

Pleading Restitution for Unjust Enrichment Claims

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The topics to be covered in this brief Webinar include:

- ❖ Pleadings: General Principles
- ❖ Restitution: Unjust Enrichment:
 - Restitution
 - Unjust Enrichment
- ❖ Examples of Causes of Action in Unjust Enrichment
- ❖ Useful Guidance from Justice Ward
- ❖ Examples of Unjust Enrichment provided by Professor Kit Barker
- ❖ Restitutionary Defences: Mason, Carter and Tolhurst
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Pleadings: General Principles

Pleaders are required to plead the facts which are material to their case (**Supreme Court (General Civil Procedure) Rules 2015 (Vic)** Rule 13.02(1)(a):

“... Every pleading shall:

- a) contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved ...”*

There are a number of general propositions:

- i) Pleadings define the issues between the parties.
- ii) The issues not admitted/denied in the pleadings become the subject matter of the trial.
- iii) The function of pleading is to state with sufficient clarity the case that must be met.
- iv) In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity to meet the case against it, and incidentally, the pleadings define the issues for decision.

Restitution: Unjust Enrichment

Although the term “*restitution*” and “*unjust enrichment*” are often used interchangeably, they are not synonymous. **Restitution** is the remedial response to any unjust enrichment ie: restitution is the claimed

relief, whereas **unjust enrichment** is the basis of the claim seeking restitution.

Restitution

Restitution is concerned with the restoration to the Plaintiff of a benefit conferred on the Defendant at the expense of the Plaintiff in circumstances which make it unjust that the Defendant should retain that benefit. The underlying principle of the law of restitution is the prevention or stripping of gains made by the Defendant at the Plaintiff's expense in circumstances recognised by the law as unjust or in consequence of an established wrong.

The notion of a “*benefit*” or “*enrichment*” in the Defendant's hands is therefore central to the law of restitution.

The law of restitution is not concerned with:

- i) compensation for loss; or
- ii) enforcement of expectations.

Personal Remedy

Most restitutionary claims are personal. The basis of the claim is for the imposition of a personal obligation on the defendant to make restitution to the plaintiff, A claim for the recovery of money, or for the reasonable value of goods or services supplied, are personal claims for recovery of the value of the enrichment.

The objective of restitutionary remedies is to reverse the unjust enrichment of the Defendant at the Plaintiff's expense.

On a personal claim the Plaintiff seeks one of 2 remedies:

- i) the recovery of \$; or
- ii) the reasonable value of goods or services.

The forms of action for the recovery of money are typically:

- i) money had and received; or
- ii) money paid.

An award of the remedy of restitution is simply an order that the Defendant pay a sum of money to the Plaintiff.

Proprietary Remedy

Occasionally a restitutionary claim is proprietary. The basis of the claim is the assertion that the defendant holds the plaintiff's “*property*.”

The objective of a claim for proprietary relief is for the return of property retained by the Defendant at the Plaintiff's expense. A proprietary claim is appealing as a means for the Plaintiff to obtain priority over unsecured creditors in the event of the Defendant's insolvency.

The forms of action for the recovery of the reasonable value of goods or services are:

- i) quantum meruit; or
- ii) quantum valebat (eg: when goods are sold, without specifying any price, the law implies a promise from the buyer to the seller that he will pay him for them as much as they were worth).

The quantification of a claim for the reasonable value of goods and services will depend on whether the Defendant's enrichment is established by reference to free acceptance or exceptionally, incontrovertible benefit. If the former, the usual measure of recovery is the market value of the service. If the latter, the usual measure of recovery will be the amount by which the Defendant's assets have been enhanced.

Unjust Enrichment

The Courts have tended to reject attempts by pleaders to frame claims as if they were based solely on unjust enrichment. Pleders are required to bring their claims and defences within more specific recognised legal categories.

Unjust enrichment is **not** recognised as a cause of action in Australia. The Courts have said so on a number of occasions:

- ❖ **David Securities Pty Ltd v Commonwealth Bank of Australia** (1992) 175 CLR 353, 378, 406;
- ❖ **Burkett v Bendigo and Adelaide Bank Ltd (No. 2)** (2018) 133 ACSR 411.441 [104] Croft J citing **Lumbers v W Cook Builders Pty Ltd (in liq)** (2008) 232 CLR 635, and **Pavey and Matthews Pty Ltd v Paul** (1987) 162 CLR 221.

