IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **S163 of 2013**

BETWEEN:

AUSTRALIAN FINANCIAL SERVICES AND LEASING PTY LIMITED
ACN 105 657 681
Appellant

10 **and**

HILLS INDUSTRIES LIMITED
ACN 007 573 417
First respondent

BOSCH SECURITY SYSTEMS PTY LIMITED
ACN 068 450 171
Second Respondent

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SECOND RESPONDENT'S SUBMISSIONS

Part I: Internet certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Concise statements of the issues which this appeal presents

2 This appeal raises the question whether a lost chance or opportunity qualifies as detriment for the purpose of the change of position defence to a claim for restitution. Does the defence require the chance or opportunity to be measureable so that and in the absence of such a valuation there is no defence?

30 **3** This appeal also raises two subsidiary issues. First, whether the factual matrix was such that, notwithstanding the fraud practiced on all the parties, the contractual allocation of risk deprived AFSL of a claim in restitution. Second, whether, for the purpose of establishing either the defence of good consideration or the defence of bona fide purchase for value, it is relevant to consider the payer's objective intention when making the mistaken payment at the direction of the debtor to the recipient creditor.

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Part III: Section 78B of the *Judiciary Act 1903*

4 No notice need be given in compliance with section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of facts supplementing AFSL's narrative

5 Bosch supplied TCP Australia, TCP Vic., and TCP Qld (the "**TCP Companies**") on credit {Red [82N-P]}. As part of the terms of trade, Bosch and the TCP Companies agreed a rebate arrangement {Red [85F-G]; Reasons for Judgment 4th December 2012 ("***CA***") [13]}. This rebate arrangement is significant because it resulted in Bosch making a payment to the TCP Companies following receipt of $198,000 from AFSL.

10 6 By May 2009, the TCP Companies had fallen into arrears and Bosch put them on cash on delivery terms {Red [85H-I]; CA [13]}. In July and August 2009 Bosch obtained default judgments against the TCP Companies and their principals (Skarzynski and Musico) {Red [85K-P]; CA [14]}. In due course Writs for the Levy of Property were issued, as well as Examination Notices to each of Skarzynski and Musico {Red [85R-S]}. By 28 August 2009 Bosch had garnisheed the TCP Companies' bank accounts {Red [85W]; CA [14]}.

7 The principals of the TCP Companies immediately complained that the garnishee orders froze payroll {Red [85W]; CA [17]}. On 31 August 2009, Skarzynski informed the Bosch Finance Director ("**Piper**") that payment of the outstanding debt and costs would be made by the end of that week {Red [86E]}.

20 8 The indebtedness of the TCP Companies to Bosch as at 1 September 2009 was $177,689.06 {Red [86G]}. The solicitor for the TCP Companies contacted Piper on 2 September 2009 seeking a stay of the garnishee orders and promising payment of $198,000 from a third party {Red [86I-J]; CA [15]}. On the same day, following a conversation between Bosch's solicitor and the TCP Companies' solicitor, the former informed Piper that the garnishee orders were having effect and money had been taken from the group's accounts {Blue [1004T-V], [1382-1384], [1427H-J]}. TCP Companies' bankers were holding the funds. The TCP Companies' solicitor promised Bosch's solicitor that the entire debt would be paid by funds transfer on 3 September 2009.

9 On 3 September 2009, AFSL sent to Bosch by funds transfer $198,000 (incl. GST)
30 {Red [86L]} - precisely the amount Bosch expected. This amount did not correlate to the TCP

Companies' indebtedness to Bosch, but the trial Judge accepted that overpayments were not unusual and raised no red flags {Red [94Y-95I]}.

10 On the morning of 4 September 2009 Bosch became aware that it received $198,000 on 3 September 2009 {Red [86O]}. It became aware of the receipt of these funds prior to the receipt (at about noon) of AFSL's remittance advice {Red [86P-R]}.

11 AFSL did not contact Bosch to check on the existence of the equipment it thought it was buying prior to the transfer. Both the Court of Appeal and the trial Judge found that the remittance advice should not have put Bosch on inquiry {CA [22], [31], [206]}.

12 Contrary to the Appellant's Submissions ("**AS**") at 27 and 28, the trial Judge did not find that Bosch's claim against the TCP Companies or Skarzynski was worthless or of no value.

13 In response to Skarzynski's request {Red [86V]}, on 15 September 2009 Consent Orders were filed setting aside Bosch's default judgments against the TCP Companies, Musico and Skarzynski, as well as discontinuing the recovery proceedings {Red [86W], [87C]; CA [33]}. There was no challenge below that Bosch took this action on the faith of the receipt {CA [34], [139]-[140], [155], [165]}, ie Bosch had understood that the debt had been discharged.

14 Between 18 and 22 September 2009, Bosch transferred $52,326.35 to the TCP Companies as a result of the rebate, the overpayment, and some other transactions {Red [87F]; CA [34]}. Bosch did this on the faith of the receipt {CA [34]}. Notwithstanding this payment, AFSL contends that Bosch did not part with any part of the $198,000 received: AS 69. This is difficult to understand. After applying the receipt to the debt and making an actual payment of funds, Bosch continued to trade with the TCP Companies.

