LUMBERS & ANOR V W COOK BUILDERS PTY LTD (IN LIQ)[2007] HCA Transcript 420

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INTRODUCTION

This case note examines the recent decisions in the litigation that has been granted special leave to appeal to the High Court of Australia ('High Court') as *Lumbers & Anor v W Cook Builders Pty Ltd (in liq)*.[1] The case is brought on a suit for restitution on the basis of unjust enrichment in relation to building works allegedly performed by W Cook Builders Pty Ltd (in liq) ('Builders') for the Lumbers family ('Lumbers') in the construction of a residential house. The case deals with questions relating to the legal doctrine of free acceptance as a ground for a finding that a defendant has been unjustly enriched. Further issues also arise on the facts in relation to whether or not it would be unjust for the defendant to retain the purported benefit that they have received. It is expected that the High Court will examine these doctrines and hopefully clarify the Australian position in these important areas of the law.

The case note will consider the issues of:

(a) Whether or not free acceptance is an unjust factor in the Australian law of restitution;

(b) Whether or not free acceptance or incontrovertible benefit are tests for enrichment by services rendered by a plaintiff in restitution for a defendant;

(c) The relationship between contract law and the law of restitution on the facts of this case; and,

(d) Where the commercial relationship between the parties is governed by a valid contract, whether or not the law of restitution should have any role to play.

It is the writer's view that free acceptance is currently held to be an unjust factor in Australian law. Despite this, the writer believes that in the context of cases such as *Pavey & Matthews Pty Ltd v Paul*[2] and *Lumbers*, the better explanation for the results found by the courts is that of failure of consideration.

This case note sets out the facts, the trial decision, the appeal decision, and the application for special leave to appeal to the High Court. An examination of the Australian cases on free acceptance is provided in section six. Given constraints of space, only a cursory review of the other issues is possible.

FACTS

Negotiations

In September 1993, Warwick Lumbers, the second–named appellant and the father of the first–named appellant before the High Court, telephoned David McAdam, the managing director of W Cook & Sons Pty Ltd ('Sons'), to engage Sons to construct a house. The Cook family were proud of their reputation in the building industry,[3] and according to Warwick Lumbers, the excellent reputation of Sons was a significant factor in their choice of Sons to perform the building works.[4]

Whatever arrangement the parties actually came to, it was never 'committed to writing'.[5] Throughout the works, Warwick Lumbers acted on behalf of the actual owner of the land on which the house was to be constructed, this being his son, Matthew Lumbers.[6] Matthew appears to have had no role in the formation of the contract with Sons, this being solely negotiated, and financed, by Warwick.[7]

From the judgments, it appears that following the initial contract discussions in October 1993, one of the principals and directors of Builders, Jeffrey Cook, prepared an estimate of the costs of construction from

plans provided by the Lumbers' architect (a brother in law of Warwick).[8] The estimate was not given to the Lumbers.[9] The actual form of agreement appears to have been a mixed 'cost–plus' and construction management agreement.[10] Lumbers admitted that they were paying Sons for the costs charged for the work performed by Sons and the subcontractors for the supply of materials, and an additional charge for the supervision and management by Sons.[11] The arrangements were however 'quite vague,'[12] and the project 'commenced on an informal basis between friends and family members'.[13] Indeed, Sulan and Layton JJ concluded that whilst not close friends, 'Warwick Lumbers trusted David McAdam implicitly.'[14] Reliance was placed by Warwick Lumbers on McAdam for engaging and approving the subcontractors, and checking and approving the invoices.[15] Warwick considered the involvement of McAdam as crucial for the project as Warwick was to spend extended periods overseas, when he would be unable to supervise the works.[16]

It is important to note that there was no system of progress claims and payments.[17] The parties instead relied upon telephone calls, with the Lumbers paying the amounts requested by McAdam without any supporting documentation. Warwick Lumbers held a restricted builder's licence,[18] and carried out some of the structural steel works himself.[19] The Lumbers were involved also in the procurement of some of the materials.[20]