Mason at [9] observes that by themselves, the words "*unjust enrichment*" express no more than a "*general principle of justice*", to which the whole law of civil obligations is relevant. By embracing the notions of the Defendant being enriched unjustly and at the Plaintiff's expense, the unjust enrichment concept provides a framework for understanding, exposition and development.

A pleading which asserts, in the abstract, that the Plaintiff was unjustly enriched at the Defendant's expense will usually be struck out. The basis of such an allegation must be explained in the pleading.

In view of the general statements in **David Securities Pty Ltd v Commonwealth Bank of Australia** (1992) 175 CLR 353.378-9, 406, Courts have been averse to pleadings which simply appeal to "*idiosyncratic notions of what is fair and just*" (**Pavey and Matthews Pty Ltd v Paul** (1987) 162 CLR 221.256), or which plead generalised claims based on unjust enrichment.

Unjust Enrichment will arise where there is:

- i) an enrichment;
- ii) obtained at the Plaintiff's expenses;
- iii) in circumstances where a principle ground of recovery exists which make it unjust that the Defendant should retain the enrichment; and
- iv) no defence is available.

The High Court has emphasised that unjust enrichment does not confer a broad subjective discretion to do what is just, but that the plaintiff must plead and prove a principled ground of recovery recognised in the precedents, such as mistake or total failure of consideration.

It is not sufficient to assert unjust enrichment in the absence of the facts supporting the claim. In **Winterston Constructions Pty Ltd v Hambros Australia Ltd** (1991) 101 ALR 363, Gummow J struck out a pleading which asserted an enrichment and that it *“would be unconscionable for [the defendant] to retain the benefit of that enrichment.”*

Gummow J held that the pleading was embarrassing as it did:

“[N]ot specify with anything like sufficient clarity what are the material facts upon which [the plaintiff] relies:

- (i) to show enrichment of [the defendant];*
- (ii) at the expense of [the defendant]; and*
- (iii) in circumstances demonstrating the necessary element of injustice.”*

Further, it is not sufficient merely to plead that it would be *“unjust in all the circumstances”* for the defendant to retain the enrichment; rather the facts supporting the unjust factor(s) on which the claim is based, must be specifically pleaded.

In the High Court, the following claims have clearly been recognised as based on unjust enrichment:

- ❖ a recovery of \$ paid under a mistake of fact or law (**David**);
- ❖ the award (or assessment) of reasonable remuneration following full performance of a contract unenforceable by statute (**Pavey**);
- ❖ restitution based on a failure of consideration (**Roxborough** 527,529);
- ❖ the award (and assessment) of an account of profits (**Dart** 111, 123);
- ❖ non-contractual claims for equitable contribution (**Bofinger** [88]).

Further examples endorsed by other Courts include:

- ❖ restitution for a benefit conferred under a contract discharged by frustration (**Pavey** 356);
- ❖ recovery of \$ paid under compulsion (**David** 379);
- ❖ recovery of reasonable remuneration against a party in breach of contract (**Renard**);
- ❖ restitution in respect of a benefit conferred under a contract void for incompleteness (**David** 382, 388); and
- ❖ the award of interest (**Mason** p45).

The category of the law of unjust enrichment is a collection of individual causes of action. Each cause of action in the category can be legitimately described as a claim *“in”* Unjust enrichment (eg: just like a claim for negligence is a claim *“in tort”*), but unjust enrichment is not *“a”* cause of action in itself any more than a *“tort”* is *“a”* cause of action.

Causes of action in unjust enrichment include:

- Mistake;
- Failure of basis (consideration or condition);
- Personal incapacity;
- Duress;
- Legal compulsion;
- Undue influence;
- Absence of consent or want of authority in respect of the bestowal of a benefit;
- Illegality; and
- May also include wrongs including torts such as breach of confidence, breach of fiduciary duty, breach of some types of contract (eg: restrictive covenants) and accessorial equitable wrongs.

