PRESENTERS

Charles Cato, Barrister, Auckland

Charles has been involved with the subject of restitution for many years. He first studied it under Professor GH Treitel and Professor Peter Birks for the BCL in 1973-74 at Worcester College, Oxford. Charles then taught and examined Restitution as a degree course at the Auckland Law School in 1980-83. In 1998, he published *Restitution in Australia and New Zealand* (Cavendish Press) and he has commented regularly in journals on various developments in the subject.

Tim Mullins, LeeSalmonLong, Auckland

Tim practises in the field of general commercial litigation as an associate with LeeSalmonLong. He has advised on and conducted proceedings concerning various claims with restitutionary aspects, including misappropriated money, quantum meruit and constructive trusts. He recently completed postgraduate study on the law of restitution with Graham Virgo at Cambridge University. He maintains a close interest in this developing area.

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INTRODUCTION

This seminar is timely. In recent years, there has been considerable focus on the subject "restitution", both from a theoretical and practical aspect. The last survey of case law and developments was presented for the New Zealand Law Society by Professor Watts and Stephen Kós in 1990. Since then, both here and in other jurisdictions, there has been a significant number of cases which are relevant to an understanding of modern restitution.

Restitution as a subject had its origins many years ago in the famous dicta of Lord Mansfield in *Moses v Macferlan* (1760), a case involving the common law remedy of monies had and received. Other distinguished jurists such as Lord Wright in *Fibrosa* (1942) , a case on frustration and contract, and Lord Denning in *Nelson v Laholt* [1948], a case of knowing receipt of misappropriated trust monies, spoke of restitution. However, it was not until Goff and Jones published their seminal work *The Law of Restitution* in 1966 that restitution as a subject was given a sound theoretical basis or foundation in English law. The great contribution of these writers lay in their collection of both common law and equitable remedies under an overarching umbrella of unjust enrichment. In this sense, they achieved for English lawyers what the *Restatement of the Law of Restitution* (1937) did for the subject in the United States.

In recent times, there has been a good deal of theoretical debate on the basis for and the boundaries of restitution. In this booklet we mention some of these themes. However, we are keen to convey the message that restitution as a subject now has a strong foothold in the common law, and no doubt over a period of years its ambit and scope will be gradually settled. With the fusion of law and equity, we see restitution as an appropriate practical vehicle to collect both cases resulting in gain-based remedies arising under a broad conception of unjust enrichment, and, if we allow ourselves a measure of indulgence, also cases where such remedies are crafted to address the consequences of unconscionable dealing.

We are conscious of the fact that Professors Berryman and Watts, and Stephen Kós, have recently presented an NZLS seminar on contractual remedies which incorporates a comprehensive discussion of restitution within that framework. We have accordingly chosen to limit our discussion in that area, and in other areas involving contractual obligation, such as mistake, frustration and illegality. We summarise the New Zealand statutory overlay, much of which is directed to contract, from the point of view of restitution. In the time permitted we will present certain selected topics where modern restitution has had a significant role to play, in addition to an overview of the subject as a whole. These topics include mistake and money payments, duress, undue influence and unconscionable bargains, fiduciary obligations, restitution for wrongs, and proprietary remedies, all of which are important areas in practice.

Above all, we see modern restitution, as Lord Wright said in *Fibrosa*, as a subject worthy of study, we submit, for practitioners and students alike.