Works commence

Preparatory site works were carried out between November 1993 and February 1994,[21] with construction occurring between late February 1994 and May 1995.[22] The District Court decision notes that the 'building was very difficult to construct. It had 'totally curved walls and was of a most unusual design'.[23] The house also appears to have been expensive. The estimate prepared by Jeffrey Cook was for the house to cost $ 665 050 in October 1993.[24] In fact, 'the cost of construction exceeded $ 1,000,000'.[25] In the District Court, Builders claimed $ 274 791 as the balance outstanding for the construction.[26]

Cook Group reorganization

The key period of time was late February 1994. The basis of Builders' claim was that around this time, a reorganization took place within the Cook group of companies.[27] Prior to February 1994, Sons carried on the business of joinery, carpentry and construction.[28] After this time, the operations of Sons were restricted to joinery and carpentry, with Builders carrying out all building and construction work.[29] The evidence led at trial as to the purported reorganization appears to be sketchy. The trial judge stated that '[t]here was a dearth of evidence about the internal arrangements of what is called 'The Cook Group of Companies'[30] with the case being more complex than it should have been due to 'the manner in which [the parties] conducted the litigation'.[31] The central point of contention is that the Lumbers clearly contracted orally with Sons for the construction works.

Builders maintained that under the reorganization, the works on the Lumbers' house were actually undertaken by Builders and not Sons. If the reorganization was undertaken, it was done so on an informal basis.[32] There were no formal documents that indicated that the reorganization had occurred. According to Joseph Cook, the idea of the reorganization was McAdam's, and virtually no details of it were provided to Joseph.[33] In around early March 1994, 'an invoice was rendered by Sons to Builders for the sum of $29,984'.[34] This was expressed to be the cost of the work done on the Lumbers' house to that point by Sons.[35] It was then noted as owing to Sons in the books of both the companies.[36] However, if this provides a clear inference that there was intended to be a changeover in the role of the companies in the work on the Lumbers' house, other facts muddy the waters. Despite both the Cook companies having directors, the actual employees of both Builders and Sons were provided by another entity within the Cook group, that being a partnership called 'Portrush Trades' ('Portrush').[37] All the work done on the Lumbers' house was undertaken by these employees and Portrush provided the same employees to both Builders and Sons.[38] Likewise, all the administration of both companies was undertaken solely by McAdam as a contracted employee of Portrush.[39] Further, Builders and Sons shared a common bank account, with the only separation between the monies owing to them being through accounting journal entries undertaken by McAdam.[40] Following the reorganization, there were no changes of employees on the site, and amounts that were owing by the Lumbers were requested by McAdam and paid by the Lumbers by cheques expressed to be for the account of Sons.[41] Neither the Lumbers nor their architect were notified of the purported assignment of the contract.[42]

The claim begins

Works continued on the Lumbers' house and acceptance occurred in 1995. A final sum was paid by the Lumbers on 15 December 1997.[43] No further requests for payment

The case deals with questions relating to the legal doctrine of free acceptance as a ground for a finding that a defendant has been unjustly enriched. Further issues also arise on the facts in relation to whether or not it would be unjust for the defendant to retain the purported benefit that they have received.

were made of the Lumbers until 1999.[44] By this time Builders had gone into administration. The Lumbers inquired of Joseph Cook, as a director of Sons, whether or not they had any outstanding liability to Sons for the construction.[45] Cook replied that they had no outstanding liability to Sons.[46] Builders then brought a suit in the District Court of South Australia (Civil) against both the Lumbers and Sons.

DECISION AT TRIAL

Background

Trial of the matter occurred in the District Court of South Australia (Civil) before His Honour Judge Beazley.[47] Prior to trial, Builders was ordered to provide security for Sons' costs of the action.[48] This was not provided and the Master of the District Court stayed the action against Sons.[49] A consequence of this was that Sons took no part in the action and that Builders were unable to pursue any claims to be beneficially entitled to sums owed, if at all, by the Lumbers to Sons, nor that Sons was entitled to recover the balancing outstanding to Builders on behalf of Builders, nor any claim against Sons under the *Worker's Liens Act 1893* (SA).[50]

The claim in restitution

At trial most of the argument, and most of Judge Beazley's decision, focused on whether or not there was in fact an assignment of the contract between Sons and Lumbers to Builders. Of present importance is the short finding of his Honour on the then alternative claim of Builders in restitution.