15 On 3 September 2009, AFSL and TCP Australia entered into rental agreement number 2009/09/03 ("**Rental Agreement**") {Red [9D-G],[76-85]; CA [25]} which included the following provisions: total rent over 4 year term of $284,592 (cls. 2.1 and 3.1); it was a fundamental and essential term that rent was to be paid on time (cl. 9.1(a)), that TCP Australia would not become insolvent (cl. 9.1(d)), that warranties in cl. 4.1(a) were correct (9.1(l)), and that breach of any of the foregoing was repudiation (cl. 9.2); failure to perform was an event of default (cl. 10.1); breach of an essential term or default entitled AFSL to terminate (cl. 11.1); and termination entitled AFSL all moneys due at termination and the discounted rental

stream (cl. 11.2(b)(c)). The Rental Agreement is significant for the contractual allocation of risk argument advanced by Bosch in its Notice of Contention.

16 Bosch was not aware of the existence of the Rental Agreement. TCP Australia made 6 monthly rental payments to AFSL totaling $35,574 between 3 September 2009 and 23 February 2010 {Blue [9U-10J]; CA [36]}.

17 TCP Australia started defaulting on the Rental Agreement and similar agreements in late 2009 {Blue [25R-V], [27E-F]; CA [42]}. In mid-February 2010, Musico informed AFSL that TCP Australia and the other TCP Companies were hopelessly indebted and that the group's bankers had frozen their accounts {Blue [33S]-[34L]; CA [44]}.

10 **18** In late February 2010, AFSL obtained a mortgage over 17 Chalmers St. Strathfield ("**Strathfield Property**") from Mrs Skarzynski (Skarzynski's wife) to secure the Rental Agreement {Blue [38S-U], [371-437]}. This mortgage eventually yielded AFSL $512,378.94.[1]

19 In March 2010, AFSL exercised its rights under the Rental Agreement. AFSL sent a letter of demand to TCP Australia arising out of various defaults, including failure to make the March 2010 payment under the Rental Agreement {Blue [45G-K, [468-479]; CA [47]}. Further, on 19 March 2010, it exercised its right to terminate the Rental Agreement and sought possession of the equipment and payment of moneys due under the agreement {Blue [45S-W], [491-494]; CA [47]}.

20 **20** The first occasion on which Bosch became aware of any impropriety was on 19 March 2010 when AFSL contacted Bosch {Blue [40C-S]}. The first time that AFSL demanded repayment from Bosch was on 6 April 2010 {Blue [46D-E], [497]}, ie six months after the $198,000 transfer. This demand was met with the prompt and reasonable response on 9 April 2010 (a Friday) that Bosch was investigating the demand and a response would be provided shortly {Blue [46I-J], [501]}. The following Monday (12 April 2010), receivers and managers were appointed to the TCP Companies pursuant to debentures {Blue [46L-M], [503-506]}.

21 In April 2010, AFSL served further demands on TCP Australia, Skarzynski, Musico and Mrs Skarzynski, including for default under the Rental Agreement {Blue [46N-Q], [508-532]}. That is, after discovering the fraud, AFSL continued to press its contractual rights.

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[1] *Australian Financial Services and Leasing v All Up Financial* [2012] NSWSC 1004 at [1], [9]-[12], [20]-[28] and [90].

Part V: Applicable constitutional provisions, statutes and regulations

22 No Constitutional provisions, statutes or regulations are applicable to this appeal.

Part VI: Bosch's outline of argument in answer to AFSL

23 In *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353 this Court accepted (for the first time) the defence of change of position to ensure that restitution is limited to those instances where the defendant's receipt is unjust. However, this Court did not articulate the precise scope of the defence.

24 The '*central element*' of the defence is the recipient's conduct to her or his '*detriment on the faith of the receipt*' (*David Securities* at 385.22).[2] It is important to at once observe that the defence is not *expenditure* or *financial commitment* on the faith of the receipt. It is broader; the recipient's detriment. The notion of detriment is broad enough to allow for the consideration of both qualitative and quantitative factors.

25 The defence of change of position focuses on the recipient's action or inaction which in the relevant circumstances brings about the detriment. Detriment is assessed at the time the payer makes a claim for restitution.[3]

26 The change of position defence seeks to strike a balance between the payer's *prima facie* entitlement to restitution and the recipient whose detriment on the faith of the receipt disentitles the payer from restitution. If detriment is established, the recipient is preferred over the payer.

27 Writing extra-judicially, Justice Gummow acknowledged the equitable roots of the defence.[4] Indeed, this Court has stated that the inquiry is whether it would be inequitable, in all the circumstances of the case, to order restitution.[5]

28 The defence operates *pro tanto*,[6] ie the recipient is ordinarily relieved of the obligation to make restitution to the extent of the detriment.

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[2] See also the observations of Dawson J at 405.32-41.
[3] See *David Securities* at 385 and *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 579.
[4] Hon. Justice W M C Gummow, Moses v Macferlan: 250 years on, (2010) 84 ALJ 756 at 760, 762 acknowledged by the court below {CA [71] and [151]-[154]}.
[5] *David Securities* at 379; see also *Roxborough v Rothmans of Pall Mall Australia* (2001) 208 CLR 516 at [16]-[17] and *Equuscorp v Haxton* (2012) 246 CLR 498 at 516 [30] and 517-518 [32].
[6] *David Securities* at 385 and *Lipkin Gorman* at 559A, 563B-C, 579F-G, 580G-H.

