

INCAPACITY, NON EST FACTUM AND UNJUST ENRICHMENT

ELISE BANT*

[Although the concept of enrichment is fundamental to the law of unjust enrichment, there is relatively little case law on this issue. This is because most cases involve the receipt of money and, in general, money is regarded as incontrovertibly beneficial. Against this backdrop, the recent unanimous New South Wales Court of Appeal decision of Ford v Perpetual Trustees Victoria Ltd stands out as a singular opportunity for reflection on the nature of enrichment. The case concerned, inter alia, the restitutionary liability of a borrower who so lacked mental capacity at the time of entering into the impugned loan transaction that the transaction was void for non est factum. The Court of Appeal found that the borrower was not in fact benefited by his receipt of the loan and restricted his restitutionary liability to a small sum retained in his account. This article explores the doctrinal foundations that support this conclusion. It explains that findings of incapacity and non est factum have significant ramifications for the issue of enrichment, even in cases where the putative enrichment is money. Such findings may also affect the availability of the change of position defence. This is because the law requires that the tests generally applicable to resolving those matters be modified so that they do not undermine or stultify the policies of the law in protecting an incapax or a defendant whose mind did not go with their deed.]

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I INTRODUCTION

In *Ford v Perpetual Trustees Victoria Ltd* ('Ford')¹ the appellant (Ford) had taken out a loan with the respondent ('Bank') for the purchase of a cleaning

* BA, LLB (Hons) (UWA), BCL, DPhil (Oxon); Associate Professor, Melbourne Law School, The University of Melbourne; Honorary Fellow, The University of Western Australia. My grateful thanks to Michael Bryan for his comments on earlier drafts of this article.

¹ (2009) 257 ALR 658, on appeal from *Perpetual Trustees Victoria Ltd v Ford* (2008) 70 NSWLR 611 ('Perpetual Trustees').

business. The loan was secured by a mortgage over his residential property. Harrison J at first instance conducted a detailed examination of the evidence surrounding the circumstances of Mr Ford's entry into the loan agreement and the nature of his impairment. No appeal was brought against those factual findings.²

At the time of entering into the loan transaction, Mr Ford was almost 58 years old, illiterate (although, somewhat unfortunately in light of the events, able to sign his name) and suffering from a significant congenital intellectual impairment. As the recipient of a modest disability income, he had no capability arising from either his income or other sources (including the cleaning business) to service the payment of interest on the loan.³ Inevitably, Mr Ford defaulted on repayment of the loan, and the Bank sought to enforce its rights under the loan and mortgage agreements.⁴

Harrison J found that Mr Ford had been the pawn of his adult son throughout the unfortunate saga. The son had arranged the loan in order to finance the purchase of the cleaning business. The son's plan was to enjoy the full practical benefit of both loan and business without attracting any of the accompanying legal liabilities.⁵ Mr Ford, in contrast, had no understanding of what a loan was or what this particular loan entailed, nor any real appreciation of the existence or significance of the cleaning business.⁶ He entered into the transactions under the pervasive undue influence of his son.⁷ To adapt a phrase from another undue influence case, so far as the loan and mortgage transactions were concerned, his mind was 'a mere channel through which the will of [his son] operated'.⁸

Harrison J concluded that as a result of his significant intellectual disability Mr Ford lacked legal capacity.⁹ Further, his Honour found that the transactions were void for non est factum.¹⁰ Mr Ford's degree of incapacity meant that when he signed the documents he had no positive belief about their nature and effect. He did not understand that he was a borrower or that if he failed to repay the loan he would lose his house. He had no appreciation of the significance of signing the loan agreement. Although Harrison J did not put it in this way, the act of signing his name on the loan and mortgage documents was no different, from Mr Ford's perspective, to signing his name for fun. It was an act devoid of

² *Ford* (2009) 257 ALR 658, 660 (Allsop P and Young JA). Accordingly, the following discussion will refer to the primary judge's assessment of the evidence unless otherwise stated.

³ *Perpetual Trustees* (2008) 70 NSWLR 611, 613 (Harrison J). Mr Ford's characteristics and capacity are summarised at 613. The full analysis of the nature of his impairment is contained at 614–22. See also at 630–1 in relation to his capacity to understand the transaction in question.

⁴ *Ibid* 613.

⁵ *Ibid* 634.

⁶ *Ibid* 620–2, 629–31, 634. See also at 617 for the cross-examination of the defendant over the cleaning business.

⁷ *Ibid* 635.

⁸ *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923, 969 (Slade LJ for Slade, Balcombe and Woolf LJJ), citing *Tufton v Sporni* [1952] 2 TLR 516, 529 (Jenkins LJ); see also at 532 (Morris LJ).

⁹ *Perpetual Trustees* (2008) 70 NSWLR 611, 622.

¹⁰ *Ibid* 631.

meaning. Therefore, this was not simply a case where a mentally infirm defendant lacked contractual capacity — it was a case where his mind did not go with his deed.¹¹

This finding was upheld on appeal to the New South Wales Court of Appeal in a joint judgment delivered by Allsop P and Young JA,¹² with which Sackville AJA concurred.¹³ The Court of Appeal emphasised that the plea of non est factum is concerned with ‘the *true consent* of the signer’.¹⁴ Where, as here, the signer had no understanding at all of what he was signing and the nature of his act, and no capacity to form any such understanding, his mind did not go with his pen.

The defendant’s degree of mental incapacity also led Harrison J to reject the Bank’s submission that the defendant was careless in signing the documents or did not take proper care to ascertain the true nature of the document.¹⁵ As his Honour explained:

The notion that the defendant failed to take proper precautions to ascertain the true nature of the documents he was signing assumes that he was first capable of turning his mind to the issue and, secondly, that he was capable of making a satisfactory judgment about it if he were. Neither of these assumptions is accurate.¹⁶

The Court of Appeal also rejected this submission, although on the slightly different basis that any reasonableness requirement must be assessed by reference to the circumstances of the signer and his personal attributes. Given the extent of his intellectual impairment and the manipulation by his son, Mr Ford could not be said to have ‘failed to take any precautions that a person in his position and with his attributes should have’ taken.¹⁷

Before turning to the claim in unjust enrichment, one final point should briefly be noted. At trial, the Bank had argued that, in order for the loan and mortgage transactions to be held void, the other party must show that the Bank had knowledge of the facts giving rise to the defence of non est factum.¹⁸ If accepted, this requirement would have constituted a difficult hurdle for the defendant to overcome because the Bank had never dealt with him personally (the loan having been arranged through a broker) and, according to Harrison J, the Bank had no reason to suspect the defendant’s incapacity.¹⁹

¹¹ Ibid 629–30.

¹² *Ford* (2009) 257 ALR 658, 678–9.

¹³ Ibid 688.

¹⁴ Ibid 668 (Allsop P and Young JA) (emphasis added).

¹⁵ *Perpetual Trustees* (2008) 70 NSWLR 611, 630–1.

¹⁶ Ibid 631.

¹⁷ *Ford* (2009) 257 ALR 658, 679 (Allsop P and Young JA).

¹⁸ *Perpetual Trustees* (2008) 70 NSWLR 611, 631–3 (Harrison J).

¹⁹ Ibid 634–6, 638. Whether this is so is debatable: it would be usual for a borrower to note on his loan application that he was in receipt of a disability pension. This might reasonably be expected to trigger an inquiry into the nature of the disability. See generally Jeannie Marie Paterson, ‘Knowledge and Neglect in Asset-Based Lending: When Is It Unconscionable to Lend to a Borrower Who Cannot Pay?’ (2009) 20 *Journal of Banking and Finance Law and Practice* 18, 28–9. However, the Court of Appeal alluded to the fact that the loan was a so-called ‘low doc’

Harrison J found, however, that knowledge was not required. His Honour noted that it is an accepted incident of a successful plea of non est factum that the defence may adversely affect innocent third parties who have relied on the outward appearance of a valid contract signed by the affected party.²⁰ This necessarily suggests that there is no requirement that the other contracting party was aware that the defendant's mind did not accompany his deed in order for the defence to succeed. Any other conclusion would have a tendency to lead to inconsistent results.²¹ This analysis was not challenged on appeal.