Builders submitted that the District Court should follow the decisions in *Angelopolous & Ditara Pty Ltd v Sabatino & Spiniello ('Angelopoulos')*[51] and *ABB Power Generation Ltd v Chapple ('ABB Power v Chapple')*.[52] His Honour distinguished both cases on their facts.[53] In relation to *ABB Power v Chapple*, he concluded that the case related to works that were a variation that had been expressly requested by the defendant who was aware of the identity of the party undertaking the work.[54] In any event, His Honour also noted that the decision had been the subject of critical academic comment.[55] On Angelopoulos, His Honour stated that the case did not concern an existing contract and the judge, Doyle CJ, 'identified nine circumstances which imposed, in that case, an obligation to make fair and just restitution'.[56] On the instant case, His Honour noted that:[57]

> At all times there was extant an agreement between the Lumbers and Sons which covered the work said to have been undertaken by Builders. Insofar as a claim ought to have been made by Builders it ought to have been against Sons[58] ...It cannot be said that the Lumbers have an obligation to make restitution to Builders, irrespective of whether Builders was mistaken as to its position when allegedly constructing the house. There was of course no evidence at all as to the allegedly mistaken undertaking of Builders. In my opinion Builders could not succeed against the Lumbers under this alternative claim.[59]

His Honour's conclusion thus turns upon his finding, on the facts, that there was no assignment of the contract between Sons and the Lumbers from Sons to Builders. Analysis of the law of assignment is not relevant to the present case note, nor is an analysis of the reasoning of His Honour that led to this conclusion.

APPEAL TO THE SUPREME COURT OF SOUTH AUSTRALIA (FULL COURT: CIVIL)

Background

Builders appealed the decision to the Supreme Court of South Australia (Full Court: Civil) ('the Supreme Court').[60] The Supreme Court, comprised of Sulan, Vanstone and Layton JJ, allowed the appeal of Builders from the decision of the District Court. The majority judgment consisted of Sulan and Layton JJ. Vanstone J dissented. The appeal was principally addressed to the claim in restitution.[61]

Majority judgment

Sulan and Layton JJ concluded that the appeal should be allowed. One of the underlying bases of their Honours' judgment is their finding, contrary to that of the trial judge, that it was, as a matter of fact, Builders that provided the services for the construction of the Lumbers house.[62]

On the issue of what constituted the unjust factor, their Honours held that mistake as to identity does not affect the finding of free acceptance of benefit.[63] Particular attention was paid to the case of *Rowe v Vale of White Horse District Council ('Rowe')*.[64] Whilst distinguishing the result in *Rowe*, it appears that their Honours follow *Rowe's* reasoning on mistaken identity of the provider of services.[65] In short, they held that the failure of Builders to inform the Lumbers that it was they who were constructing the house did not affect the finding of the Lumbers acceptance.

This means that the issue of the identity of the party providing the benefit, and indeed all of the facts, is being characterized by their Honours, not as a salient point that mitigates against the situation being classed as 'unjust', but as a point on whether or not there was a benefit received. Emphasis is placed on 'free acceptance' and 'incontrovertible benefit', rather than upon 'unjust'. Their Honours do, albeit briefly, acknowledge that 'the existence of a mistaken belief that it was Sons who was completing the work…may…go towards what is conscionable for the Lumbers to provide by way of restitution'.[66]

However, the decision in *Rowe* does not merely say that mistake as to identity of the provider of services is not a defence to a claim in unjust enrichment. Their Honours quotation from Rowe is followed by the statement that:[67]

Where (as in this case) for good reason the defendant as a reasonable person should not have known that the claimant who rendered the services expected to be paid or paid extra for them, as a matter of principle the third condition cannot be satisfied and no claim can lie in restitution.

Rowe lists three authorities for this proposition: *Bridgewater v Griffiths*,[68] *Bookmakers Afternoon Greyhound Services v Gilbert*[69] and *Gilbert v Knight*.[70]

Dissenting judgment of Vanstone J

Vanstone J held that the appeal should be dismissed as the facts indicated:[71]

…that the position of Builders is very much that of a subcontractor. It was delegated work by Sons, although McAdam remained responsible for determining what payments would be sought from the owner. Those payments were made to Sons, consistent with its position as the main contractor. Although the terms of the arrangement were left more open than in typical subcontracting situations, this does not change the essential fact that Builders' work on the Lumbers project was performed under obligations owed to Sons as part of that arrangement…Its remedy, if any, must lie against Sons as the party with which it had a contractual relationship.