29 In this Court (as was the case below), AFSL does not challenge that Bosch acted on the faith of the $198,000 transfer. In this appeal, the issue for this Court is the scope and content of detriment which qualifies for the purposes of the change of position defence.

30 In many cases, the detriment will comprise either wholly or partially of financial commitment or expenditure. For example, part of Bosch's detriment in this appeal is payment of $52,326.35 to the TCP Companies. AFSL's submission that there was no detriment because Bosch appropriated the funds fails to deal with this element of detriment: AS 45 and 57ff. Bosch made a payment pursuant to the trading terms to the TCP Companies and continued to trade on COD terms {CA [195]}.

10 31 However, the notion of detriment can and should extend to real foregone or lost opportunities which could have benefitted the recipient (as the court below found {CA [161]}). The gamut of human and commercial activity demands this approach.[7]

32 Some opportunities or chances are capable of measurement.[8] However, that is not every case. This Court has recognized in the context of estoppel[9], as Allsop P did below {CA [153]}, that the infinite variety of human endeavor and activity in both domestic and commercial settings is such that it is not always possible or appropriate to quantify the recipient's detriment in dollars and the only way to make good the detriment is to enforce the representation. In the context of the change of position defence, the challenge is how to distinguish between detriment which is capable of measurement and that which is not.

20 33 At least where the foregone or lost opportunity is legally or practically irreversible[10] and the process of measurement or evaluation of the chance or opportunity amounts to speculation[11] (or where the lost chance or foregone opportunity is a certainty),[12] it is unjust to order the recipient to make restitution to the payer.

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[7] For example, see *Moore v National Mutual Life Association of Australasia Ltd* [2011] NSWSC 416 at [100]-[105] and *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318 at [23]-[28].

[8] For example, *Gertsch v Atsas* [1999] NSWSC 898 at [98] (lost opportunity to remain in employment).

[9] *Grundt v Greater Boulder Proprietary Gold Mines* (1937) 59 CLR 641 at 674.29 – 675.4 and *Giumelli v Giumelli* (1998) 196 CLR 101 at [34]-[48].

[10] *Alpha Wealth Financial Services & Ors v Frankland River Olive Co.* (2008) 66 ACSR 594 at [1] and [202], *Kinlan v Crimmin* [2006] EWHC 779 at [60]; see also K Mason, J Carter and G J Tolhurst, *Mason & Carter's Restitution Law in Australia*, (2nd edn., LexisNexis Butterworths, Sydney, 2008) at [2420], J Edelman and E Bant, *Unjust Enrichment in Australia*, (Oxford University Press, Melbourne, 2006) at 324, and E. Bant, *The Change of Position Defence*, (Hart Publishing, Oxford and Portland, Oregon, 2009) at 131-142. Contrast the position adopted in J. Edelman, *Change of Position: A Defence of Unjust Disenrichment*, (2012) Boston University Law Review 1009 at 1019-1020.

[11] Although not reasoned in those terms, some first instance decisions can be explained in those terms. For example, *Moore v National Mutual Life Association of Australasia Ltd* [2011] NSWSC 416 at [104]-[105] and *Kinlan v Crimmin* [2006] EWHC 779 at [56]-[60].

34 This is the position which Bosch found itself in when AFSL demanded repayment of $198,000. At about the same time, the TCP Companies went into receivership, ie its secured creditors had acquired domain over its property and assets. The position was irreversible:

34.1 In commercial terms, Bosch had discharged the debt of the TCP Companies. It did this in the mistaken belief that the $198,000 was payment of the debt.

34.2 Even if it were possible to restore the default judgments against the TCP Companies and to have the Writs for the Levy of Property restored, the appointment of receivers and managers would have prevented Bosch from taking any effective enforcement action.

34.3 Similarly, in late August 2009 and early September 2009, Skarzynski and Musico at least had a commercial imperative in treating with Bosch. In those circumstances the Examination Notices might well have enabled Bosch to extract valuable information from Skarzynski and Bosch to aid enforcement and recovery of the debt. By April 2010, with the TCP Companies in receivership, this incentive had disappeared.

34.4 Restoring Bosch to the position of garnishee as at late August 2009/early September 2009 was of no utility. Whatever was available in the TCP Companies' accounts in early September 2009 had by April 2010 been either appropriated for the benefit of the secured creditors or had vanished.

34.5 The payment of $52,326.35 made in mid-September 2009 to the TCP Companies was likewise beyond recovery.

34.6 To measure and evaluate Bosch's judgments, writs and examination notices amounts to requiring the impossible unravelling and hypothetical reconstruction of six months of group trading, including with Hills, and no doubt other third parties.

34.7 The opportunity to obtain security against the Strathfield Property had been appropriated by AFSL in February 2010. At the time of demand for restitution, this security was no longer available. This security ultimately yielded well in excess of the debt to Bosch in early September 2009. This was not an insignificant opportunity because at the time Skarzynski procured the security AFSL was in debt recovery mode – just as Bosch had been some five months earlier.