Claims for gains made by a Defendant in each of these circumstances requires the injustice of the Defendant's enrichment to be proven. For example, see the following Table:

Claim for money paid

A claim for money paid on a basis which has failed currently still formally requires proof that the basis has failed in total (**Baltic Shipping Co v Dillion** (1993) 176 CLR 344, 350, 377-8,386 and 389) with some growing exceptions (**David Securities** 383).

Claim for mistaken payment

A claim based on mistaken payment requires proof that the mistake was causative of the payment having been made in the first place.

Claim for duress

A claim based on duress requires proof both that a given threat was causative of payment and that the relevant threat was illegitimate.

Useful Guidance from Justice Ward

Problems with the pleading of unjust enrichment claims was explained by the Honourable Justice Julie Ward (Chief Justice in Equity, New South Wales Supreme Court) in her seminar paper delivered on 13 June 2019 entitled **What's in a Name? The Taxonomical and Conceptual Divide Between Unjust Enrichment and Equity** as follows:

"Pleading Rules and Unjust Enrichment

66 *One issue that was raised with me at the time I was considering what to speak about today, was the concern that practitioners may have as to how to plead a*

claim in equity when seeking relief for unjust enrichment ... I suspect that this largely stems from the way that unjust enrichment muddies the waters of the equity/law divide and defies clear classification by the High Court or academics.

- 67 *Anecdotally, some practitioners argue that problems stem from the uncertainty regarding how unjust enrichment is classified; and whether liability should be characterised as legal or equitable; others lament that the flexibility of equity more generally results in uncertainty, making it difficult for practitioners to provide reliable legal advice to their clients (particularly in relation to commercial disputes). I am of the school of thought, however, like Justice Leeming and Lord Millett, that '[e]quity's place in the law of commerce, long resisted by commercial lawyers, can no longer be denied. (Peter J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 **Law Quarterly Review** 214, 214 (as cited in Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes – Meeting the Needs of any Sophisticated and Successful Legal System' (2019) 47 **Australian Bar Review** 137, 139).*
- 68 *Despite assurances by the High Court that unjust enrichment has a taxonomic (ie: classification) function and is not a cause of action, it remains common to see cases argued or pleaded on the basis of unjust enrichment. I point to one recent example in this regard.*
- 69 *In **Carbone v Melton City Council** ([2018] VSC 812) certain land vested in a Council by registration of a plan of subdivision by the Plaintiffs. The question arose as to whether the Council had 'acquired' the land and, thus, was required to pay compensation under the **Land Acquisition and Compensation Act 1986 (Cth)**. One of the claims pleaded was that, if compensation under the Act was unavailable the Council had been 'unjustly enriched, at the expense of the Plaintiffs ([38]). The basis for the claim was that: the transfer of the land was made at the Council's request; the Council 'freely accepted' the land; and the transfer was made in circumstances where there was clearly no intention to make a gift.*
- 70 *The difficulty with pleadings of this kind is that they risk concealing the real basis upon which a claimant seeks restitution. To plead one's case as being for 'restitution' because the Defendant has been unjustly enriched is no different from pleading a claim for 'damages' for a tort. This is problematic not only as a matter of procedure, but it also appears to have led certain cases to be put in a rather novel fashion. In **Carbone v Melton City Council**, the claimant eventually puts its case in oral argument as one for a quantum valebat ([151]). This brings out a further problem of terminology in this area of the law. That is, one consistently sees cases pleaded on the basis of the old forms of actions, most commonly as a quantum meruit. (And one consistently sees such cases get struck out). While it is true that in most of these instances it quickly*

becomes evident that the true complaint is restitution for total failure of consideration, or what has more recently become known as ‘failure of basis’, this is not invariably so and should not be presumed.