Vanstone J paid particular attention to the case upon which Judge Beazley rested his decision, namely that in *Angelopoulos*[72] Vanstone J followed the decision of Doyle CJ in *Angelopoulos* and noted that the trial judge had correctly interpreted the facts in the instant case.[73]

APPLICATION FOR SPECIAL LEAVE TO APPEAL BEFORE THE HIGH COURT

Lumbers' case

An application for special leave to appeal to the High Court was heard, and granted, before Gummow, Kirby and Heydon JJ on 8 August 2007.[74]

Lumbers argued that the majority decision in the Full Court 'extended the ambit of restitution…into areas previously regulated by the law of contract'.[75] Lumbers argued that the finding of the Full Court allowed a person who simply does the work to sue the principal, and that this undermined the notion of contract. Lumbers also asserted that the majority of the Full Court's view was inconsistent with the cases of *Pan Ocean Shipping Ltd v Creditcorp Ltd*,[76] *Hampton v Glamorgan County Council*,[77] and *Christiani & Neilsen Pty Ltd v Goliath Portland Cement Co Ltd*.[78]

In the following section, the bivalent nature of free acceptance, as a test for enrichment and as an unjust factor are examined.

FREE ACCEPTANCE IN AUSTRALIA

What is the doctrine of free acceptance?

The initial definition[79] of free acceptance[80] was by Lord Goff and Professor Jones ('Goff and Jones') who stated that a defendant:[81]

... will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the services. Moreover, in such a case, he cannot deny that he has been unjustly enriched.

Goff and Jones' view was echoed by Professor Birks.[82] As will be seen, free acceptance is hotly debated.

Free acceptance as an unjust factor

Cases where free acceptance is cited as being the unjust factor are better understood as cases of failure of consideration. Edelman and Bant are of this view.[83] They state that 'once the benefit and the unjust factor are separated out, it is clear that, like Pavey, the other Australian cases in which free acceptance has been relied on as a ground of restitution are better understood as concerned with failure of consideration'.[84] Each of the significant Australian cases on free acceptance are examined below.

1. ***Pavey & Matthews Pty Ltd v Paul*** (1986) 162 CLR 221 ('***Pavey***')

The majority judgments in *Pavey* do not state which factor they find to be unjust.[85] However, the case is best viewed as dealing with the unjust factor of failure of consideration as a basis for an award of restitution. Edelman and Bant argue that 'the case is easily understood as involving the unjust factor of failure of consideration'.[86] *Pavey's* case concerned a builder bringing a claim seeking restitution on a quantum meruit basis arising for building works done under an oral, and under the applicable legislation,[87] unenforceable, contract.[88] The builders undertook to perform the work for a reasonable remuneration.[89] The court found that whilst some payment was made to them, it was not of a reasonable amount.[90] As this basis failed, the payment made to the builders was subject to 'counter–restitution' for the same reason. Failure of consideration as the unjust factor in this case is further strengthened by the illogicality of applying free acceptance to cases such as *Pavey's*. The defendant home–owner there had no choice but to accept the works done by the builder. Rejection would have been a physical impossibility. Lastly, there was no rejection by the home–owner, as she was willing to pay what she thought was a reasonable amount, and there was nothing unconscionable in her actions.

Burrows, Birks, Edelman and Bant all classify *Pavey* as being a case of failure of consideration.[91] Burrows and Birks cannot find anything unconscionable in the actions of the home–owner.[92] As proposition for this, Burrows cites the dicta in *Taylor v Laird* that 'one cleans another's shoes; what can the other do but put them on?'[93]

Erbacher disagrees, and instead recognizes the unjust factor as being that of acceptance.[94] Erbacher's reasoning originates from the discussion in the cases of acceptance,[95] but glosses over the failure by the judges to explicitly state which unjust factor justifies recovery. Tolhurst and Carter are also supporters of free acceptance.[96] They argue that free acceptance begins in Australia, and is most clearly demonstrated by, *Steele v Tardiani*.[97] However, the origins and justifications of their argument stem from the law of contract; particularly the acceptance of goods that do not conform to contract, such as in quantity or specification.[98] They do not see *Pavey* as a case of free acceptance though.[99] They classify *Pavey* as a case of constructive acceptance, which in their view is a specialized restitutionary version of acceptance.[100] Their reasoning for this is that the home–owner was unable to reject the benefit and that she did not have knowledge at the time of receipt of the unenforceable contract.[101] They argue that acceptance is 'an insistence that there be some established basis for restitution'.[102]