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[12] For example, *Palmer v Blue Circle Southern Cement Ltd (1999) 48 NSWLR 318* (the lost opportunity was to receive social security benefits) and *Morgan Guaranty Trust Co. of New York v Outerbridge* (1990) 66 DLR (4th) 517 at 552a-f (lost leverage over client files which a solicitor's lien provides).

35 In circumstances where Bosch had acted in good faith and in the ordinary course of its business for a period of six months before AFSL sought repayment {CA [156]-[157]}, the Court of Appeal rejected AFSL's contention that to satisfy the requirement of detriment Bosch had to disentangle the TCP Companies' financial affairs and its dealings with third parties over a period of six months to demonstrate that it would have been in the same position or better off in early September 2009 {CA [164]}. To require Bosch to embark upon this exercise was to require it to reconstruct the events of six months with a tolerable degree of precision {CA [165]}. This was impossible and a wholly artificial exercise – it was pure speculation.

36 The Court of Appeal was mindful that at least as between AFSL and Bosch, the former had created the situation by the initial transfer and then allowed six months to elapse before seeking restitution from Bosch {CA [153], [164]-[165]}. This was important having regard to the equitable roots of the defence. Specifically, during the six month period prior to seeking restitution:

36.1 As early as October 2009, AFSL had identified that TCP (in contradistinction to the equipment vendor) had "created" an invoice which formed the basis of a rental agreement {Blue [14J], [14S-T]}.

36.2 By late October 2009, AFSL knew that the TCP Australia had a writ recorded against it and had cashflow problems {Blue [1459]}.

36.3 In December 2009, AFSL identified documents bearing suspicious signatures {Blue [29D-S]}. Of course, Musico subsequently claimed that he did not sign a number of documents {Blue [32V-34K]}.

36.4 From November 2009, AFSL had identified arithmetical errors in '*vendor*' invoices submitted by Skarzynski {Blue [21R-V], [23R-V]}.

36.5 From early October 2009, AFSL had noticed the identity of the account payee on the forged invoices was different to the entity allegedly issuing the invoice {Blue [12J-13C], [14G-H]}. There were also discrepancies between the identity of the equipment vendor in a rental agreement and the direction for payment {Blue [27J-28E]}.

36.6 In early February 2010, AFSL entertained a request from Skarzynski to '*change*' the equipment described in the rental agreements to "*make sure everything goes smoothly with the auditors*" {Blue [31S-32K]}.

36.7 In mid-February 2010, AFSL knew that the TCP Companies were financially doomed. AFSL's response was to obtain security over the Strathfield Property.

36.8 From early December 2009, default in the payment of monthly hire charges under some of the rental agreements {Blue [25P-W], [27E-H], [30U-W], [31K]}.

None of these red flags, either separately or in combination, prompted AFSL to seek restitution prior to April 2010. These matters must also be weighed in the balance to determine whether restitution is unjust and they weigh heavily against AFSL. Had these matters caused AFSL to contact Bosch earlier, it may have been possible to measure the value of Bosch's enforcement armory with a closer approach to certainty.

37 In this appeal, AFSL has adopted an inconsistent approach. It at once maintains that in order to establish the defence it is necessary to point to a financial commitment or expenditure, whilst at the same time propounding a valuation or assessment approach for lost or foregone opportunities [AS 35 and 49ff]. This Court did not limit the defence to financial commitment or expenditure (*David Securities* 175 CLR at 385]. As both this Court and the House of Lords foreshadowed, the defence has developed to allow lost or foregone opportunities to qualify as detriment. The real issue in this appeal is the nature of foregone opportunities or chances which operate either *pro tanto* or wholly to disentitle the payer.

38 However, even AFSL's submission that it is necessary to identify a financial commitment or expenditure to qualify for the defence fails to deal with the payment of $52,326.35 made in mid-September 2009. At least to this extent, it would be unjust to require Bosch to make restitution. AFSL fails to grapple with this payment, contending that Bosch's position is one of bare receipt (putting to one side the setting aside of the default judgments and enforcement process, as well as continuing to trade on a COD basis). AFSL does not accommodate this payment in its analysis of the case, except perhaps for the implicit concession of requiring restitution of $144,426: AS section VIII (c).[13]

39 AFSL's requirement of an assessment of the detriment by valuing the lost or foregone opportunity is flawed both in the circumstances of this case and at a conceptual level.

40 In the circumstances of this case:

40.1 Bosch had discharged the indebtedness of the TCP Companies on the faith of the receipt of $198,000.

[13] The matter is not entirely clear because the difference between the payment of $198,000 and the $144,426 is not $52,326.35.