- 71 Another pleading rule – equally simple and a matter of common sense (but, I regret to say, commonly overlooked) – is that pleadings should not be made in general or abstract terms. Courts have been averse to pleadings that simply appeal to idiosyncratic notions of equity as what is ‘fair and just’ or which plead generalised claims based on unjust enrichment (**Coshott v Lenin** [2007] NSWCA 153, [8]-[11]; **Chidiac v Maatouk** [2010] NSWSC 386, [216]ff; **Hightime Investments Pty Ltd v Adamus Resources Ltd** [2012] WASC 295; **Pavey**; **Lumbers** [67]). Equally, references to ‘justice’ and ‘equity’ in the abstract should not be used to deny or misrepresent the common law origin of many claims of restitution (JW Carter, **Contract Law in Australia** (LexisNexis, 7th ed, 2018) [2904]). As Gummow, Hayne, Crennan and Kiefel JJ stated in their joint judgment in **Lumbers** unjust enrichment cases should proceed by ‘the ordinary process of legal reasoning’ ([85]). So, for example, more is required than proof of retention of a benefit (see **Lahoud v Lahoud** [2010] NSWSC 1297); there must be some additional factor rendering retention of the benefit ‘unjust’ in the relevant sense and that additional factor must be identifiable and causative (**Lahoud** at [151]). As was recognised in **David Securities Pty Ltd v Commonwealth Bank of Australia** (by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ):

‘... it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality ((1992) 175 CLR 353 at 378-278; [1992] HCA 48; See also Deane J in **Pavey** and in **Lactos Fresh Pty Ltd v Finishing Services Pty Ltd (No.2)** [2006] FCA 748).’

- 72 The absence of a factor rendering retention of the benefit (or the relevant enrichment) ‘unjust’ for the purposes of a claim in restitution was determinative of the claimant’s inability to establish an entitlement to interest upon moneys paid over in **State Bank of New South Wales v FCT** ((1995) 62 FCR 371; (1995) 132 ALR 653). Similarly in **Lahoud v Lahoud** no causative mistake was identified so as to warrant the conclusion that what had occurred on the facts was inequitable or unconscionable. Instead of pleading in general and abstract terms, the facts material to the case should be pleaded clearly and with particularity.
- 73 The general rule is that pleadings must plead all the material facts on which reliance is placed (see the review of some of the relevant case law in **E Co v Q (No.4)** (**E Co** [a pseudonym] **v Q** [a pseudonym] **No. 4**) [2019] NSWSC 429,

[403]) (J Jacob and I Goldrein, **Pleadings Principles and Practice** (Sweet and Maxwell, 1990) 48). Any matter that, if not pleaded specifically, may take the opposite party by surprise must be specifically pleaded (**Uniform Civil Procedure Rules 2005 (NSW)**; r 14.14(2)(a); **Tyson v Brisbane Market Freight Brokers Pty Ltd** (1994) 120 ALR 1; [1994] HCA 67; **Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd** (1990) 169 CLR 279; [1990] HCA 11). A failure to plead material facts may raise concerns in relation to procedural fairness (**Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd** (1990) 169 CLR 279; [1990] HCA 11; **Mercanti v Mercanti** [2015] WASC 297). Thus, material facts going to the discretion whether or not relief should be granted should be pleaded (such as those giving rise to alleged disproportion in the grant of relief to make good an expectation in an estoppel case) even though it is not necessary for the Plaintiff as part of its pleaded cause of action to plead that the grant of the relief claimed would be proportionate to the alleged detriment. In relation to cases involving mistaken payments, being a core area of unjust enrichment, the defence of change of position is often raised (Jessica Hudson, "Estoppel by Representation as a Defence to Unjust Enrichment – the Vine has Not Withered Yet" [2014] 22 **Restitution Law Rev** 19-34, 21). Liability in unjust enrichment is strict and 'determined primarily upon claimant focused enquiries (see Hudson, 31). Strictly speaking, the defence of change of position will not be available if the recipient of the benefit has not specifically pleaded change of position (see Hudson, 31).