There is another reason why Harrison J's conclusion on the knowledge requirement was undoubtedly correct. As explained by the High Court of Australia in *Gibbons v Wright*, signatories of documents may be mentally incapable in the sense that they are not capable of understanding the general nature of a transaction and yet may still intend to sign the document that purports to give effect to the transaction.²² In other words, their consent may be profoundly defective or impaired, but not entirely absent. In contrast, where the signatory's mind has not accompanied the signature, there is no legally significant event at all.²³ That is, there is no act of consent (whether impaired or otherwise) that could potentially affect or be the source of legal rights, and any transaction based on the signature consequently has no legal effect. A distinction is therefore drawn between a person unable to understand the general nature or purport of a document due to mental incapacity and a person whose mind has no conception at all of the deed apparently executed. In the former case, the transaction is at most voidable, not void, and knowledge of the incapacity on the part of the other contracting party may affect a party's right to rescind. In the latter, the deed is void for non est factum, and a finding of knowledge of the circumstances giving rise to the non est factum plea on the part of the other contracting party does no more than confirm the independent conclusion that the impugned transaction is void. For this reason, there can logically be no independent requirement of knowledge in order for the defence to succeed.

II THE CLAIM IN UNJUST ENRICHMENT

Although the agreements were void for non est factum,²⁴ the Bank nonetheless argued that it was entitled to restitution of the amount of the loan on the basis of

loan (see *Ford* (2009) 257 ALR 658, 662–3, 683 (Allsop P and Young JA)), which may indicate that not even this amount of information was available to the Bank. On the significance of the Bank's failure to take any steps to ascertain the circumstances of the borrower for the purposes of the *Contracts Review Act 1980* (NSW), see *Ford* (2009) 257 ALR 658, 682–3 (Allsop P and Young JA) and further below n 24.

²⁰ *Perpetual Trustees* (2008) 70 NSWLR 611, 632–3, citing *Petelin v Cullen* (1975) 132 CLR 355, 360 (Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ).

²¹ *Perpetual Trustees* (2008) 70 NSWLR 611, 633 (Harrison J).

²² (1954) 91 CLR 423, 442–4 (Dixon CJ, Kitto and Taylor JJ). See also *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643, 673 (Giles J).

²³ *Gibbons v Wright* (1954) 91 CLR 423, 443 (Dixon CJ, Kitto and Taylor JJ).

²⁴ *Perpetual Trustees* (2008) 70 NSWLR 611, 631 (Harrison J). There was a further difficult question, answered by Harrison J in the negative, as to whether registration of the mortgage document 'cured' the invalidity of the loan agreement: see at 639. This point was not taken on

the law of unjust enrichment.²⁵ The core elements of that category of claim are (1) enrichment, (2) ‘at the expense of’ the claimant, and (3) the existence of an ‘unjust factor’.²⁶ Accordingly, it was argued that:

- Mr Ford was enriched by his receipt of the loan monies;
- the loan monies were transferred from (at the expense of) the Bank; and
- Mr Ford received the benefit in circumstances where, because of the Bank’s mistake as to the validity of the loan agreement,²⁷ or because the Bank had transferred the loan monies on the shared basis that the agreement was enforceable (a basis that was subsequently discovered to have failed at the outset),²⁸ it was unjust for Mr Ford to retain the benefit.

Regarding the second ground of ‘failure of basis’, it must be doubted that a basis can ever be ‘shared’ in any meaningful, let alone legal, sense with a party who entirely lacks mental capacity — unless one takes a strongly objective approach to determining the ‘basis’ of the transaction.²⁹ However, given the alternative ground of mistake, which was sufficient to support the Bank’s claim, this matter will not be further addressed here.

At first instance, Harrison J reluctantly acceded to the Bank’s claim for two reasons.³⁰ First, his Honour found that the receipt of the loan monies by Mr Ford was incontrovertibly beneficial or ‘enrich[ing]’.³¹ Secondly, because the

appeal. Relief under the *Contracts Review Act 1980* (NSW) was also sought, both at first instance and on appeal. However, given the finding that the contract was void ab initio, the Court of Appeal took the view that the statutory provisions did not apply: *Ford* (2009) 257 ALR 658, 679 (Allsop P and Young JA). Had it applied, the Court found (contrary to Harrison J: *Perpetual Trustees* (2008) 70 NSWLR 611, 637–8) that it would require the same conclusion as reached concerning the claim in unjust enrichment: *Ford* (2009) 257 ALR 658, 679–83 (Allsop P and Young JA).

²⁵ *Perpetual Trustees* (2008) 70 NSWLR 611, 639–40 (Harrison J).

²⁶ On the adoption of ‘unjust factors’ in Australian law, see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd* [2002] NSWCA 263 (Unreported, Spigelman CJ, Young CJ in Eq and Foster AJA, 13 August 2002) [34] (Spigelman CJ); *Ethnic Earth Pty Ltd v Quoin Technology Pty Ltd (rec & mgr apptd) (in liq) [No 3]* (2006) 94 SASR 103, 117 (Bleby J), citing J W Carter and D J Harland, *Contract Law in Australia* (4th ed, 2002) 915–16. In England, see, eg, *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 234 (Lord Hoffmann), and, more generally, at 227 (Lord Steyn), 239 (Lord Hutton); *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558, 611–13 (Lord Walker); *Sempre Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561.

²⁷ See the discussion in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 376–8 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). The list of operative mistakes was somewhat expanded on appeal: see *Ford* (2009) 257 ALR 658, 683 (Allsop P and Young JA).

²⁸ See *Goss v Chilcott* [1996] AC 788, 798 (Lord Goff for Lords Goff, Jauncey, Steyn, Hoffmann and Cooke). In *Perpetual Trustees*, the Bank relied on *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 to argue that there had been a total failure of consideration.

²⁹ An objective approach was endorsed in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 252 (Mason P). Cf Peter Birks, *An Introduction to the Law of Restitution* (1st revised ed, 1989) 219 and Andrew Burrows, *The Law of Restitution* (2nd ed, 2002) 408, who both adopt a subjective approach.

³⁰ *Perpetual Trustees* (2008) 70 NSWLR 611, 642.

³¹ *Ibid.*

availability of defences such as the change of position defence had not been argued before him,³² the finding that Mr Ford had been enriched by his receipt effectively concluded the matter.

The Court of Appeal overturned this ruling, holding that Mr Ford was only liable to make restitution of a relatively small amount of the loan still retained in his personal account. This was not on the basis that Mr Ford had the benefit of some change of position defence, which (as noted by the Court) had not been pleaded,³³ but because the elements of the claim in unjust enrichment had not been made out.

The Court emphasised that the inquiry concerned the ‘injustice of the retention of any money or benefit.’³⁴ Although this and other comments of the Court suggest an open-ended inquiry into the relative fault of payer and recipient,³⁵ it is submitted that the crucial findings of the Court rightly focused on the issue of enrichment.³⁶ Here, the Court found that Mr Ford in substance received no benefit from the loan beyond the receipt and retention of the small sum still identified in his account. Nor, given his incapacity, had he truly requested or chosen the loans.

These findings go to the heart of the matter. They not only reveal why Mr Ford’s restitutionary liability was properly limited on the particular facts of this case, but also suggest important insights into the nature of the enrichment and change of position inquiries in unjust enrichment claims. The balance of this article seeks to explore the implications of the Court’s findings and to examine the doctrinal foundations that support its conclusions.

A *Enrichment*

Turning first to the question of enrichment, Harrison J had expressed his concern that there was

considerable tension between the notion of an incapacitated defendant being able to establish a defence which avoids a contract on the one hand, and his nonetheless remaining liable for ‘benefits’ arguably passing to him or given in discharge of his liabilities, which by definition he neither agreed to nor (in the context of the present case) desired or understood, on the other hand.³⁷

As his Honour noted, this ‘issue distils into [the question] of whether or not the defendant was truly enriched’ for the purposes of the claim in unjust enrich-

³² See *ibid* 640.

³³ *Ford* (2009) 257 ALR 658, 684 (Allsop P and Young JA).

³⁴ *Ibid*.