In the writer's view, Erbacher's failure to engage with the absence of discussion in the case of the unjust factor means that her argument founders. The criticism also applies to the arguments of Tolhurst and Carter. Further, their critique of failure of consideration centres on its application to the sale of goods. Their explanations of Pavey do not appear to logically deal with competing explanations, and there is over–reliance on *Sumpter v Hedges*,[103] a case which is arguably distinguishable from *Pavey*, or wrongly decided.[104] Burrows, Edelman and Bant all provide more cogent explanations. Whilst it may be the case that acceptance has a role to play in the law of unjust enrichment, in the context of cases such as *Pavey*, it is the writer's view that the concept is of limited use in explaining the results found by the courts.

2. ***Brenner v First Artists' Management Pty Ltd*** [1993] 2 VR 221 ('***Brenner***')

Goff, Jones, Erbacher and Bryan cite *Brenner*[105] as authority for the recognition of free acceptance.[106] *Brenner* considered restitution for services performed by a management team to a singer, under a contract void for uncertainty. Restitution was awarded on the basis that a reasonable person should have realized the provider expected to be paid and there was no rejection.[107] The phrase free acceptance was not used, and the judgment implicitly seems to turn

on the failure of consideration as the unjust factor.

3 ***Angelopoulos & Ditara Pty Ltd v Sabatino*** (1996) 65 SASR 1 (‘***Angelopoulos***’)
In *Angelopoulos*,[108] prospective lessees of a hotel carried out renovations with the encouragement of the owner during negotiations for the lease in the lead–up to a peak trading time. The leading judgment was by Doyle CJ, who set out factors that Edelman and Bant characterize as showing that the ground of recovery was that the work and acquisition of equipment was done on the shared basis that it would be remunerated.[109] They conclude that ‘although he described it as ‘free acceptance’, the unjust factor was failure of consideration’.[110]

4 ***Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd*** (2002) 5 VR 577 (‘***Shelton***’)
In *Shelton*,[111] financial advisory services were provided to a company during a takeover but were never paid for. It was found that Shelton was purporting to act on behalf of the company, and that the company had acknowledged through its actions that Shelton was entitled to some payment for his services.[112] Whilst Warren J explicitly used the language of free acceptance,[113] like the other cases, Edelman and Bant are of the view that the unjust factor is failure of consideration.[114] As both parties acted on the basis that the services would be paid for, this writer’s view is that the case is better described as being one of failure of consideration.

5 ***ABB Power Generation Ltd v Chapple*** [2001] WASCA 412 (‘***ABB***’)
Erbacher cites this case as proof of acceptance as an unjust factor.[115] However, in *ABB*[116] Murray J stated ‘the law…will encompass a claim for reasonable compensation to be paid to a plaintiff who has supplied materials, done work for or otherwise benefited a defendant who has accepted a benefit upon the understanding that the plaintiff will be paid for the service rendered’.[117] Given such a clear statement, it is difficult to see the persuasiveness of Erbacher’s argument, and the writer is of the view that the better explanation is that of Edelman and Bant.[118]