- 74 A further pleading issue arises when there is a disconnect between the claim pleaded and the relief sought. In **Brambles Holdings Ltd v Bathurst City Council** (2001) 53 NSWLR 153, the ground of unjust enrichment was raised on appeal. It was argued by the appellant that the trial judge had erred in finding that the appellants would be unjustly enriched in certain circumstances. Whilst it was not necessary for this to be determined on appeal, Heydon J (as his Honour then was) noted that a reason for not examining the unjust enrichment claim, had it come to that point, would have been because the way in which the claim was pleaded was different from the position as found by the trial judge ((2001) 53 NSWLR 153; [2001] NSWCA 61, [93]). The disconformity between the way the claim was pleaded and the way the facts were found made it inappropriate to examine the unjust enrichment claim.
- 75 As an example, see **Anderson v McPherson (No.2)** [2012] WASC 19 where Edelman J, sitting as his Honour then was in the Supreme Court of Western Australia, considered in some detail what can only be described as a pleading debacle. In that case, at the start of the trial the Defendant (the daughter-in-law of the Plaintiff) defending a claim of resulting trust by her former parents-in-law, amend her pleading to allege a raft of counterclaims based on mistake (later abandoned, failure of consideration, undue influence and unconscionable

conduct). It is fair to say that his Honour was critical of the pleadings in a number of respects and found that the evidence did not support any of those claims. His Honour found that certain new pleas, including mistake, had no evidentiary or factual foundation ([7]; [26]-[27]). His Honour was understandably critical of the submission apparently made by Counsel for the Defendant that the Court could fill evidentiary gaps arising due to deficiencies in evidence which could have been led by the Defendant (due to an asserted lack of clarity in the Plaintiff's case) and held that evidentiary gaps prevented the relief counterclaimed and that Counsel had not let 'sufficient evidence in support of the quantum of any claim for restitution' ([8]-[9]ff). Among the contentions there advanced was the proposition (not surprisingly, unsuccessful) that a claim for equitable compensation could be supported by reference to the 'minimum equity principle' alone ([6]; [39]-[42]; in that regard see Dixon CJ in **Mayfair Trading Co Pty Limited v Dreyer** (1958) 101 CLR 428; [1958] HCA 55 as to the need for a Plaintiff to show an equity to relief and that what constituted an equity to relief was determined by the doctrines of equity (especially at [19])).

Examples of Unjust Enrichment Situations provided by Professor Kit Barker

For a claim based on unjust enrichment to succeed, precise facts establishing each of the relevant elements of a restitutionary entitlement must be pleaded (**Winterton Constructions Pty Ltd v Hambros Australia Ltd** (1991) 101 ALR 363,373-6).

It is necessary to show not just that the Defendant has been enriched at the Plaintiff's expense in a relevant and established sense, but also that there is a sufficient, specific ground for restitution, or "unjust factor" (**Hightime Investments Pty Ltd v Adamus Resources Ltd** [2012] WASC 295.[183]-[185]).

In the absence of such pleaded facts, broad assertions that it would be unconscionable for the Defendant not to pay for a benefit, will not be sufficient.

Edelman J in **Hightime Investments Pty Ltd** at [185] said:

"The presence of an unjust factor is an indispensable requirement to demonstrate the facts upon which the Plaintiff relies for a claim that a Defendant has no 'right to retain' the benefit and was unjustly enriched. The unjust factor may also affect the availability or scope of defences, such as change of position, which rely upon pleading facts which fall within established and developing rules concerning circumstances which reduce or extinguish a Defendant's duty to make restitution by 'any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust.'"

Restitution for Mistaken Payment

- A. Mason at 1018 states that the general structure of a pleading to advance a claim for restitution of money paid should be:

- i) the payment (or other benefit) provided by the Plaintiff (at the Plaintiff's expense);
 - ii) the basis for the claim, such as:
 - request by the Defendant;
 - the Plaintiff's title; or
 - an operative unjust factor (eg: mistake); and
 - iii) the causal link between (i) and (ii).
- B. To plead a cause of action based on a mistaken payment, the relevant mistaken belief and its causative effect must be pleaded along with details of the payment (**Lahoud v Lahoud** [2010] NSWSC 1297.[168], [176]-[179]).
- C. If the Plaintiff wants a proprietary remedy in respect of money paid then it is necessary to plead facts which show that the Defendant had knowledge of the mistake (**Wambo Coal Pty Ltd v Ariff** (2007) 63 ACSR 429);
- D. In a case of failure of basis, the pleading needs to include the relevant condition subject to which the benefit has been provided and the facts establishing that the condition or purpose has failed, together with the fact that the Defendant was aware of the relevant condition, so that it was within both parties' contemplation (**Roxborough v Rothmans of Pall Mall Australia Ltd** (2001) 208 CLR 516.526.[17]);
- E. In any case in which a benefit has been provided under a Contract, it will also be necessary to plead facts demonstrating that the Contract is invalid, incomplete, has been rescinded or discharged, or is otherwise void or voidable, so as to negate the Defendant's legal right to retain the benefit and displace any concern that restitution will undermine a valid contractual allocation of risk (**Brenner v First Artists' Management Pty Ltd** [1993] 2 VR 221.260-1);