³⁵ For example, the Court’s discussion of the relevance of both the ‘fault’ of a defendant who knowingly receives a payment into his account (*ibid* 685) and of the Bank’s risk-taking (at 686–7). For an alternative explanation of the relevance of a defendant’s knowledge of receipt that does not import a fault requirement, see James Edelman and Elise Bant, *Unjust Enrichment in Australia* (2006) 104.

³⁶ See *Ford* (2009) 257 ALR 658, 686 (Allsop P and Young JA).

³⁷ *Perpetual Trustees* (2008) 70 NSWLR 611, 642.

ment.³⁸ Of course, money is normally regarded as the very measure of enrichment, a proposition that Harrison J ultimately accepted. We have seen that, on appeal, the Court held that as a matter of substance, Mr Ford was not enriched by his receipt of the loan.³⁹ As the following analysis demonstrates, the Court's decision is both consistent with a principled understanding of the enrichment requirement and with the considerations of precedent and policy that inform its broader private law context.

B *Autonomy-Based Enrichment Principles*

It is necessary to go back to first principles in examining the enrichment question. In identifying 'enrichment' for the purposes of a claim in unjust enrichment, the law places considerable store on the need to afford adequate respect, and protection, to defendants' freedom of choice.⁴⁰ Recipients of wealth have different tastes and legitimately desire goods and services to different extents. In the academic literature, the law's recognition of defendants' rights to autonomy — in particular, their right to choose the allocation of their resources — has been labelled the principle of 'subjective devaluation'.⁴¹ This label is unhelpful because it implies that defendants are entitled to assess the value of any received benefit subjectively.⁴² To the contrary, once it is shown that a defendant subjectively desired or chose the received benefit, its value is assessed objectively (by reference to its market value).⁴³ Whatever the label adopted, however, the law clearly takes the view that the identification of an 'enrichment' for the purposes of a claim in unjust enrichment must accommodate defendants' rights to freedom of choice in allocating their financial resources.⁴⁴ The various principles and tests which collectively address the enrichment issue are here called 'autonomy-based enrichment principles' in order to highlight the underlying purpose of the law.

The autonomy-based enrichment principles tend to address two broad categories of cases. In the case of non-monetary benefits, it must be demonstrated that the defendant desired or chose the particular good or service provided by the plaintiff and was thus enriched by its receipt.⁴⁵ There are a number of ways of addressing this issue, for example by adducing evidence that

³⁸ *Ibid.*

³⁹ *Ford* (2009) 257 ALR 658, 686 (Allsop P and Young JA).

⁴⁰ Edelman and Bant, above n 35, 98–9. See also Keith Mason, J W Carter and G J Tolhurst, *Mason and Carter's Restitution Law in Australia* (2nd ed, 2008) 48–9.

⁴¹ The term was coined by Birks, above n 29, 109–10.

⁴² Edelman and Bant, above n 35, 108.

⁴³ In relation to services, see, eg, *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 263 (Deane J); *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 261–5 (Byrne J). In relation to goods, see, eg, *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775, 2791–2 (Mance LJ). In relation to the use of money (interest), see, eg, *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561.

⁴⁴ Edelman and Bant, above n 35, 98–9.

⁴⁵ *Ibid* 108.

the defendant requested the received benefit,⁴⁶ was saved a necessary expense by its receipt,⁴⁷ or could easily have returned the benefit but chose not to do so.⁴⁸

In contrast with goods and services, the receipt of money is generally regarded as incontrovertibly beneficial. This is because no reasonable person would disagree that the receipt of money is desired and thus beneficial, and the defendant is presumed to be a reasonable person.⁴⁹ Indeed, even if a defendant is philosophically opposed to the accumulation of money, it remains the medium by which they can obtain the goods and services that they subjectively desire. As Robert Goff J elegantly stated, '[m]oney has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited'.⁵⁰

However, a view that money is incontrovertibly beneficial does not mean that the autonomy-based enrichment principles do not apply in money cases. Subjective devaluation is relevant, but is rarely explicitly invoked as the freedom of choice concerns that it seeks to address are usually met. This is because, as we have seen, the money is either subjectively desired by the defendant (as it would be by any reasonable person) or because it supplies the means to purchase other things and services subjectively desired by the defendant. On either approach the same autonomy-based enrichment principles apply to monetary as to non-monetary benefits.

One final point must be made before considering how these enrichment principles operate in non est factum cases. The law's concern to protect defendants' freedom of choice is undoubtedly a primary consideration that affects restitutionary liability in claims of unjust enrichment.⁵¹ However, defendants' freedom of choice is not the sole concern in this area. Plaintiffs, after all, will have a countervailing interest in reversing transfers made in circumstances where their autonomy (and thus their ability to exercise meaningful choice) was impaired, for example, as a result of a mistake, undue influence or duress. This accommodation of competing interests⁵² is reflected in the imposition of limits on the application of the principle of subjective devaluation. We have seen that this principle protects the defendant where personal restitution of the objective value of the received benefit is sought. But where the original benefit can still be identified in the hands of a defendant and the defendant has not detrimentally relied on the receipt (a point to which we return in Part IV), the fact that the defendant did not subjectively desire or choose the benefit is no

⁴⁶ See, eg, *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 258 (Byrne J).

⁴⁷ See, eg, *Young v ACN 081 162 512* (2005) 218 ALR 449, 450–2 (Gzell J).

⁴⁸ See, eg, *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775, 2791 (Mance LJ).

⁴⁹ See generally Edelman and Bant, above n 35, 108–9; Burrows, above n 29, 18–20; Mason, Carter and Tolhurst, above n 40, 52–3.

⁵⁰ *BP Exploration Co (Libya) Ltd v Hunt [No 2]* [1979] 1 WLR 783, 799.

⁵¹ See Edelman and Bant, above n 35, 98–9.

⁵² Another legal mechanism that addresses this issue is the change of position defence, considered below in Part IV.

answer to a claim for its return. The defendant must make restitution of the retained benefit, whether or not it was subjectively desired.⁵³

C *The Principles Applied*

The preceding point is demonstrated by the facts of *Ford*. A small amount of money had been deposited in Mr Ford's account and had not been spent by the time of the initial hearing. There was no real dispute either at first instance⁵⁴ or on appeal⁵⁵ that this amount should be returned.⁵⁶ Any argument that the sum was undesired and thus not theoretically enriching to Mr Ford could not constitute a principled reason for refusing to return it to the Bank. The real trouble in the case was that this amount only comprised a fraction of the loan monies.⁵⁷ The balance was no longer in Mr Ford's account. Indeed, as we will see below in Part III(C), most of the loan monies never made it into his hands at all.

This brings us to the crux of the problem. When money or its traceable substitute is no longer retained in specie, an order to repay its value necessarily presupposes that the defendant was enriched by the original receipt. We have seen that a claim for personal restitution normally invokes those autonomy-based enrichment principles that seek to protect defendants' freedom of choice. In that regard, as noted above, the receipt of money will generally be regarded as incontrovertibly beneficial because it was either (1) subjectively desired by the defendant (as it would be by any reasonable person) or (2) could be the means to purchase other goods and services subjectively desired by them. What makes *Ford* an unusual case is that it is not obvious on the facts of the case that either proposition was true.

As for the first proposition, Harrison J's findings as to mental incapacity established that Mr Ford did not subjectively desire the loan even though he had formally requested it.⁵⁸ The passage extracted above in Part II(A) demonstrates that he did not understand that he was entering into the loan agreement, still less that he desired or agreed to it. He had exercised no freedom of choice in relation to the loan monies because he had no capacity to exercise an independent

⁵³ The link between this and the test of the 'readily returnable' benefit identified by Mance LJ in *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775, 2791 is very close. The only real difference between the two is that the readily returnable benefit test does purport to identify cases where a defendant subjectively desires the received benefit, whereas with the approach to the recovery of benefits still identifiable 'in specie' the subjective desire of the defendant for the identified benefit is irrelevant. In the latter case, the fact that the benefit can still be identified does not require its return in specie; rescission case law shows increasingly that proprietary rights can be satisfied by purely personal remedies: see, eg, *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002) [98].

⁵⁴ See *Perpetual Trustees* (2008) 70 NSWLR 611, 635, 642 (Harrison J).

⁵⁵ *Ford* (2009) 257 ALR 658, 664 (Allsop P and Young JA).