6 Application to the present case
It is the writer’s view that the Full Court erred in their interpretation of the case in *Lumbers*. None of the cases that are relied upon justify the use of free acceptance as a basis for finding that the enrichment is unjust. Edelman and Bant agree, stating that none of the cases that involve claims following termination are correctly categorized.[119] To their view, this includes the decisions in *Brenner*, *Angelopoulos*, *ABB* and *Chapple*.[120] Whilst it can be argued that free acceptance is an organizing paradigm for some cases as Birks noted,[121] its application only seems to cause problems in cases such as the present. Even Goff and Jones, despite holding that free acceptance explains decisions where restitution is granted for services that had not been requested but that had benefited the defendant, do not attempt to justify its use in cases such as *Pavey* or the type encountered in *Lumbers*.[122] Likewise its limits have been noted by Mason P in Australia.[123] It must be conceded that it appears that future Australian courts will continue to recognize free acceptance as an unjust factor, and shall interpret *Pavey*, amongst other cases, as such. As Professor Bryan notes ‘‘free acceptance’ may, for better or worse, be too deeply entrenched in Australian law as the basis of restitution for requested services to be displaced by alternative explanations’.[124] To the writer, it appears that free acceptance appears to focus more on ‘the action of taking the thing’, whereas failure of consideration focuses upon ‘the failure to pay for the thing’. Both the action and the failure are necessary to found an action that grants the remedy of restitution. Whilst free acceptance may be the law in Australia, the writer’s view is that Edelman and Bant are correct in stating that once the enrichment and unjust factor elements are separated out, the decided cases show that the true unjust factor is failure of consideration.

Free acceptance as a test for enrichment

There is ongoing debate, which is beyond the scope of this case note,[125] as to the effectiveness of free acceptance as a test for enrichment, and its scope vis–à–vis incontrovertible benefit.[126] Indeed a lengthy article could be compiled solely upon that issue. Edelman and Bant take the view that the leading case on enrichment and services is *Brenner*.[127] They cite Byrne J’s rejection of the Beatson approach[128] that services must have an economic or exchange value.[129] In *Lumbers* there appears to be little difficulty, although one must not proceed on intuition,[130] in finding that the benefit was desired. Accordingly, for want of space, this case note shall not comment further on the issue.

Application to the present case

1 Benefit and the unjust factor
With respect, the majority in the Supreme Court have failed to identify the true issues that should regulate the case. Identity is the key factual issue, and what is ‘unjust’ is the key legal issue.

Lumbers' case will be an opportunity for High Court consideration of free acceptance.

It is submitted that the Supreme Court paid too much attention to the issue of acceptance of the benefit in question. The real issue in this case is the unjust factor. Precisely what factor is alleged to have made the case unjust? This does not appear in the majority's judgment. Nor is there any logical or cogent argument by Builders.

In the writer's opinion, *Lumbers* falls squarely within the principles enunciated in *Pavey*. The weight of academic commentary favours defining *Lumbers'* case as one of failure of consideration. On the facts, there is no unjust factor present. The case for Builders thus runs afoul of the principle in *David Securities*[131] that it is not enough to allege the enrichment is unjust 'by reference to some subjective evaluation of what is fair or unconscionable'.[132]

2 At the plaintiff's expense

Indeed, when one considers that the original contract was made by Lumbers with Sons; and all payments were to Sons, which had a joint bank account with Builders; and Sons used the same employees as Builders (presumably, the facts are so poor that this is not clear), why has the majority so readily accepted that these factors are outweighed by the mere assertions of an assignment of Sons contractual interest (for which there is no evidence), that Builders did all the work and that Builders was not paid (for which there are only book entries)? There is thus a real issue as to whether or not the services were rendered at the plaintiff's expense.

The interaction of contract, restitution and commercial relationships

Another salient aspect of the Supreme Court's judgment is their overturning a finding of fact on the identity of the true contracting party in the case. The majority assume that it truly was Builders that did the work. What evidence, aside from book entries, is there to support this? Their Honours proceed from a self–fulfilling point that is a non–sequitur. They state that Sons accepted that it has no claim against Lumbers. There is nothing in any judgment that indicates that this was because Sons was not the contracting party, or that Sons did not carry out the work; thus, overlooking that Builders may have been a subcontractor.

Lumbers' case really concerns the complex relationships within a corporate group.

There is a real issue in *Lumbers* as to the correctness of the Supreme Court's decision in light of *Pan Ocean Shipping Ltd v Creditcorp Ltd*,[133] *Hampton v Glamorgan County Council*,[134] and *Christiani & Neilsen Pty Ltd v Goliath Portland Cement Co Ltd*.[135] Space does not afford a thorough examination of the issues these cases raise, save to say that it would appear that the High Court will need to examine whether or not the facts show that there was an assignment between Sons and Builders. Further, Builders claim raises the issue of a subcontractor circumventing the doctrine of privity to claim against the principal under a building contract through restitution.[136] In the writer's view, Builders will face doctrinal difficulties from these issues.