Restitution of Wrongs

Mason notes at 1024 that pleadings by Plaintiffs must involve:

- a) a specific allegation of the Defendant's wrong;
 - b) identifying the benefit derived from the wrong;
 - c) asserting a causal link between the two; and
 - d) claiming the appropriate relief
- F. In cases involving wrongful enrichment, where a part of the Plaintiff's cause of action resides in the wrong itself it will normally be sufficient to prove facts establishing that the Defendant breached a relevant legal or equitable duty owed to the Plaintiff (ie: a duty within a category that has been recognised in the precedents as giving rise to gain based claims), and that the gain in question was factually and legally caused by the breach (**Ancient Order of Foresters in Victoria Friendly Society v Lifeplan Australia Friendly Society** (2018) 360 ALR 1.22-3,[78]);
- G. Proper pleading of claims for services rendered has proven to be difficult. If no express request was made for work provided then it will be necessary to plead facts which establish a basis for "*inferring*" one eg: such as the Defendant's acceptance of the work, its necessity or its uncontrovertibly

beneficial nature.

Restitutionary Defences

Mason observes in Ch 22, p823 ff, there are 6 recognised defences to a claim based on an unjust enrichment claim:

i) Change of position:

Mason states at p861, change of position is a recognised defence in restitution. Change of position operates principally as a defence under the general law which may displace a prima facie obligation to make restitution for unjust enrichment. This operates to reduce the defendant's liability to the extent to which his/her circumstances have changed as a consequence of an enrichment (**Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd** [2014] HCA 14).

ii) Estoppel:

Kit Barker and Ross Grantham, observe at p406-7:

Until the recognition of the defence of change of position, the principal defence to an unjust enrichment claim, at least in relation to mistaken payments of money, was estoppel. Where the Plaintiff had made a representation to the effect that the Defendant was entitled to retain the money paid, and that representation was relied upon by the Defendant, the Plaintiff was precluded from denying the truth of the representation. In this way, the Defendant was able to deny any ground existed, as between itself and the Plaintiff, which would justify restoring the enrichment. In this way, the Defendant could justify the subordination of the Plaintiff's interest in restitution to the Defendant's interest in the security of its receipt.

In order to make out the defence of estoppel, there are 3 conditions which the Defendant must satisfy (**United Overseas Bank v Jiwani** [1976] 1 WLR 964; **Legione v Hateley** (1983) 152 CLR 406):

1. The Plaintiff must have made a representation of existing fact or law to the Defendant as to the Defendant's entitlement to the enrichment. The representation may be by words or conduct as long as it is clear and unambiguous (**Western Australian Insurance Co Ltd v Dayton** 91924) 35 CLR 355). Where, as is often the case in respect of restitutionary claims, it is sought to raise the defence in relation to a (mistaken) payment of money, the payment itself has been held not to contain an implicit representation that the Defendant is entitled to the payment. It is only where the Plaintiff is under a duty of accuracy (**Skyring v Greenwood** (1825) 4 B&C 282) or, being aware of the Defendant's belief in his entitlement that he has a duty to speak, that the payment itself can amount to a representation (**Williams v Frayne** (1937) 58 CLR 710 at 736).
2. The Defendant must have relied upon the Plaintiff's representation (**Commonwealth v Verwayen** (1990) 170 CLR 394 at 445). This reliance must also be reasonable in the circumstances.

