need for legal justification. Scottish law has a similar approach. Lord Hope observed (at 408) that in the civilian systems and in Scotland, which has a mixed system of law, the essence of the principle of unjust enrichment is that it is unjust for a person to retain a benefit which he has received at the expense of another, without there being a legal ground to justify its retention. Two decisions at that time expressly recognised absence of a legal ground for retention of a benefit as an element of a claim for unjust enrichment in Scottish law.[38] Lord Hope went on to say that since England and Scotland regard the law of restitution as based on the same principle, of unjust enrichment, they might be expected to apply it in much the same way.

Some commentators regard the judgments in *Kleinwort Benson* as bringing the English and German approaches closer, not just because of what was said by Lords Goff and Hope, but because mistake does not appear to be the true basis for liability in the judgments in that case. Professors Zimmermann and Meier[39] say that the decision cannot be explained by reference to mistake and that it therefore supports the analysis that the basis for liability in English law revolves around absence of legal ground. This was a view shared by Professor Birks.[40] It is also suggested that the English courts may be using the concept of "mistake" as something of a fiction.[41] In this regard it is to be observed that in the later case of *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 at 570, Lord Hoffmann said that although English law has no general principle that to retain money received without any legal basis is unjust enrichment, the effect of *Kleinwort Benson* may be to extend the concept of mistake so that a payer may be *deemed* to have made a mistake, thus circumventing the need to establish an unjust factor as a basis for liability.

It is well known that Professor Birks was a convert to the German absence of legal ground as a basis for liability. As Lord Hoffmann observed in *Deutsche Morgan Grenfell* (at 560 [21]-[22]), Professor Birks also claimed that English law had developed a general basis for restitution by reference to the absence of basis approach. However, his Lordship did not consider it necessary to determine whether that was so in that case. Lord Walker also doubted whether *Deutsche Morgan Grenfell* was an appropriate vehicle for rebasing the common law on what he acknowledged to be a "highly abstract principle" (at 612, 613 [155], [157]-[158]). His Lordship's preference was for an alignment with Scottish law, which, however, would seem to take English law in the same direction.

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[37] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 173.

[38] *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 SCLR 697; *Shilliday v Smith* (1998) SLT 976.

[39] Zimmermann and Meier, n 18 at 563-565.

[40] Birks P, "Private Law" in Birks and Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, London, 2000) p 14.

[41] Dannemann, n 20, p 211; see also Krebs, "A German Contribution to English Enrichment Law" (1999) 7 *Restitution Law Review* 271 at 278.

Lord Walker in the same case acknowledged that English law, with respect to its basis for liability for restitution, might be at a crossroads (612 [154]).[42] In the meantime it would appear that the Court of Appeal is proceeding upon the basis that it is necessary for a claim for restitution to bring the facts within one of the accepted categories, such as mistake.[43] Further resolution may be required.

WHAT THE COMMENTATORS SAY

German scholars do not suggest that either the basis for liability for unjustified enrichment or the defence of change of position in the BGB is particularly compelling. Section 812(1) is not regarded as a "legislative masterpiece".[44] Professor Krebs has remarked that the BGB's drafters had something of a "hazy" idea of how to structure the unjust enrichment subject. But once it was decided to provide a wide ground of liability for restitution, based upon Roman law, it was obvious to those drafters that a strong and wide-ranging defence would be necessary.[45]

As I have mentioned, English law has gone about the matter the other way – by first recognising a wide defence and allowing the ground for liability to be worked out. Lord Goff acknowledged in *Lipkin Gorman* that it would follow that that ground would be wide. That, necessarily, is the relationship between the two.

Professor Zimmermann puts the defence in its historical context. He explains[46] that it was the view of 19th-century writers, which influenced the drafters of the BGB, that if a defendant had spent the moneys received, the defendant could hardly be said to be enriched. It will be recalled that the German view of enrichment is concerned with the accretion of wealth. The defence is fundamentally economically based.

Thus, the BGB's drafters proposed that a bona fide defendant who is no longer enriched should not be liable to the extent that he has been disenriched. A recipient of money or chattels should be able to rely upon change of position caused by the receipt so long as the causal link was sufficient and not too remote. It was left to the German courts to determine the scope of this defence. The courts did not seek to narrow it. The defence, at the outset, was regarded by the courts as expressing a fundamental principle of enrichment law, namely that the defendant must never be worse off as a result of making restitution than he was before he received it. As long as there was a causal link between the enrichment and the disenrichment, the courts generally held the defence to be available.

The defence also extended to provide compensation to the defendant as a condition of restitution. An example cited[47] is a defendant, who finds and looks after a dog. He has come into the possession of the dog "without legal ground". The dog then claws the defendant's valuable Persian rug. The German courts would hold that the defendant can refuse to return the dog unless paid the cost of the food and the damaged rug. Thus the economic consequence for a plaintiff is not only the loss of the money or chattel paid or transferred but a possible requirement to reimburse the defendant regardless of the circumstances.

[42] Referring to *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London Borough Council* [1999] QB 215 at 233 (Waller LJ); Krebs, n 13. More recently his Lordship explained that there is uncertainty as to the direction in which the principle of unjust enrichment will develop in English law in *Test Claimants in the Franked Investment Income Group Litigation v Revenue & Customs Commissioners* [2012] 2 AC 337 at 375.

[43] See *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC* [2009] 1 WLR 1580 at 1597, 1600 [50], [62]; see also *Test Claimants in the Franked Investment Income Group Litigation v Revenue & Customs Commissioners* [2012] 2 AC 337 at 402 [162] (Sumption LCJ).

[44] Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, Oxford, 1996) p 887.

[45] Krebs, n 13, p 279.