⁵⁶ This is consistent with the preference demonstrated in the law for restitution in specie in the case of minors, to avoid the imposition on them of crushing personal liability: see below Part III.

⁵⁷ See *Perpetual Trustees* (2008) 70 NSWLR 611, 625 (Harrison J).

⁵⁸ For the same reason, no legal significance can attach to the fact of Mr Ford's formal request of the loan: *Ford* (2009) 257 ALR 658, 686 (Allsop P and Young JA).

judgement.⁵⁹ Viewed from this perspective, autonomy-based enrichment concepts such as incontrovertible benefit (and corresponding assumptions about the character of money as enrichment) are unhelpful because they are premised on inapplicable assumptions regarding defendants' capacities for independent action. Indeed, it could be argued that to apply the usual enrichment principles (which are designed to protect defendants' autonomy) to a case where the defendant entirely lacks mental capacity is to turn the law's protective purpose on its head. If the law's concern is to protect freedom of choice, and a defendant in fact lacks any legal capacity to choose, the policy of the law is surely more logically and effectively promoted by recognising that such a defendant is not necessarily and 'incontrovertibly' enriched by their receipt of money. This sensitivity to context would allow courts to consider other policy concerns that may have a more appropriate role to play in cases involving profound mental incapacity than principles which presuppose the autonomy and freedom of action of the defendant.⁶⁰

What of the second proposition, namely, that Mr Ford was benefited by the receipt of the *means* of obtaining goods and services that he genuinely and subjectively desired? Even though he may not have desired the loan, its receipt gave him the practical means by which to satisfy his wants. On this analysis the loan could arguably be regarded as beneficial, and therefore enriching.

To respond to this argument we must return to the facts of the case. Mr Ford lived a very simple life. His needs and wants were very few. This is highlighted by his interaction with his son before his entry into the impugned transactions. He had been out of touch with his son for many years. On resuming contact, the son, the son's wife and their four children came to live with Mr Ford.⁶¹ Consequently, space in his house was limited and he moved into an old caravan in the backyard. He lived there with his dogs, without complaint, in very primitive conditions.⁶² There was evidence that he had little, if any, access to a shower or to proper sanitation, and that he washed rarely (if at all).⁶³ He seemed to have no appreciation of the need for personal hygiene.⁶⁴ The evidence suggested that his wants were limited to the basics of life — food, clothing, shelter, medical assistance and other essentials — and all on a very modest basis. His needs beyond the shelter provided by the caravan were met in the most part with the assistance of his sister. Because of his illiteracy and lack of real conception of the role or value of money, she helped him to pay his bills for food, water, medical attention and other essentials.⁶⁵ She also helped him to shop

⁵⁹ For a discussion of this aspect of the defendant's cognitive abilities, see *Perpetual Trustees* (2008) 70 NSWLR 611, 631 (Harrison J).

⁶⁰ Considered below in Part V.

⁶¹ *Perpetual Trustees* (2008) 70 NSWLR 611, 616, 620 (Harrison J).

⁶² *Ibid.*

⁶³ *Ibid.* 620.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* 616, 620.

for food and clothing — activities which he was otherwise largely incapable of managing by himself.⁶⁶

In light of these facts, it is not unduly favourable to Mr Ford to conclude that he subjectively desired — and obtained — only what was required to satisfy his most basic needs. In that context, of what benefit to him was a \$200 000 loan? Arguably, it was only beneficial to the extent that it could theoretically be used to service his limited needs. But the evidence indicated that these needs were already covered by his disability pension. From this perspective, the loan lost much of its ‘beneficial’ character (as a means of obtaining desired ends) and was in fact an onerous imposition that only succeeded in generating a crushing personal liability.

In summary, the enrichment principles that usually inform the unjust enrichment inquiry are premised on considerations of autonomy and reflect a policy of protecting defendants’ freedom of choice. It is far from clear that those principles should apply to defendants who suffer from profound mental incapacity. This brings us to the next question. If autonomy-based principles are of doubtful applicability in cases of non est factum, what other policies are relevant to determining the availability of an unjust enrichment claim in that context?

III ENRICHMENT AND INCAPACITY

There is a considerable body of case law concerning claims for the value of benefits (primarily goods and services) conferred on minors⁶⁷ and the mentally incapacitated other than by way of gift. Indeed, this body of law was obliquely relied upon by the Bank at first instance when arguing that a finding that the loan monies were conferred under a contract void for incapacity did not necessarily bar their recovery on the basis of unjust enrichment.⁶⁸ In contrast, the Court of Appeal regarded this same body of authority as supporting its conclusion that

⁶⁶ Ibid.

⁶⁷ The position at common law in relation to recovery from parties without capacity has been adopted, so far as goods are concerned, by the sale of goods legislation in all Australian states and territories: *Sale of Goods Act 1954* (ACT) s 7; *Sale of Goods Act 1923* (NSW) s 7; *Sale of Goods Act 1972* (NT) s 7; *Sale of Goods Act 1896* (Qld) s 5; *Sale of Goods Act 1895* (SA) s 2; *Sale of Goods Act 1896* (Tas) s 7; *Goods Act 1958* (Vic) s 7; *Sale of Goods Act 1895* (WA) s 2. Section 2 of the *Sale of Goods Act 1895* (WA) is representative of the provisions:

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property: Provided that where necessaries are sold and delivered to an infant or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefore.

Necessaries ... mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

In New South Wales, the legislation does not apply to minors’ contracts: see *Minors (Property and Contracts) Act 1970* (NSW).

⁶⁸ The leading case on the necessary conditions for restitution from the mentally incapable is *Re Rhodes; Rhodes v Rhodes* (1890) 44 Ch D 94, which expressly draws on the authorities on minors. The case was referred to with approval by the High Court in *Gibbons v Wright* (1954) 91 CLR 423, 449 (Dixon CJ, Kitto and Taylor JJ). This passage of *Gibbons v Wright* was relied upon by the Bank in *Perpetual Trustees* (2008) 70 NSWLR 611, 639 (Harrison J).

Mr Ford was not enriched by the loan.⁶⁹ Its bearing on and relationship to the claim in unjust enrichment accordingly warrants further examination.

The authorities on the liability of minors are divided as to whether the liability to pay a reasonable price for certain received benefits is contractual, or arises by operation of law in response to the defendant's unjust enrichment or to some other legal event.⁷⁰ No such debate arises in respect of claims involving mental incapacity, where liability is accepted as restitutionary, arising independently of contract.⁷¹ In the author's view, the fact that the contract price is not payable in the minority cases strongly supports the view that liability is restitutionary in nature and arises by operation of law, rather than in contract.⁷² The following analysis will therefore assume that these claims involve restitutionary liability for policy-based reasons (which may or may not fall within the category of unjust enrichment). The question then becomes: what are the relevant policy considerations that inform restitutionary liability?

Even if (contrary to the position adopted here) liability is considered to be contractual, it is clear that the liability of minors is limited to the reasonable price of a certain class of benefits received, rather than the full contract price for all contractual benefits received.⁷³ The policy concerns that operate to limit a minor's contractual liability, notwithstanding the law's general interest in upholding bargains, must apply even more critically to cases of non est factum. This is because contractual interests are absent in such cases, and thus there exists no countervailing interest that would favour the imposition of full contractual liability in order to uphold the security of the concluded bargain.

A *Enrichment and Minors*

The more fully developed body of law relates to minors. It is well-established at common law that minors must pay a reasonable price for 'necessaries' that have been supplied to them other than by way of gift.⁷⁴ 'Necessaries' does not bear the same meaning as 'necessities'.⁷⁵ In essence, the concept of necessaries refers to articles and services 'fit to maintain the [defendant] in the state, station and degree in life' in which they move.⁷⁶ Thus food,⁷⁷ shelter,⁷⁸ clothing,⁷⁹

⁶⁹ *Ford* (2009) 257 ALR 658, 686 (Allsop P and Young JA), where the Court held that 'the loan was not for necessaries', and at 687, where the Court referred to the public policy behind cases such as *R Leslie Ltd v Sheill* [1914] 3 KB 607 ('*Leslie v Sheill*') (discussed below in Part III(C)).

