

Books

THE DEFENCE OF PASSING ON by Michael Rush, Oxford, Hart Publishing, 2006, 236pp, ISBN 978 1 84113 602 8

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Unjust enrichment and restitution are still enigmatic to many Australian lawyers. That is so notwithstanding the High Court's recent pronouncements in *Roxborough v Rothmans of Paul Mall Australia Ltd*¹, the large volume of cases now reported (particularly from other common law jurisdictions) and the extensive writings on all aspects of the area by what Professor Birks first labelled the 'restitution industry'.²

If restitution as a remedial response to particular causes of action is an enigma, then defences to claims in unjust enrichment – restitution's most recognised form of action – must appear to the unacquainted as something of an encrypted code. While 'change of position' is no doubt familiar to seasoned litigators and those trained in the dark arts of restitution, few practising lawyers would be able to profess more than a passing knowledge of other defences to claims in unjust enrichment. Dr Rush, a graduate of restitution's own Bletchley Park, Oxford University, seeks to remedy that to some degree by cracking one of restitution's continuing riddles: the so-called defence of 'passing on'.

The Topic

What is the Defence of 'Passing On' and is it of any Relevance to Australian Lawyers?

Those who have practised in taxation litigation may be familiar with the defence in its statutory form. Indeed, only a few weeks before the book was published, the High Court gave judgment in a matter in which the operation of the statutory defence was squarely at issue: *Avon Products Pty Ltd v Commissioner of Taxation*.³ The book is therefore no academic frolic. It deals with a defence that has received statutory recognition in this country, and in others, and has been suggested as a common law defence, but of which little is known and even less, particularly in Australia, has been written.⁴

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1 *Roxborough v Rothmans of Paul Mall Australia Ltd* (2001) 208 CLR 516 ('*Roxborough*').

2 Peter Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 *Current Legal Problems* 231 at 231. Heydon JA sought to nuance the description in *Brambles Holdings v Bathurst City Council* (2001) 53 NSWLR 153 at 183 (Heydon JA), by adding 'academic division' to the epithet, an addition endorsed by Mason P at 155.

3 *Avon Products Pty Ltd v Commissioner of Taxation* (2006) 80 ALJR 1161. See also Monica Chowdry & Simone Degeling, 'Passing on in the High Court of Australia' (2007) 123 *Law Quarterly Review* 203.

The ‘passing on’ defence is significantly different to the better known defence of change of position because its attention is focused not on any change in the circumstances of the defendant after receipt of the enrichment, but rather on the circumstances of the claimant after the defendant’s enrichment. The defence, in the context of a claim for repayment of taxation extracted pursuant to an *ultra vires* law, has recently been explained in these terms⁵:

The basic premise of the passing-on defence is that if the taxpayer has passed on the burden of the tax payments to others, usually via price increases charged to its customers, the taxpayer has not suffered a deprivation, the taxing authority’s enrichment was not at its expense, and it would receive a windfall if it were awarded recovery.

Accordingly, the relevant enquiry is whether the claimant has ‘passed-on’ its loss to a third party by, for example, increasing prices commensurate with the levy imposed, and in doing so, avoided any real ‘loss’.

The Structure and Content of the Book

The book is divided into three parts. The first part introduces the topic and lays the intellectual framework for the rest of the book. It commences by dealing with preliminary matters in Chapter One – some of which will be touched upon later – and then, in Chapter Two, by marking out the realm of the defence. Separate chapters are then devoted to the reception and recognition of the defence at common law and the statutory enactment of the defence in the United Kingdom.

The third chapter, which deals with common law cases on the defence, is a commendably thorough analysis of the relevant jurisprudence. It considers every English and Australian authority on the defence up until the time of publication, along with a considerable number of Canadian and North American authorities which, due to their large number, are thematically grouped.

The second part deals with what is commonly explained in the texts as the second element to an action in unjust enrichment – that the enrichment must come at the claimant’s expense. Dr Rush seeks to understand and elucidate what the law means by this requirement: does a claimant simply need to show that the enrichment came *from* him, or is it necessary to show *actual loss*?

This part contains an invaluable analysis and explication of one of the basal requirements of actions in unjust enrichment and, in so doing, makes the book one of wider significance and use than the title would suggest. Only a moment of reflection is necessary before it becomes clear why the nature of the requirement is important to the topic of the book. Put simply, the defence needs ‘at the expense of’ to mean ‘loss’ in order for it to work.

4 Perhaps the most significant article on the topic published in this country appeared in the *Sydney Law Review* ten years ago: Mitchell McInnes, ‘Passing On in the Law of Restitution: A Reconsideration’ (1997) 19 *Sydney Law Review* 179.

5 *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* (Unreported, Supreme Court of Canada, McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ, 11 January 2007) at [41] (Bastarache J) (*‘Kingstreet’*).

Chapter Five gives detailed consideration to the two alternative meanings of ‘at the expense of’ and canvasses definitional issues presented by both options. As to ‘loss’, for example, time is spent examining whether it should be taken to mean ‘detriment’, ‘deprivation of a right’ or an ‘opportunity foregone’. Similarly, whether intangibles such as services can be considered to have come ‘from’ the claimant is considered. The following chapter, Chapter Six, provides a very useful examination of the Australian, Canadian, English and North American case law on the topic. Indeed, this chapter is likely to be of considerable use to practitioners and students outside the context of the central topic of the book.