[46] Zimmermann, n 44, pp 900-901.

[47] Mächtel, n 20 at 34.

It has been said that attempts were made for more than half of the 20th century to work out how to narrow the ground of liability in s 812(1) and that there was a strong drive to interpret it to require positive factors for restitution.[48] But as s 812(1) was narrowed, it became arguable that the defence became – and is now still – too wide.[49]

It is for this reason that the defence of change of position in German law has itself come under increasing fire and some commentators are in favour of its scope being scaled down.[50] Its breadth of operation is regarded as both the essential characteristic of enrichment law[51] and the reason why claims for unjustified enrichment are so unlikely to be successful.[52] Fundamentally, the defence allocates the risk of loss to the plaintiff. This has drawn increasing criticism from academic writers.[53] The historical, underlying idea of the defence, that the enrichment claim should not cause the defendant loss, is now questioned. Professors Zweigert and Kötz suggest[54] that it may be more realistic to hold that, in general, everyone should bear the normal risks of the conduct of his (or her) affairs.

At the time when English scholars were looking to the German model for ideas, reform of the BGB had been mooted. A paper, published under the auspices of the German Federal Justice Ministry,[55] recommended far-reaching reforms of the law of obligations. Amongst these was the replacement of the one comprehensive disenrichment defence with defences relevant to the circumstances. The striking feature of the suggested reforms was that regard might be had to the conduct and fault of the respective parties. It has been suggested[56] that the proposal represents an acceptance that the high level of abstraction which runs through the German law of unjustified enrichment cannot be maintained and that there is a need to move beyond abstraction and to identify the concrete *reasons* for restitution.

Professors Zweigert and Kötz conclude that the way in which the various foreign systems solve these problems shows that there is "nothing necessary or self-evident" about the approach adopted in Germany.[57] Even in other civilian legal systems, the recipient of money is not treated as generously as the BGB would treat them, the Professors point out.[58] The American Law Institute's *Restatement of the Law Third: Restitution and Unjustified Enrichment*, published in 2011,[59] takes account of the defence allowed by German law but appears unconvinced that the approach taken by United States law, following the Restatement, which is based largely upon equitable notions, is unduly limited in its application.[60]

CONCLUSION

There are a number of questions about the suitability of the change of position defence, as understood in English and German law, to Australian law. The defence would appear to operate differently from, and more widely than, our conception of a change of position that makes restitution, in all the

[48] Krebs, n 13, p 28.

[49] Krebs, n 13, p 305.

[50] Visser D, *Unjustified Enrichment* (Juta & Co, Cape Town, 2008) p 704.

[51] Zweigert and Kötz, n 16, p 583; Zimmermann, n 44, p 900.

[52] Zimmermann, n 44, pp 895-896.

[53] See, eg Visser, n 50, p 717.

[54] Zweigert and Kötz, n 16, p 593.

[55] Krebs, n 13, pp 295-296, referring to a paper prepared for the Ministry in 1981 by König.

[56] Krebs, n 13, p 296.

[57] Zweigert and Kötz, n 16, p 588.

[58] Zweigert and Kötz, n 16, p 583.

[59] American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (St Paul, 2011).

[60] Reporter's Note to s 65, vol 2, pp 532-533.

circumstances, inequitable. As Justice Gummow pointed out,[61] it is important to appreciate that in Australian law "'change of position' is a species of the genus 'inequitable', not a synonym for it". Focusing on change of position may serve only to divert attention from the central question: "whether it would be an inequitable result for the claimant to require repayment."[62]

Australian law does not share the viewpoint which is the historical, philosophical foundation for the defence in Germany. It does not seek to allocate the risk of loss to either the plaintiff or the defendant, but rather to consider what is an equitable result in the circumstances of the case.

Then there is the relationship between the defence and the ground for liability. Whether a defence having an essentially economic purpose can be rationalised with liability founded upon equitable principle may be a challenge facing the English courts. Discordance may suggest a structural problem. This raises a fundamental question for Australian law, which was mentioned at the outset: is acceptance of a change of position defence appropriate given the rejection of unjust enrichment as a legal principle?

It is useful perhaps to return to those whose role in "the conversation" between English and German scholars was said to be so important. Professors Zweigert and Kötz, after comparing the operation of the unjustified enrichment principle in a number of countries, say:

> Even if one does not accept the theory that remedies in unjust enrichment are purely equitable … it still seems a good idea, particularly prominent in American law, to make the outcome depend on the conduct and position of both parties during and after the relevant transaction; there is also merit in the view that the party who receives the benefit is responsible for any decisions he makes in the management of his own assets, even if the doctrine it is sometimes used to justify, namely that the liability to repay is absolute, is itself too rigid.
>
> These points are rather obscured by the accepted German law that enrichment is simply an economic imbalance. Traditionally, a decision about liability in unjustified enrichment is the result of pure mathematics in which value judgments have little part to play … but one sees how relevant they are as soon as one puts the question asked by the American lawyer, namely, who should properly bear the *loss* resulting from the disappearance of the enrichment. On this view, the continuing liability of the defendant depends on whether the *events* which cause the loss should be *imputed* to him or to the other party.[63]

It is of some interest to observe that whilst some English judges are considering widening the ground of liability for unjust enrichment beyond specific factors, some German scholars are acknowledging that German law cannot, or should not, be wholly indifferent to *the reason* why legal grounds are lacking.[64] Each looks in the direction of the other, confirming, perhaps, that there is no perfect solution.

[61] Gummow, n 3 at 757.

[62] Gummow, n 3 at 762.

[63] Zweigert and Kötz, n 16, pp 591-592 (original emphasis).

[64] Zweigert and Kötz, n 16, p 557.