⁷⁰ See, eg, *Nash v Inman* [1908] 2 KB 1, 12 (Buckley LJ), holding that liability arises in contract; see also at 8 (Fletcher Moulton LJ), holding that liability is non-contractual but is imposed by law.

⁷¹ See *Re Rhodes; Rhodes v Rhodes* (1890) 44 Ch D 94, 104–5 (Cotton LJ), 107 (Lindley LJ).

⁷² See also N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th ed, 2008) 867.

⁷³ See below Part III(A).

⁷⁴ *Nash v Inman* [1908] 2 KB 1, 5–7 (Cozens-Hardy MR), 9 (Fletcher Moulton LJ).

⁷⁵ See J Beatson, *Anson's Law of Contract* (28th ed, 2002) 217.

⁷⁶ *Peters v Fleming* (1840) 6 M & W 42, 47; 151 ER 314, 315 (Parke B); see also at 48; 316 (Alderson B), 49; 316 (Rolfe B). See generally Seddon and Ellinghaus, above n 72, 864–6; J W Carter, Elisabeth Peden and G J Tolhurst, *Cases and Materials on Contract Law in Australia* (5th ed, 2007) 332.

medical services,⁸⁰ means of transport,⁸¹ legal services,⁸² employment⁸³ and the provision of education⁸⁴ have all been found to be necessities in particular cases.

For present purposes the most important point to note is that the minor is only required to make restitution for benefits held to be necessities. Two main policies inform this limitation on minors' liability. The first is the need to protect minors from exploitation, as well as from their assumed youthful proclivity to act impulsively and without mature consideration.⁸⁵ The second is a related policy concern which seeks to protect minors from the crushing effects of extensive personal liability.

These policy concerns are mirrored in the principles governing whether a benefit received by a minor constitutes a 'necessary'. There are two main questions that must be addressed.⁸⁶ First, courts consider whether the class of item or service conferred is *capable*, as a matter of law, of constituting a necessary.⁸⁷ The minor's subjective views on whether the goods or services are necessary, and indeed the intended effect of any contractual terms on the point, are irrelevant: the characterisation of necessities is a question of law. Secondly, courts determine as a question of fact whether the item or service was a necessary for *this defendant* at the time it was conferred.⁸⁸ This second inquiry is not the same as the autonomy-based enrichment principles that apply to claims in

⁷⁷ See, eg, *Russel v Lee* (1661) 1 Lev 86, 86–7; 83 ER 310, 310; *Ayliff v Archdale* (1660) Cro Eliz 920, 920; 78 ER 1142, 1142.

⁷⁸ See, eg, *Duncomb v Tickridge* (1648) Aleyn 94, 94; 82 ER 933, 933; *Soon v Watson* (1962) 33 DLR (2d) 428, 434 (Munroe J). Cf *Sultman v Bond* [1956] QSR 180, 193 (Stanley J).

⁷⁹ See, eg, *Russel v Lee* (1661) 1 Lev 86, 86–7; 83 ER 310, 310.

⁸⁰ See, eg, *Dale v Copping* (1610) 1 Bulst 39, 39; 80 ER 743, 743 (Williams J).

⁸¹ See, eg, *Scarborough v Sturzaker* (1905) 1 Tas LR 117, 117–18 (McIntyre J); *The Clyde Cycle Co v Hargreaves* (1898) 78 LT 296, 296 (Lord Russell CJ); *Mercantile Credit Ltd v Spinks* [1968] QWN 32, 69 (Wanstall J). Cf *Re Mundy* [1963] ALR 264, 266–7 (Paine J); *Alliance Acceptance Co Ltd v Hinton* (1964) 1 DCR NSW 5, 7 (Monahan DCJ).

⁸² See, eg, *Helps v Clayton* (1864) 17 CB NS 553, 570–1; 144 ER 222, 229 (Willes J for Willes, Byles and Keating JJ); *McLaughlin v Darcy* (1918) 18 SR (NSW) 585, 589–90 (Cullen CJ), 591–3 (Sly J), 595 (Gordon J).

⁸³ See, eg, *Walter v Everard* [1891] 2 QB 369, 374, 377 (Lord Esher MR), 375–6 (Fry LJ), 377 (Lopes LJ). See generally *Green v Thompson* [1899] 2 QB 1; *Gadd v Thompson* [1911] 1 KB 304; *Evans v Ware* [1892] 3 Ch 502; *Bromley v Smith* [1909] 2 KB 235.

⁸⁴ See, eg, *Minister for Education v Oxwell* [1966] WAR 39.

⁸⁵ Seddon and Ellinghaus, above n 72, 862; Carter, Peden and Tolhurst, above n 76, 331.

⁸⁶ A third question courts consider in determining whether a contract is for 'necessaries' is whether any contract agreed upon by the parties contains provisions that are so unfair as to render the contract, as a whole, one that is not to the minor's benefit: see *De Francesco v Barnum* (1890) 45 Ch D 430, 439, 443 (Fry LJ); *De Garis v Dalgety & Co Ltd* [1915] SALR 102, 137, 139–40 (Murray J), 156–7 (Buchanan TJ); *Blennerhassett's Institute of Accountancy Pty Ltd v Cairns* (1938) 55 WN (NSW) 89, 90 (Jordan CJ); *Minister for Education v Oxwell* [1966] WAR 39, 45 (Virtue J). This third question appears to be predicated on the assumption that the question is whether the impugned contract can be enforced, rather than the separate question of whether restitution of a conferred benefit can be allowed, as to which see above n 70 and accompanying text.

⁸⁷ See, eg, *Peters v Fleming* (1840) 6 M & W 42, 46–7; 151 ER 314, 315–16 (Parke B); see also at 48; 316 (Alderson B), 49; 316 (Rolfe B); *Bojczuk v Gregorcowicz* [1961] SASR 128, 132–4 (Ross J).

⁸⁸ See *Nash v Inman* [1908] 2 KB 1, 5–7 (Cozens-Hardy MR), 10–11 (Fletcher Moulton LJ), 12–13 (Buckley LJ); *Sultman v Bond* [1956] QSR 180, 189–90, 192–3 (Stanley J).

unjust enrichment. Consistently with the law's view of their limited autonomy and, in particular, their underdeveloped judgement, the subjective views of minors are not taken into account on the question of benefit. The fact that a minor may not want or value an apprenticeship,⁸⁹ for example, is of no consequence — the minor has no right to subjectively devalue the benefit. Conversely, even if a benefit is clearly desired by a minor and is objectively valuable, such as a loan of money,⁹⁰ an antique silver goblet⁹¹ or a beneficial trading contract,⁹² the benefit may well not constitute a necessary for the purposes of a claim for restitution. The courts' approach to identifying actionable enrichment in this context is paternalistic and firmly focused on the policy reasons for imposing legal incapacity on the minor. This makes sense given the applicable policy concerns: as discussed previously, the concept of subjective devaluation presupposes the autonomy of the defendant, an autonomy which is lacking or deficient in a minor. When viewed in the context of the policies of protecting minors from exploitation and their own doubtful judgement, there is a strong case for rejecting a subjective, autonomy-based approach to determining benefit in favour of one which only recognises necessities as enriching.

This distinct approach to what constitutes an actionable benefit in cases of minority is illustrated by the long-established attitude of common law courts to claims for restitution of monies paid pursuant to loan contracts entered into with a minor.⁹³ Traditionally, loan agreements have not readily been regarded as contracts for necessities, and loan monies thus cannot be recovered from a defendant minor.⁹⁴ Indeed, it has long been recognised that even a loan *for necessities* to a minor is not recoverable at common law, because 'it may be borrowed for necessities, but laid out and spent at a tavern'.⁹⁵ Traditionally, any relief against a minor recipient of a loan is only possible in equity.⁹⁶ Provided that the money was borrowed *and used* to pay for necessities, the lender is subrogated to the position of the person paid and is entitled to recover the money lent. It thus appears that loans for money are not regarded as inherently beneficial unless the loan was closely tied to, and was used to discharge, debts incurred for the provision of necessities.

⁸⁹ As was the case in *Roberts v Gray* [1913] 1 KB 520.

⁹⁰ See, eg, *Leslie v Sheill* [1914] 3 KB 607, 611 (Lord Sumner).