3. Third, the Defendant must have suffered some detriment as a result of its reliance on the Plaintiff's representation. The Defendant must be able to show that if the Plaintiff is allowed to resile from the representation the Defendant would suffer some financial or other harm (**Newborn v City Mutual Life Assurance Society Ltd** (1935) 52 CLR 723 at 732-5. The function of the detriment requirement is twofold:

- i) it is to justify the enforcement of bare representations or promises unsupported by consideration; and
- ii) it contributes to establishing that a greater injustice would be done in granting the Plaintiff's claim for restitution than in denying it.

iii) **Statutory Defences:**

Mason observes at p829 that there are very few examples of statutory defences limited to restitutionary claims. However, the Frustrated Contracts legislation is an example of a statute which is specific to restitutionary claims.

iv) **Delay in Equity: Laches and Acquiescence:**

Kit Barker and Ross Grantham, state at p517 that:

Some claims based on the principle of unjust enrichment belong historically to the jurisdiction of equity, and the claim is for restitution in equity. Other claims are for equitable relief in respect of non-equitable unjust enrichment claims. These arise particularly where the relief sought is equitable in nature, such as a proprietary remedy. These circumstances are all generally subject to 2 limitation doctrines articulated in equity. First,

- a) equity will generally follow the common law, and accordingly it will apply *by analogy* limitation periods for common law claims. This will involve applying the limitation statute periods; and
- b) equity has its own exclusively equitable doctrines, of laches, acquiescence and delay.

The equitable doctrine of the application of the limitation statutes by analogy is itself subject to 3 considerations:

- a) if the limitation statute provides a specific limitation period for the relevant equitable cause of action, then the matter ceases to be one dealt with under the analogy doctrine and the specific period will apply. Thus, for example, Section 48 of the **Limitation Act 1969 (NSW)** provides that an *"action on a cause of action in respect of a breach of trust is not maintainable if brought after the expiration of ... a limitation period of 6 years running from the date on which the cause of action first accrues to the Plaintiff or to a person through whom the Plaintiff claims ..."*;
- b) there must be a relevant common law analogy; and
- c) the analogy doctrine will not apply.

v) **Limitation Periods:**

Kit Barker and Ross Grantham, observe at p515 that:

In Australia, each State and Territory has its own limitation statutes. In relation to claims based on principles of unjust enrichment the **Limitation of Actions Act 1958 (Vic)** Section 5(1)(a) refers to contracts “*implied by law*”. Such wording is archaic and apt to mislead. However, it is clear enough that this Section was intended to regulate restitutionary claims at common law.

vi) **The Impossibility of Counter Restitution: Restitutio in Integrum**

Kit Barker and Ross Grantham, state at p489) (see Mason p85) that:

The Plaintiff’s right to restitution depends upon its restoring to the Defendant any benefit it has received from the latter in exchange for the enrichment sued upon. This is called *restitutio in integrum*, or counter restitution. Counter restitution is a condition for relief rather than a true defence. The Defendant in effect sets off the benefits conferred against the enrichment received, because the subtraction was in exchange for, and thus a condition of, his receipt of the enrichment.

vii) **Election**

Mason at p839 states that the ability to elect between restitution and damages arises principally in respect of claims for the recovery of money paid or in relation to non-monetary benefits in the context of an ineffective contract.

Where to go for guidance

1. Mason and Carter’s **Restitution Law in Australia** (LexisNexis, 3rd ed, 2016) Ch 29.
2. **Butterworths’ Court Forms, Precedents and Pleadings**, 1989 “*Money Claims*” §3642.
3. Kit Barker, “*Unjust Enrichment in Australia: What is(n’t) it? Implications for Legal Reasoning and Practice*” (2020) 43(3) **Melbourne University Law Review** 1.
4. Edmund Finnane, Christopher Wood, Nicholas Newton, **Equity Practice and Precedents** (Thomson Reuters, 2nd ed, 2019).
5. Blair et al, **Bullen and Leake and Jacob’s Precedents of Pleadings** (Sweet and Maxwell, 18th ed, 2016) Vol II.
6. Justice Julie Ward, “*What’s in a Name? The Taxonomical and Conceptual Divide between Unjust Enrichment and Equity*” (**Current Legal Issues Seminar 2019**) (13 June 2019).
7. J Taliadoros, S Erbacher, **The Laws of Australia: Restitution** (Thomson Reuters, 2014).
8. Kit Barker, Ross Grantham, **Unjust Enrichment** (LexisNexis, 2008).