40.2 It was impossible to restore Bosch to the position of early September 2009 (see paragraph 34).

40.3 In order to consider the imponderable constituted by the value of Bosch's judgments, garnishee orders, writs and examination notices, it must unravel and hypothesize the TCP Companies' commercial transactions over a six month period, including with third parties. This ultimately can be no more than conjecture and speculation as to the value of the TCP Companies and Skarzynski and Musico at a particular point in time. It is inconsistent with the practical approach adopted in other single judge decisions measuring detriment where this is meaningful and possible, but where it is not provided the detriment is nonetheless real, denying the payer restitution.[14]

40.4 The Strathfield Property alone provides a sufficient answer. Even on AFSL's flawed approach, the measure of the lost chance or opportunity exceeds the debt which Bosch gave up. Because Skarzynski was willing to procure a mortgage over the property in circumstances where AFSL was asking difficult questions about various transactions, it is a safe inference that Bosch would have achieved the same result, it being further along the enforcement path.

41 Conceptually, there are four problems with AFSL's approach of requiring a valuation of the lost or foregone opportunity in order to establish the change of position defence:

41.1 AFSL's approach disregards the inquiry whether the detriment is irreversible (at the same time as conceding that it is part of the inquiry: AS 62). The qualitative element of the detriment is disregarded or truncated.

41.2 Where it is impossible to undertake a valuation as result of the payer's acts or omissions in the period prior to the demand for restitution, the payer will benefit at the recipient's expense by obtaining a restitution order. This has the effect of rewarding payers who defer or delay seeking restitution.

41.3 It is inconsistent with the requirement that the defence have regard to all the circumstances (*Lipkin Gorman* at [1991] 2 AC 580F). Applying AFSL's approach in this case requires assessment of the TCP Companies' and their principals' position in mid-September 2009 and ignoring the events of the remaining five and half months. The equitable roots of the unifying concept and defence are contradicted.

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[14] For example, *Moore v National Mutual Life Association of Australasia Ltd* [2011] NSWSC 416 at [104]-[105] and *Kinlan v Crimmin* [2006] EWHC 779 at [56]-[60].

41.4 By definition this appears to exclude non-pecuniary changes of position.

42 Bosch does not dispute that it may be appropriate in some lost or foregone opportunity cases to undertake an assessment or valuation of a lost or foregone opportunity, not least in order to be satisfied as to its real assistance. However, this cannot be a mandatory requirement in every case. Such an approach is inconsistent with the broad and flexible notion of detriment and the objective of the defence to disallow restitution where it is unjust to do so.

43 Bosch's approach is entirely consistent with the objective of the defence. Where it is possible to value the lost or foregone opportunity and that opportunity is less valuable then the receipt, the defence will operate *pro tanto*. However, where it is not possible or inappropriate to measure the value of the opportunity or chance, the defence operates to preclude restitution. In circumstances where the qualitative aspect of the detriment is irreversible (here returning Bosch to its position in early September 2009) and valuation amounts to speculation, the defence ought to preclude restitution completely.

44 Bosch's approach is entirely consistent with the position adopted by Professor Birks: see AS 52. Where the detriment is such that the opportunity cannot be valued or measured, provided it is substantial, it bars recovery. AFSL's reliance on the recent decision of the United Kingdom Supreme Court in *Benedetti v Sawiris* (2013) 3 WLR 351 is misconceived. Their Lordships said nothing about the change of position defence, lost or foregone opportunities, or how they should be assessed in the context of the defence. That case focused the valuation of services (*Benedetti* at [11]]).

45 AFSL contends that the principles which this Court enunciated in the *Malec v J C Hutton* (1990) 169 CLR 638 and *Sellars v Adelaide Petroleum* (1992) 179 CLR 332 decisions should be applied where the detriment comprises of a loss of chance or opportunity. Both decisions were concerned with the question of damages for breach of contract, tort and under the then *Trade Practices Act*. This broad and unqualified submission disregards the differing objectives of a damages claim and the defence of change of position.

46 In a claim for damages, the court is required to give a monetary award. This Court rightly recognized that in a damages claim for lost chances or opportunities there may be no option but to embark upon a rough and ready calculation by reference to probabilities. However, the change of position defence is concerned with whether the payer ought to be denied restitution in whole or *pro tanto*. The notion of detriment allows for not just monetary considerations, but qualitative issues as well. Where (as in this appeal) the circumstances

make the valuation speculative, the notion of detriment allows the court to avoid conjecture and deny restitution completely. Indeed, this Court has recognized that even in the context of damages award, it may be going too far to assess chances or opportunities on the basis of probabilities (*Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 118.). To import damages assessment principles without taking into account the equitable roots of the defence and its flexibility, including the ability to focus on qualitative factors, is inappropriate. This would serve to unduly restrict the scope of the defence without good reason. The concept of detriment is central to both estoppel and the change of position defence and, as in the case of estoppel, it may be that the justice of a particular case means the recipient can maintain the status quo by declining to make restitution.

47 The principle for which Bosch contends (see paragraph 33) allows for the operation of the sorts of concepts enunciated in the *Malec* and *Sellars* decisions, whilst at the same time preserving the elasticity of the concept of detriment and the scope of the defence. For the reasons set out in paragraphs 33, 40, 41, 45 and 46, the damages assessment concepts articulated in the *Malec* and *Sellars* decisions have no work to do in relation to Bosch's change of position defence.