CONCLUSION

Lumbers' case will be an opportunity for High Court consideration of free acceptance. *Brenner*, *Angelopoulos* and *Shelton* stand as authority for its use in both assessing benefit and whether there is an unjust factor. But in the writer's view, these cases fail to separate the basis of a claim for restitution from the issue of whether or not there has

been a benefit. When this is done, these cases are better explained through the principle of failure of consideration. Free acceptance is a satisfactory principle for explaining benefit and unjust factors in many cases. But in cases such as *Lumbers* and *Pavey*, the principle is strained beyond its rightful boundaries and only brings darkness and confusion to the minds of many.

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96. GJ Tolhurst and, JW Carter, 'Acceptance of Benefit as a Basis for Restitution' (2002) 18 *Journal of Contract Law* 52

97. (1946) 72 CLR 386

98. Tolhurst and Carter, above n 96, 63

99. Ibid 72

100. Ibid 62–63

101. Ibid 71–72

102. Ibid 63

103. [1898] 1 QB 673

104. See Birks, above n 80, 113–114

105. [1993] 2 VR 221

106. Goff and Jones, *The Law of Restitution* (5th ed, 1998) 18; Erbacher, above n 94, 281; Michael Bryan, 'Essay—Peter Birks and Unjust Enrichment in Australia' (2004) 28 (3) *Melbourne University Law Review* 724, 726–727

107. [1993] 2 VR 221, 260; Edelman and Bant, above n 83, 314

108. (1996) 65 SASR 1

109. Edelman and Bant, above n 83, 315

110. Ibid

111. (2002) 5 VR 577

112. Ibid 607

113. Ibid 600

114. Edelman and Bant, above n 83, 315

115. Erbacher, above n 94, 281

116. [2001] WASCA 412

117. [2001] WASCA 412, para 10

118. Edelman and Bant, above n 83, 314–315

119. Ibid 314–317

120. Ibid 314–317

121. Birks, above n 80, 105; Goff and Jones, above n 91, 18–21

122. Goff and Jones, above n 91, 18–21

123. *Concrete Constructions Group v Litevale Pty Ltd (No 2)* [2003] NSWSC 411, para 15; Edelman and Bant, above n 83, 312

124. Bryan, above n 106, 728

125. See for instance Birks, above n 80; J Beatson, *The Use and Abuse of Restitution* (1991); J Beatson, 'Benefit, Reliance and the Structure of Unjust Enrichment' (1987) 40 *CLP* 71; Andrew Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 *Law Quarterly Review* 576; S Stoljar, *The Law of Quasi-Contract* (2nd ed, 1989); G Mead, 'Free Acceptance: Some Further Considerations' (1989) 105 *Law Quarterly Review* 460; Michael Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (1990) 10 *Oxford Journal of Legal Studies* 42

126. Goff and Jones, above n 91, 22–26; *Monks v Poynice* (1987) 8 NSWLR 662

127. Edelman and Bant, above n 83, 100

128. J Beatson, *The Use and Abuse of Restitution* (1991) 31–33

129. [1993] 2 VR 221, 257; Edelman and Bant, above n 83, 100

130. Mitchell McInnes, 'Contracts and Restitution—Free Acceptance in the Australian Law of Restitution' (1996) 24 *Australian Business Law Review* 238, 239

131. *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353

132. *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379; Erbacher, above n 81, 89

133. [1994] 1 All ER 470

134. [1917] AC 13

135. (1993) 2 Tas R 122

136. See generally Joern Schimmelfeder, 'Contractors' Claims: Contract Strategies to Regulate Claims Outside the Contract' (2002) 84 *Australian Construction Law Newsletter* 5; Martin Luitingh, 'Expanding Contractors' Claims: The Impact of 'Unjust Enrichment' on Contract' (2002) 84 *Australian Construction Law Newsletter* 12; Keith Mason, 'Where Has Australian Restitution Law Got To and Where Is It Going?' (2003) 77 *Australian Law Journal* 358, 359; *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 257; *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251, 275; Andrew Chapman, 'Restitution Leap–Frogs the Contractual Chain' (2002) 14 (9) *Australian Construction Law Bulletin* 103; Ross Grantham, 'Security of Contract: The Challenge From Restitution' (2000) 16 *Journal of Contract Law* 102.