⁹¹ See, eg, *Ryder v Wombwell* (1868) LR 4 Ex 32, 37–9 (Willes J for Willes, Byles, Blackburn, Montague Smith and Lush JJ). See also *Stocks v Wilson* [1913] 2 KB 235, 241–2 (Lush J).

⁹² See, eg, *Whywall v Champion* (1738) 2 Str 1083, 1083; 93 ER 1047, 1047 (Lee CJ); *Cowern v Nield* [1912] 2 KB 419, 422 (Phillimore J), 424 (Bray J); *Mercantile Union Guarantee Corporation Ltd v Ball* [1937] 2 KB 498, 502–3 (Finlay J for Scott LJ and Finlay J); *Whundo Copper Syndicate v Ferrari* [1962] WAR 24, 25 (Wolff SPJ). Cf *Re Mundy* [1963] ALR 264.

⁹³ The position in Victoria is affected by *Supreme Court Act 1986* (Vic) ss 49, 51. *Minors (Property and Contracts) Act 1970* (NSW) s 19 operates on the basis of a presumption of contractual capacity in minors under some circumstances.

⁹⁴ *Leslie v Sheill* [1914] 3 KB 607.

⁹⁵ *Earle v Peale* (1711) 1 Salk 386, 387; 91 ER 336, 336 (Parker CJ). See also *Ellis v Ellis* (1689) Comb 482; 90 ER 605.

⁹⁶ *Marlow v Pitfeild* (1719) 1 P Wms 558, 559; 24 ER 516, 517; *Re National Permanent Benefit Building Society; Ex parte Williamson* (1869) LR 5 Ch App 309, 313 (Giffard LJ); *Martin v Gale* (1876) 4 Ch D 428.

Why are loans not regarded as beneficial to minors? In *R Leslie Ltd v Sheill* (*'Leslie v Sheill'*), a minor fraudulently induced the plaintiffs to make two loans of £200 to him by falsely representing to them that he was of full age.⁹⁷ When the plaintiffs discovered the lie they sought to recover the amount of the loan by pleading, *inter alia*, that it was 'money had and received by the defendant to the use of the plaintiffs.'⁹⁸ Lord Sumner, Kennedy LJ and A T Lawrence J separately held that allowing the plaintiffs to obtain restitution of money lent to the minor would effectively enforce the contract.⁹⁹ With respect, it is clear that this analysis is not correct, at least not in those unqualified terms.¹⁰⁰ There is a great deal of difference between requiring a defendant to make restitution of a received benefit and enforcing a contract, even if the outcome may be similar in monetary terms.¹⁰¹

A more convincing analysis of the decision is that it gives effect to an important protective policy, namely, that of preventing the law's policy of prohibiting loan agreements with minors from being stultified or undermined.¹⁰² We have seen that the main policy concerns are to protect minors from exploitation or the consequences of their own doubtful judgement. Both policies have particular application in the case of loan agreements. Replacing a contractual liability to repay with a personal restitutionary liability of an equivalent amount fails to meet these concerns.¹⁰³ In contrast, these policies will not be undermined where the loan is strictly limited to the provision of necessities.

The form and extent of restitutionary liability is an important factor in applying these policies. We have seen that at common law the normal outcome of a successful claim for restitution of benefits transferred is an order for the defendant to pay the *reasonable value* of the benefit conferred, which is a personal liability. In that context, a concern to restrict a juvenile's personal liability provides a rational explanation as to why trading contracts, even if highly desired by minors and objectively valuable at the time of hearing, have been discouraged so strongly by common law courts.¹⁰⁴ Courts simply do not

⁹⁷ [1914] 3 KB 607, 611 (Lord Sumner).

⁹⁸ *Ibid* 620 (Kennedy LJ).

⁹⁹ *Ibid* 619 (Lord Sumner), 620–1 (Kennedy LJ), 626 (A T Lawrence J).

¹⁰⁰ This reasoning was expressly based on the similar argument accepted in *Sinclair v Brougham* [1914] AC 398, and thus probably cannot survive the overruling of that case on this point in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 710 (Lord Browne-Wilkinson); see also at 718 (Lord Slynn); 738 (Lord Lloyd), where their Lordships concurred on this point.

¹⁰¹ The outcome may not be identical. One would expect, for example, that awards of interest might well differ, a point recognised in the judgment at first instance in which the trial judge did not award interest on the loans in the claim for money had and received: see *Leslie v Sheill* [1914] 3 KB 607, 611–12 (Lord Sumner), 620–1 (Kennedy LJ).

¹⁰² See, eg, *ibid* 625–6 (A T Lawrence J).

¹⁰³ The position may be different where restitution is proprietary in nature or the change of position defence applies. As to the former, see discussion immediately below, and as to change of position, see below Part IV.

¹⁰⁴ See above n 92 and accompanying text.

want to encourage minors to enter into contracts which may burden them with a considerable personal liability.

Arguably for the same reason, courts in equity restrict relief to proprietary restitution, only allowing restitution where the original benefit received, or its identified substitute, is still in the hands of the minor.¹⁰⁵ Consistently with this view, the judges in *Leslie v Sheill* repeatedly refer to the need to avoid the imposition of personal liability on minors who receive a loan but do not retain the amount of the loan. As Lord Sumner aptly described the approach taken in the relevant authorities, '[r]estitution stopped where repayment began'.¹⁰⁶ The same concern is also evident in Lord Sumner's acceptance that a creditor may bring an action to recover the amount of a loan against a bankrupt minor, but only on the ground that the creditor 'had a claim on his assets, not against him personally'.¹⁰⁷ Restricting a plaintiff to a proprietary remedy ensures that the minor is protected from the personal consequences of their poor judgement, while allowing recovery where the item transferred, or its substitute, can still be identified. Thus both common law and equity, in their different ways, reject the imposition of excessive personal liability that could have crushing, long-term financial consequences on the minor.

This concern to restrict a minor's personal restitutionary liability developed before the recognition of the change of position defence.¹⁰⁸ It is clear that, where that defence is available, it supports the protective policies of the law relating to minors by limiting the restitution available against the minor. The application of the defence restricts the extent of minors' personal restitutionary liability so that they are not placed in a worse position than they occupied prior to receipt of the loan. In this way the defence protects them from the potential effects of exploitation and their impaired judgement.

However, as we will see below, the change of position defence will not be pleaded, let alone succeed, in every case of incapacity. Further, where a defendant has instigated a change of position, they must have acted in reliance on their receipt in order for the defence to apply.¹⁰⁹ It is questionable whether minors who have made false representations about their age in order to obtain benefits (as in *Leslie v Sheill*) can be said to have relied on their receipt of such benefits. Yet, unless courts are to take a different view of the policy of protecting

¹⁰⁵ See, eg, *Campbell v Ridgely* (1887) 13 VLR 701; *Re Henderson* (1916) 12 Tas LR 40, 41–2 (Crisp J). Cf *Stocks v Wilson* [1913] 2 KB 235, 242–4 (Lush J), discussed by Beatson, above n 75, 227.

¹⁰⁶ *Leslie v Sheill* [1914] 3 KB 607, 618; see also at 623–4 (Kennedy LJ), 627 (A T Lawrence J).

¹⁰⁷ Ibid 616 (Lord Sumner), discussing *Re King; Ex parte Unity Joint Stock Mutual Banking Association* (1879) 5 QBD 28.

¹⁰⁸ Express recognition of the change of position defence came in England in *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, 579–80 (Lord Goff), and in Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 384–5 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

¹⁰⁹ Reliance is not necessary where the change of position has occurred independently of the defendant: see below Part IV(B). For a discussion of the so-called 'broad' (but for) and 'narrow' (reliance) versions of the defence, see Elise Bant, *The Change of Position Defence* (2009) ch 5.

minors from their own errors of judgement¹¹⁰ and instead require them to accept the consequences of their actions, minors may still need protection from full personal liability. Otherwise, they may be faced with overwhelming debts from which they will recover with difficulty, if at all, and the protective policies underpinning the law will be undermined. It is submitted that, in the absence of an explicit and deliberate shift in the underlying protective policies, it is premature to conclude that the traditional approach of denying personal restitution of loan monies from minors should be abandoned.