Part VII: Bosch's argument on its Notice of Contention

1. Contractual allocation of risk: contentions 5 and 6

48 Unjust enrichment is a concept unifying different categories of cases, but not a principle the elements of which *necessarily* entitle a plaintiff to relief (*Lumbers v W Cook Builders* (2007) 232 CLR 635 at [85]). This appeal is a category of case where the payer ought not to obtain relief because of the need to ensure that the unifying concept does not encroach upon or diminish other settled areas of the law (*Lumbers* at [78]). Specifically, restitution for unjust enrichment would interfere with the contractual allocation of risk between the parties (*Lumbers* at [45], [47], [79] and [124]-[127]).

49 The trial Judge rejected this argument on the basis that whereas in *Lumbers* there was an allocation of risk pursuant to contract, there was no such allocation in this case. Specifically, in *Lumbers* Builders had voluntarily accepted the risk of loss and there was no unconscionability in the Lumbers retaining the house for which they had paid Son. In this case, the trial Judge was of the view that AFSL did not accept the risk of loss arising out of the fraud and in those circumstances it was unconscionable for Bosch to retain the receipt {Red [89P-90G]}.

50 The Court of Appeal dismissed this argument on the basis that there was no inconsistency between rights and remedies. The learned President {CA [170]} was of the view that AFSL's enforcement of the Rental Agreement in no way diminished the operative mistake grounding the right to restitution (Bathurst CJ [3] and Meagher JA [219] agreed).

51 It is respectfully submitted that both the trial Judge and the Court of Appeal might have been justified in dealing with the matter on this basis, except that upon discovering the fraud AFSL embraced it and pursued their contractual rights.

52 The Rental Agreement is the contractual relationship between TCP Australia and AFSL. AFSL exercised its right to terminate this contract and pursued securities in two Supreme Court proceedings to make good its rights under the contract.

53 Whatever may have transpired between AFSL and TCP Australia, the former has not recanted the Rental Agreement for fraud, misrepresentation or otherwise. At no stage since 3 September 2009 has AFSL sought to adopt the position that the contract is void, voidable or unenforceable for fraud or otherwise. Far from adopting this position, AFSL has affirmed the Rental Agreement and exercised its rights thereunder. Firstly, it has received monthly rental payments, albeit for 6 months. Secondly, it secured its rights under the Rental Agreement by the mortgage over the Strathfield Property from Mrs Skarzynski. Thirdly, it issued demands for payment under the Rental Agreement to TCP Australia in March and April 2010, ie after AFSL became aware of the fraud. Similarly, it has exercised its termination rights under the Rental Agreement on 19 March 2010, ie again, after AFSL became aware of the fraud.

54 The exercise of those contractual rights, including under the mortgage for the Strathfield Property, has yielded AFSL $512,378.94.

55 Separately, prior to the receipt of $198,000, the TCP Companies and Bosch were in a creditor and debtor relationship pursuant to contract. On receipt of the sum and allocation against the debt, Bosch ceased the enforcement of its rights.

56 There is no relationship between AFSL and Bosch. The decision in *Lumbers* makes plain that there need not be a contractual relationship between the plaintiff payer and the defendant recipient in order for the sanctity of contract to play a decisive role in denying a claim for unjust enrichment. Here, as in *Lumbers*, the recipient sought nothing from the payer.

57 AFSL has obtained satisfaction of its contractual rights in separate proceedings. In order to do so, it embraced its mistake and the fraud about which it complains. In this appeal, it seeks to sweep aside both its contractual arrangements with AFSL and those between Bosch

and the TCP Companies. It seeks to recover for the same mistaken transfer. In these circumstances, restitution for unjust enrichment is at odds with the contractual rights, remedies and obligations between, on the one hand, AFSL/TCP Australia/security providers, and, on the other hand, Bosch/the TCP Companies.

2. Discharge: contentions 1 to 4

58 Bosch respectfully submits that AFSL's transfer of $198,000 was a discharge of the TCP Companies debt so as to preclude a claim for restitution. Bosch puts this in three ways. Firstly, AFSL's payment falls within proposition 2(b) in *Barclays Bank Ltd v W.J. Simms Son & Cooke (Southern) Ltd* [1980] 2 QB 677. Secondly, AFSL's payment is a *bona fide* purchase for value. Thirdly, upon receipt of the $198,000, there was a notional payment away to the TCP Companies and the receipt of this sum in repayment.

(1) Barclays Bank proposition 2(b): contentions 2 and 3

59 Where a payer (AFSL) pays money to a creditor (Bosch) at the direction of, or with the authorisation of, the debtor (the TCP Companies), this is good discharge of the debt provided the payee receives the funds in good faith. It matters not that:

59.1 the payer made the payment labouring under a mistake, provided the payee/creditor receives the funds in good faith and has no knowledge of the mistake under which the payer is laboring; or

59.2 the payer owes no debt or obligation to the payee, provided the debtor gives a direction or authorization for the payment.

60 This is supported by the decision in *Aiken v Short* (1856) 1 H. & N. 210; 156 E.R. 1180. In that case, Carter was indebted to both Short and Stuckey's Banking Company and had given both an interest in property to secure the debt. Carter had practiced a fraud on both by misrepresenting the nature of his interest in the property. In preparing to sell Carter's property, Carter gave a direction to Stuckey's Banking Company to repay his indebtedness to Short. Upon discovery of the fraud, Stuckey's Banking Company sued the estate of Short to recover the payment on the basis of mistake of fact. The claim was dismissed.