It is however in Chapter Seven ‘What should “At the Expense of” Mean?’, where the author’s obvious scholarly force is deployed to the greatest effect. Whilst the earlier chapters deal carefully with what ‘at the expense of’ *might* mean, and what the cases have suggested it *does* mean, in Chapter Seven Dr Rush unleashes a torrent of intellectual energy in seeking to prove his view: that the second element of a claim in unjust enrichment means ‘from’ – not ‘loss’ – and therefore that ‘passing on’ should not be accepted as a general law defence. In doing so, everything from the reasoning in key cases, the arguments of respected academics, practical considerations (such as the conservation of judicial resources), and overarching philosophical and jurisprudential considerations, drawing in particular from Aristotle’s *Nicomachean Ethics*⁶ and Ernest Weinrib’s *The Idea of Private Law*,⁷ are considered. The result is a compelling case for the rejection of the defence.

Significantly, that conclusion has also recently been reached by the Supreme Court of Canada in *Kingsstreet*. Whether the reasoning therein is as intellectually coherent as that of Dr Rush is something that readers may ponder.

It may well have been tempting for Dr Rush to conclude his analysis there. Instead, the third part of the book gives consideration to other arguments for the acceptance or rejection of the defence. Through the inclusion of these further considerations, the author presents a near complete account of judicial and academic thinking (including his own) on the defence. In the result, the book avoids the risk of being labelled a polemical account of the defence and instead becomes an authoritative monograph.

As to the arguments advanced in support of the defence, proper thought and analysis is given to each by the author before a sword is put to them. Similarly, arguments advanced by others as giving good reason for rejecting the defence are shown to be lacking. In all, nine additional arguments for rejection are considered, three of which are found to be unsupportable, and another three provide only potential or partial bases for rejecting the defence, while a further three are shown to provide good grounds for the unconditional rejection of the defence. The rigour of the analysis produces a range of convincing reasons as to why the defence is not one that should be adopted by the general law.

6 Aristotle, translated by William Ross, *Nicomachean Ethics* (1908).

7 Ernest Weinrib, *The Idea of Private Law* (1995).

Nomenclature

Restitution scholars seem even more concerned about nomenclature than Australian constitutional lawyers are with Commonwealth power. With each new book a new word is created to describe a new theory, action, remedy or defence, or to re-brand an old one. Thus, in recent years we have been educated on such exotic beasts as ‘reviving subrogation’, ‘subtractive unjust enrichment’ and ‘prosulting trusts’. Indeed new epithets spew forth at such a rate that restitution lawyers may well be considered the natural born enemies of advocates of plain English. Dr Rush has not let his team down, spending some seven pages explaining why ‘passing on’ should be renamed ‘disimpoverishment’, a creature first spotted by Professor Birks but now dissected and catalogued by Rush.⁸

It must be acknowledged though that while the author does not think the prevailing nomenclature is adequate, he has the humility and good sense to accept it is so, and in fact to entitle his book with it, rather than with his own preferred terminology. One result of that approach is to turn the discussion on the name of the defence into a genuine scholarly analysis rather than an exercise in self-justification and gratification. Many others have not had such tact, and for that he should be commended.

The book also makes use of the helpful approach often seen in many texts nowadays of incorporating tables and diagrams to assist the reader in understanding the point sought to be made. Having said that, the diagram found at page sixty-six must be one of the more inane to have ever found its way into a serious monograph. That is a very small criticism however.

Conclusion

On the whole, the book is a didactic exposition on this little known defence which will undoubtedly edify readers, both as to the detail of ‘passing on’ and, more generally, on the nature and requirements of actions in unjust enrichment.

Restitution is a hotly contested topic and not one that some are yet prepared to accept as a worthy companion to other great branches of the private law such as contract, tort and trusts. For that reason, Abraham Lincoln’s comment, made in a book review he once wrote, that ‘people who like this sort of thing will find this the sort of thing they like’ is apposite.⁹ Having said that, the detailed case analysis and consideration of one of the key elements necessary to make out a claim in unjust enrichment will ensure that this book is useful, even if its underlying thesis is not agreed with, to those who do not necessarily ‘like this type of thing’.

Restitution scholars are often criticised by practising lawyers and judges as presenting something less than a coherent and accepted picture of the nature and operation of their area of legal research. As Mason P, himself a noted restitution

⁸ Peter Birks, *Unjust Enrichment* (2nd edn, 2005) at 219–221.

⁹ GWE Russell, *Collections and Recollections* (1898) Ch 30.

scholar, acknowledged in *Brambles Holdings Ltd v Bathurst City Council*;¹⁰ ‘disagreement about the very structure of the law of restitution and its interrelationship with other branches of the law seems to be a badge of membership’. That is all the more reason for hats to be tipped to Dr Rush, who through his labours has cast great light, and provided good reason, for unanimity to be found on at least one area of restitution. It would be a brave advocate indeed who in the light of this text and the recent judicial pronouncements in *Roxborough* and *Kingstreet*, sought to breathe life into ‘passing on’ as a general law defence. For this little piece of clarity, we should all be grateful and Dr Rush should be commended.

¹⁰ *Brambles Holdings v Bathurst City Council* (2001) 53 NSWLR 153 at 155 (Mason P).