B *Enrichment and the Mentally Incapable*

The preceding discussion demonstrates that the personal restitutionary liability of a minor for benefits received other than by way of gift is very limited. And, of particular relevance to *Perpetual Trustees*, loan monies are not generally recoverable from a minor unless the monies were applied for the purchase of necessities.

Although the case law is less developed, it appears that precisely the same limitations on restitutionary liability apply in cases involving defendants suffering from mental incapacity — and for much the same reasons. In particular, it is only where the benefits constitute a necessary that restitution will be permitted.¹¹¹ Consistently with the law's concern to protect the mentally incapacitated from exploitation and from the consequences of their impaired judgement, the determination of whether a benefit constitutes a necessary is not assessed by reference to the subjective desires of the *incapax* or, indeed, the objective views of the market. A right to subjectively devalue a benefit is as inapplicable and inappropriate in this context as it is in the case of minors. Rather, the question of actionable benefit is assessed by reference to the goods and services that courts deem 'fit to maintain the [defendant] in the state, station and degree in life in which he moves'.¹¹² The policy concern which operates to protect minors from the imposition of crushing personal liability should also inform this area of the law.

It is unsurprising that, in keeping with these principles and policies (and in line with the cases on minority), recovery of loan monies from a mentally incapacitated person is restricted to cases where the loan monies were used to pay for necessities provided or paid for by another party, otherwise than by way of gift. In these circumstances, the lender is subrogated in equity to the position of the

¹¹⁰ This has occurred by legislation in New South Wales, where the law is that minors are presumptively responsible for their own actions when they act in their own interests: see *Minors (Property and Contracts) Act 1970* (NSW) s 19.

¹¹¹ See *Re Rhodes; Rhodes v Rhodes* (1890) 44 Ch D 94, 105 (Cotton LJ); *Re Brooks* (1903) 21 WN (NSW) 4, 5 (Simpson CJ in Eq); *McLaughlin v Freehill* (1908) 5 CLR 858, 861–2 (Griffith CJ), 864 (Isaacs J).

¹¹² *Peters v Fleming* (1840) 6 M & W 42, 47; 151 ER 314, 315 (Parke B); see also at 48; 316 (Alderson B), 49; 316 (Rolfe B).

provider of necessities and can obtain restitution of the value of the loan monies so spent.¹¹³

C *Enrichment and Non Est Factum*

In *Ford*, Harrison J (at first instance) expressed his regret that there were no cases addressing the public policy issues that arise when a defendant receives a benefit pursuant to a contract subsequently found to be void for non est factum.¹¹⁴ In contrast, the Court of Appeal drew an analogy with the minority cases to argue that adopting a mechanical approach to addressing the elements of a claim in unjust enrichment (rather than examining the substance of the claim) would undermine the protection given to the weak and disabled by the plea of non est factum.¹¹⁵ The Court described the policy underlying the plea of non est factum as ‘the protection of the *weak, powerless or preyed upon*’.¹¹⁶

The preceding analysis supports the view that the defence reflects a policy of protecting from exploitation those whose minds do not accompany their acts. However, it also suggests that two additional, and related, legal policies come into play. The first is to protect those suffering from profound mental incapacity from the legal consequences of their lack of judgement. We saw that this policy was evident in the minority cases. It goes beyond the threat of exploitation to encompass spontaneous and unwise decisions that are not, or may not be, in the interests of the minor. It is logical for this same policy to apply to cases of non est factum to protect defendants from legal liability arising from actions made without any understanding or exercise of judgement. The second respect in which legal policy goes beyond the prevention of exploitation is, as in the case of minors, to prevent the imposition of onerous legal liabilities which may be disproportionate to any benefit the *incapax* might obtain from the transaction. When combined, these considerations suggest that the law should adopt a paternalistic approach to the identification of benefit in cases of non est factum arising from profound mental incapacity and restrict personal restitutionary liability to those cases where the received benefit is necessary for the defendant’s welfare. They are also consistent with the rejection of an autonomy-based approach to identifying an enrichment in cases of non est factum.¹¹⁷

On this analysis, the Court of Appeal was right to identify the fact that the loan had not been taken out to buy necessities as support for the conclusion that Mr Ford had not been enriched by his receipt of the loan. We saw earlier that the necessities required to maintain Mr Ford in the ‘state, station and degree in life’ in which he moved were very limited in nature and were arguably already

¹¹³ *Re Beavan; Davies Banks & Co v Beavan* [1912] 1 Ch 196, 201–2 (Neville J). See also *Harris v Lee* (1718) 1 P Wms 482, 483; 24 ER 482, 482; *Jenner v Morris* (1861) 3 De G F & J 45, 51–2; 45 ER 795, 797–8 (Lord Campbell LC), 55–6; 779 (Turner LJ); *Re Wood’s Estate; Davidson v Wood* (1863) 1 De G J & S 465, 467; 46 ER 185, 186 (Bruce LJ).

¹¹⁴ *Perpetual Trustees* (2008) 70 NSWLR 611, 642.

¹¹⁵ *Ford* (2009) 257 ALR 658, 687 (Allsop P and Young JA).

¹¹⁶ *Ibid* (emphasis added).

¹¹⁷ See above Part II(C).

covered by his disability pension. There is no evidence that any part of the loan was used to pay for necessities or to discharge debts owed by Mr Ford for their provision that were not already covered by his pension. It follows that Mr Ford was not personally liable to make restitution of the full value of the loan. Rather, his restitutionary liability was restricted to the small amount retained in his account.¹¹⁸ This more limited liability is consistent with the traditional preference in equity for proprietary relief and with the overall approach of the modern law of unjust enrichment to restitution of retained benefits.

This conclusion is fortified by considering the passage of those loan monies that were not retained by Mr Ford.¹¹⁹ The Bank paid the money by issuing a series of cheques. One cheque, for the purchase price of the cleaning business, was made out to a Mr Ritchie who (with his wife) was the owner of the business.¹²⁰ Although the precise details remain unclear, it appears that the cheque was sent to Mr Ford at his home address, who (no doubt with the assistance of his son) forwarded the cheque to the Ritchies.¹²¹ The business was then transferred to Mr Ford.¹²² Therefore in substance, if not in form, Mr Ford received a cleaning business as a result of these loaned funds, not free monies theoretically capable of being utilised for the purchase of necessities.¹²³

We have already observed that the cleaning business was not something that Mr Ford desired, still less understood. It is also clear that the receipt of a cleaning business did not constitute one of the necessities to his position in life. In reality, he was incapable of understanding — let alone managing — the business and received no practical benefits from it through his son. Yet because it was formally registered in his name, he was legally liable for its management. This exposed him to potential crushing personal liability, which, as we have previously seen, is a principal reason for avoiding otherwise beneficial trading contracts involving minors. Indeed, it is incidentally revealed in an interlocutory decision of the Court of Appeal, relating to the same action, that Mr Ford was ‘made bankrupt on an ex parte application in connection with workers’ compensation premiums said to be related to the business’.¹²⁴ This is precisely the sort of personal liability from which the law has consistently sought to protect minors and from which Mr Ford required protection. The outcome emphasises that neither the formal receipt of the loan that was subsequently applied to the purchase of the business nor the practical receipt of the business enriched Mr Ford. The Bank’s claim for restitution of the value of those loan funds rightly failed.

¹¹⁸ See above nn 54–6 and accompanying text.

¹¹⁹ *Perpetual Trustees* (2008) 70 NSWLR 611, 625 (Harrison J).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ The fact that the cleaning business may have still subsisted in Mr Ford’s hands at the time of the hearing raises the possibility (not argued by the Bank) of an order for its restitution in specie, or restitution of its value, as to which see below Part V.

¹²⁴ *Ford v Perpetual Trustees Victoria Ltd* [2009] NSWCA 43 (Unreported, Allsop P, Young CJ in Eq and Sackville AJA, 5 March 2009) [7] (Allsop P).

IV CHANGE OF POSITION

We saw earlier that the change of position defence operates to limit the restitutionary liability of defendants. It thus has the potential to buttress the protection afforded to incapacitated defendants through adopting a paternalistic approach to identifying enrichment.¹²⁵ In that context it is worth considering what role the defence might play if Mr Ford (or another party suffering from a similar incapacity) were found to have been enriched by his receipt of a loan.