61 The payer failed because the debtor had authorised the payment to the creditor who had a valid debt claim (*Aiken v Short 1 H. & N.* per Pollock CB at 214, Platt B at 215 and probably Martin at 214]. The debtor had deceived both the payer and the recipient. The payer would not have made the payment but for its ability to realize the security. Pollock CB at 214 observed that the payer could have taken more care to inquire about the property but did not; there was a debt due to the defendant and the defendant was in no way responsible for the

mistake. Martin B (who did not give a judgment) postulated the rhetorical basis on which he thought that the case should be decided:

> The case comes to this, if I apply to a man for payment of a debt, and some third person pays me, can he recover back the money because he has paid it under some misapprehension? (at 213-214)
>
> The answer conveyed by Bramwell B for Martin B was '*no*' (at 215).

62 In *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 C.L.R. 177 the majority dismissed the appellant's claim against respondent for money had and received under a mistake of fact. In that case one LH Gill dealt with Porter and Latec as if he was HH Gill (his father) who was the registered proprietor of realty. This property was mortgaged to NBA. LH Gill falsely represented to Porter that he was HH Gill, the registered proprietor of the realty, including by forging his father's signature on a mortgage in favour of Porter, to procure a loan partly to discharge the mortgage of NBA and the balance for himself. Porter paid out NBA and in due course acquired a registered mortgage over the realty. There was default under the loan and Porter demanded payment from HH Gill. Thereafter, LH Gill sought a loan from Latec, once more representing that he was HH Gill and the registered proprietor of the realty. LH Gill forged HH Gill's signature on the loan application and the mortgage instrument. Latec deposited the loan amount with their solicitors and gave a direction to pay to, or on the authority of, HH Gill. LH Gill forged HH Gill's signature on a written authority to payout Porter and to remit the balance to him (less a small amount). In subsequent correspondence to Latec, Porter confirmed the amount due and that he would release the certificate of title and mortgage instruments. Thereafter, Porter received funds from Latec solicitors' payment of the loan amount.

63 The majority held that the claim could not succeed because Latec (the payer) made the payment to Porter (the creditor) on behalf of LH Gill (the debtor and fraudster) and not on its own account (*Porter* at 182, 184-185, 187-8, 198 and 208-209). In the alternative, Chief Justice Barwick expressed the view that he was prepared to decide for Porter even if the payment was made on account of Latec, ie not on account of the debtor. His Honour expressed this view because Latec made the payment without any obligation to do so and for the purpose of obtaining for itself better security (*Porter* 111 CLR at 186). This astute observation has a corollary in this appeal. AFSL had no obligation to make any payment to Bosch. AFSL made the payment in anticipation of acquiring equipment for the purpose of

obtaining for itself an income stream ($258,720 – see {Blue at [76]}) under the Rental Agreement far in excess of the amount paid.

64 In *Clarke v Abou-Samra* [2010] SASC 205, Samra was the principal of ALC Group. The latter borrowed funds from clients, including the Clarkes and the Abou-Samras, for lending to property developers. The Clarkes delivered a bank cheque to ALC for $207,518.20 in the belief that they were making a loan to the Abou-Samras in that amount. At the time, the Abou-Samras were purchasing property. They planned to fund the purchase of the property through a combination of a bank loan, the redemption of a $140,000 investment they had made with ALC Group, their own funds ($50,000), and a small private loan for the balance (which Samra was to procure). ALC Group delivered the cheque to the conveyancing firm acting for the Abou-Samras in the purchase of their property. The Abou-Samras believed that by delivering the cheque to their conveyancing firm, the ALC Group was discharging its indebtedness to them (ie $140,000) and providing the balance of $67,518.20 as the small loan necessary to complete the purchase. The Clarkes mistakenly believed that Samra was the agent of the Abou-Samras and that the entire sum of $207,518.20 was a loan to them which was to be secured by a mortgage over the property. Subsequently, ALC Group went into liquidation and Samra became a bankrupt. The Clarkes commenced proceedings against the Abou-Samras to recover the entire $207,518.20 on several bases, including for the abovementioned mistakes.

65 Kourakis J (as his Honour then was) distinguished between the $140,000 loan which the Abou-Samras thought ALC Group was redeeming and the $67,518.20 which they thought was the small loan to complete the purchase. In relation to the $140,000, Kourakis J decided that viewed objectively, ALC Group depositing the cheque in the Abou-Samras' conveyancing firm's account was ALC Group redeeming the $140,000 previously invested by the Abou-Samras. To the extent of the $140,000, this was ALC Group discharging its pre-existing indebtedness to the Abou-Samras, and the Abou-Samras had a good defence to the Clarkes' claim. This was the position because the Abou-Samras had no knowledge (ie received the sum in good faith) of the deception which the ALC Group was practising on the Clarkes (*Clarke* at [5] and [103]-[106]). Justice Kourakis found that the payment was made by Samra and ALC Group when the bank cheque was deposited into the conveyancing firm's trust account (*Clarke* at [72]). His Honour said:

> True it is that Mr and Mrs Clarke did not intend to allow the bank cheque to be used to discharge the ALC debt, but the effect of the payment by ALC must be considered from the perspective of Mr and Mrs Abou-Samra and ALC. {*Clarke* at [83]}

66 The significance of the decision in *Clarke* and the decisions discussed above is that the Court looks at the transaction having regard to the objective facts known to the payee. *Clarke* is distinguishable from this appeal as the cheque was delivered by the debtor/fraudster, whereas as the transfer in this appeal came directly from AFSL. However, this distinction is immaterial. With respect, why should the position turn on whether a third party's money comes directly from the debtor (as in *Clarke*) or the third party (as in this appeal) where the source of the funds is the same in both cases, i.e. the third party. Had AFSL remitted the $198,000 to TCP and the latter repaid the indebtedness to Bosch, AFSL could not recover from Bosch.[15] To allow AFSL to recover from Bosch would destabilise commerce because this would require payees to ensure that third party payers were not labouring under misapprehension (whether innocent, negligent or fraudulent) and that would convert recipients into detective agencies.[16]

67 The above authorities establish the proposition in paragraph 59. The TCP Companies were indebted to Bosch. Unbeknownst to Bosch, Skarzynski and the TCP Companies procured that AFSL make the transfer of $198,000 in discharge of their indebtedness. Prior to the receipt of the funds, Bosch had no knowledge of AFSL. The receipt of this amount from a third party was no surprise to Bosch. Bosch received the amount in good faith and without knowledge of AFSL's mistake, in discharge of the debt due to it. It matters not that AFSL thought it was buying goods and did not intend to pay the indebtedness of the TCP Companies. Where the defence is established, it is unnecessary to inquire into the sufficiency of the consideration. The foregoing is consistent with the tentative conclusion reached by Allsop P {CA at [139]-[147]}.

(ii) Bona fide purchase: contention 1

68 The alternative way of analyzing the transaction is that of a *bona fide* purchase for value. That is the manner in which Meagher JA approached the problem {CA at [211]}. Again, this requires no analysis of value.

69 Whilst conceptually different to proposition 2(b), both Allsop P and Meagher JA accepted that proposition was not exhaustive {CA at [113], [116], [189]}. The authorities

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[15] See the observations of Taylor J in *Porter* 111 CLR at 197-198.
[16] *Port of Brisbane Corp v ANZ Securities* [2002] 2 Qd R 661 at [17].

discussed in paragraphs 60 to 66 establish that what is required is a discharge of the debt; that the payer intended something different does not alter the position. With respect, this is the correct approach.

(iii) Notional payment away and receipt in repayment of the debt: the change of position defence: contention 4

70 Meagher JA's analysis led to his Honour characterizing the receipt as the notional payment to the TCP Companies and its notional repayment, thereby establishing the change of position defence {CA at [209]-[211]}. Allsop P reached the same conclusion, albeit more tentatively {CA at [139]-[145]}.

71 If the above analysis at paragraphs 59 to 67 is accepted, then (with respect) the conclusion of Meagher JA must be correct and the defence of change of position is established.

3. Partial defences: contentions 7 and 8

72 These are two sets of payments which fall to be addressed in this section.

73 First, the payment of $52,326.35; this is addressed in paragraphs 14, 34.5, and 38. This payment is the classical *pro tanto* operation of the defence.

74 Second, the rental income which AFSL received under the Rental Agreement ($35,574) and the GST component of the fake Bosch invoice ($18,000) which AFSL received as an input tax credit. AFSL did not contend below that it was not in receipt of either amount.

75 The Court of Appeal declined to deal with the partial defences based on the rental income stream and the input tax credit. Each of Allsop P and Meagher JA expressed tentative conclusions that these partial defences were unlikely to succeed because they were a species of passing on or recoupment {CA at [167] and [218]}.

76 To allow recovery in full without deduction for the rental income stream and the input tax credit is to allow the unifying concept to be abused as a charter to facilitate unjust enrichment. This is contrary to its equitable roots.

77 Critical to decisions in both *State Revenue (Vic) v Royal Sun Insurance Co. Limited* (1994) 182 CLR 51 and *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 is that the High Court was being asked to choose between which of the appellant and the respondent would keep the windfall in circumstances where a third party had already borne the cost (*Royal Sun* at 68-69, 90 and 103 and *Roxborough* at [5], [22]-[23], and [68] and [200]).

78 There is no such choice to be made in this appeal. If Bosch is forced to provide restitution, then AFSL will be restored to the position it was in prior to the transfer of $198,000 (in addition to the recovery already made against the Strathfield Property), plus a further amount of $53,574. Bosch will be left with its debt unpaid.

Part VIII: Orders

79 Bosch contends that the orders below should be upheld. If this Court finds in favour of AFSL, Bosch seeks leave to make further written submissions on costs. It does so because at trial AFSL failed on the knowing receipt case and, although initially pressed below, it was abandoned before the hearing. It may also be appropriate to apportion costs between the parties both in this Court and below if the partial defences succeed.

Part IX: Estimate of the time Bosch requires to present its argument

80 Bosch estimates that it will require approximately 2 hours to present its argument.

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