A A Defendant-Instigated Change of Position

The applicable formulation of the change of position defence varies according to the nature of the change of position pleaded.¹²⁶ The form most commonly encountered, which applies where the change of position was instigated by the defendant, is that the defendant has irreversibly changed their position in reasonable reliance on their receipt.¹²⁷ A defendant who receives money by way of loan and instigates a change of position following its receipt will not usually satisfy the reliance requirement. This is because such a defendant will know that the loan must be repaid. Any change of position prior to repayment will not be made in reliance on the validity of the receipt but instead in the hope that the borrower will be able to repay the loan in due course.

This was made clear by the Privy Council opinion in *Goss v Chilcott*.¹²⁸ In that case, Mr and Mrs Goss mortgaged their title to land in order to obtain a loan.¹²⁹ With their consent the loan was paid to a third party, Mr Haddon. Mr and Mrs Goss intended that Mr Haddon would repay the principal and interest, but he repaid only some interest and none of the principal. The mortgage was subsequently avoided on account of Mr Haddon's fraud.¹³⁰ The lender successfully sought restitution of the value of the loan monies from Mr and Mrs Goss. The relevant unjust factor was failure of basis, the basis being that the loan monies would be repaid.¹³¹ Mr and Mrs Goss unsuccessfully attempted to rely on the change of position defence, arguing that they had changed their position by allowing the loan monies to be paid to Mr Haddon. As Lord Goff (delivering the opinion of the Privy Council) explained, the defendants had allowed the monies to be paid to Mr Haddon knowing that their receipt was conditional upon repayment of the loan.¹³² In so doing, they had deliberately

¹²⁵ See above Part III.

¹²⁶ See above n 109.

¹²⁷ See, eg, *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594, 638–9 (Buss JA). See also *Fitzsimons v McBride* [2008] NSWSC 782 (Unreported, McDougall J, 4 August 2008) [128]–[129].

¹²⁸ [1996] AC 788, 799 (Lord Goff for Lords Goff, Jauncey, Steyn, Hoffmann and Cooke).

¹²⁹ *Ibid* 793.

¹³⁰ *Ibid* 795.

¹³¹ *Ibid* 798.

¹³² *Ibid* 799.

taken the risk that Mr Haddon would be unable to repay the money, in which case they would be required to fund the repayment of the loan themselves.¹³³

This is the usual position in the case of loans. However, where a defendant does not understand the nature of a loan due to their mental capacity, can it be argued that they do not take any conscious risk and that therefore they have relied on their entitlement to the money? At first glance, this argument appears attractive. It assumes, however, that a defendant who entirely lacks the capacity to understand the nature of their receipt is still relevantly capable of 'reliance'. This assumption is questionable when the defendant suffers from the extreme mental incapacity suffered by Mr Ford.¹³⁴ Broken into its constituent parts, reliance in the context of the change of position defence requires that: (1) a defendant forms an assumption as to the basis of their receipt and (2) they act on that assumed basis.¹³⁵ In Mr Ford's case, he did not understand the nature of loans in general, nor of this loan in particular,¹³⁶ so he never formed any relevant assumption. Indeed, he did not understand the concept of money in general: that was why he needed his sister's help in the management of his everyday affairs.¹³⁷ In that context it simply does not make sense to talk about him having 'relied' on his receipt in any meaningful way.

B *An Independent Change in the Defendant's Position*

A more promising analogy may be drawn from the other form of the defence, which arises where the irreversible change of position is not instigated by the defendant but, rather, occurs independently (for example, where the benefit spontaneously devalues or is stolen). In this category of case the fact that a defendant has not relied on their receipt is irrelevant: the receipt of the benefit was a precondition of their loss and thus, in order to avoid the defendant being placed in a worse position than prior to receipt, the change of position defence must apply.¹³⁸

In *Perpetual Trustees*, the money lent to Mr Ford was, on one view of the facts, transferred away from him by his son.¹³⁹ The transfer occurred independently of Mr Ford in the sense that it was not caused by his autonomous decision. In substance, if not in form, therefore, the case may be more akin to an independent change of position. On this analysis, application of the change of position defence would further the particular protective policies informing the defence of non est factum. In particular, it would save Mr Ford from what was an exploitative arrangement entered into by him without any understanding of the

¹³³ Ibid.

¹³⁴ This is the same kind of point as made by Harrison J in addressing the 'carelessness' requirement of non est factum: see *Perpetual Trustees* (2008) 70 NSWLR 611, 631.

¹³⁵ Bant, above n 109, ch 5.

¹³⁶ *Perpetual Trustees* (2008) 70 NSWLR 611, 631 (Harrison J).

¹³⁷ Ibid 616, 620.

¹³⁸ Bant, above n 109, ch 5.

¹³⁹ See *Perpetual Trustees* (2008) 70 NSWLR 611, 613, 631, 634, 637 (Harrison J).

nature of his actions and which would otherwise generate a significant and overwhelming personal liability.

It could be argued, however, that the money was used to purchase a business in the name of Mr Ford, which could be sold to fund his restitutionary liability. In other words, it may be that Mr Ford's change of position was reversible and, for this reason, the change of position defence would have failed. On this point, the argument founders for want of evidence. There are some indications in the judgment that the business may have failed;¹⁴⁰ it is implicit in Harrison J's reasoning that it had not prospered.¹⁴¹ However, there was no detailed evidence on (or discussion of) whether it had diminished in value, whether it could be sold, and, if so, for what amount. Had these matters been fully addressed and had the defence been raised, the change of position defence may have applied to the extent of any depreciation in the value of the business.

V OTHER APPROACHES

The final question is whether the foregoing analysis reveals any other approaches (which are consistent with the applicable legal authorities and the conduct of the case) that might have been applied to protect Mr Ford from full restitutionary liability. It is submitted that, given his incapacity, another appropriate form of relief would have been an order for restitution of the loan monies retained in his account, together with an order for conveyance of the cleaning business to the Bank.¹⁴² This would have been consistent with the traditional preference in equity for orders for restitution in specie of a retained benefit or its substitute in cases of minority.¹⁴³ This form of relief would also have protected Mr Ford both from the potentially devastating personal liabilities to which he was exposed as the registered owner of the business and from the real and crushing consequences of his personal liability in restitution. It would then have been up to the Bank to realise the business and meet its liabilities, thereby providing better protection to Mr Ford commensurate with and tailored to his incapacity.

VI CONCLUSION

That the receipt of money is incontrovertibly beneficial is rarely open to question. The legal principles on which that proposition rests are informed by considerations of the value of autonomy and reflect a policy of protecting defendants' freedom of choice. In most cases, the receipt of money indisputably increases defendants' autonomy by giving them the means to achieve their

¹⁴⁰ Mr Ford's counsel in cross-examination corrected himself when addressing the purchase of the business to speak in the past tense: see *ibid* 617 (Harrison J).

¹⁴¹ See *ibid* 637. See also *Ford* (2009) 257 ALR 658, 664 (Allsop P and Young JA).

¹⁴² Whether this was open depended in part on the status of the business, a matter that presumably could have been easily determined and may have been a matter of common knowledge at the hearing of the case.

¹⁴³ Discussed above in Part III(A).

desired ends. The equation of money with enrichment is accordingly uncontroversial.

However, this article argues that, where a defendant suffers from profound mental incapacity, it is inappropriate to apply autonomy-based enrichment principles to determine whether the defendant has been enriched. Furthermore, the application of these principles may undermine or stultify the policies of the law that attempt to protect an *incapax* or a defendant whose mind did not go with their deed. The law accordingly modifies its general approach, adopting an objective and highly paternalistic method of identifying enrichment. The consequence is that even money will not be enriching to an incapacitated defendant unless the money (or its traceable substitute) remains in the defendant's hands or was applied to purchase necessities for the defendant.

A similar adjustment to autonomy-based principles is required when considering the change of position defence. The requirement of reliance found in most change of position cases reflects a proper concern to protect a defendant's autonomy in decision-making. However, where a defendant is incapable of exercising any autonomous judgement because of profound mental incapacity, the reliance requirement ceases to be appropriate. In those circumstances, the better approach is to deal with the case as one where the change of position has occurred independently of the defendant.