ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S163 of 2013

BETWEEN:

Australian Financial Services and Leasing Pty Limited
(ACN 105 657 681)
Appellant

and

Hills Industries Limited
(ACN 007 573 417)
First Respondent

Bosch Security Systems Pty Limited
(ACN 068 450 171)
Second Respondent

APPELLANT'S REPLY TO THE FIRST AND SECOND RESPONDENTS' SUBMISSIONS

Part I: CERTIFICATION FOR PUBLICATION

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

Part II: REPLY

Factual Issues

2. The respondents put substantial weight on the mortgage that was given by Mrs Skarzynski to the appellant (hereafter 'AFSL'). The respondents suggest that but for the payments by AFSL, they might have sought such a mortgage for themselves. This is unlikely. The mortgage ultimately given by Mrs Skarzynski in favour of AFSL was to secure future payments due under some six rental agreements in the sum of $1,215,012.90 (**AB 2273 [46]**). The mortgage was granted on 23 February 2010. At the time of the mortgage the leases were still on foot and it secured the outstanding future liabilities in regard to those leases. At the time of the mortgage there was clearly still a commercial imperative for the TCP companies to placate AFSL if they were to avoid all the leases being terminated, and all of the liabilities crystalised. Further, at that stage Mr Skarzynski would have realised that if that had happened the false invoices would probably be discovered by AFSL.

3. By contrast, the Hills debt had been outstanding since December 2008 and the Bosch debt since January 2009. Hills had not yet issued a letter of demand prior to receiving the payment from AFSL (**AB 826.9, 914.10 and 969.40 [26]**). It is noteworthy that although Bosch had reached the point where it had obtained judgement, issued writs for levy,

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examination notices and garnishee orders, it had not taken any steps to demand a mortgage from Mrs Skarzynski.

4. Further, none of the steps taken by Hills or Bosch had resulted in payment of their debts, other than by the monies fraudulently extracted from AFSL. The respondents also point to the monies paid by the TCP companies to AFSL. The companies paid some of the initial rental payments under the leases with AFSL, however, the TCP companies had no commercial imperative to pay monies to Hills or Bosch in late 2009 or early 2010, each of which was in debt recovery mode at that stage.

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5. In any event, it would have been a straight forward factual enquiry of the sort undertaken by Courts on a daily basis, to determine whether there was a likelihood that, but for the payments by AFSL, Hills and/or Bosch would have sought and obtained from Mrs Skarzynski a mortgage over real estate, or some other economic benefit. His Honour, the Trial Judge, did not consider that Hills had established there was any real likelihood that Mrs Skarzynski would have given it a mortgage (**AB 2182-2183 [74]-[79]**)). The Court of Appeal did not reverse that finding of Einstein J so much as side-step the findings (**AB 2318 [163]-[164]**).

20 6. Hills and Bosch emphasise that 6 months elapsed between the payments by AFSL and AFSL's notification to Hills and Bosch of the mistake, and consequent demand. Hills and Bosch each argue that opportunities were lost because of that lapse of time said to be a consequence of the conduct by AFSL in not earlier notifying Hills or Bosch of the mistake. Einstein J, at first instance, had found no parties to be at fault or to have engaged in uncommercial practices (**AB 2178 [33], 2180 [52], 2189 [114]**) and there was no challenge to any of those findings in the Court of Appeal (**AB 2266 [22]**). The lapse of 6 months between the receipt of payment by Hills and Bosch and their becoming aware of the fraud, was as much caused by the failure of each of the two companies to appreciate the monies they received were not repayment of Hills or Bosch's debt (see especially Einstein J **AB**
30 **2180** at [52] and **2189** at [114] and [115]). The matter should be disposed of on the basis that each party was equally innocent of fault while being equally causative of the mistake and its consequences. Both respondents seek, in this regard, to evade the primary findings made at first instance that were neither challenged nor overturned in the Court of Appeal (BS [36.8] ff).

Valuing Detriment

7. Hills and Bosch contend that it is not always necessary to value the detriment relied upon in a change of position defence, and reject AFSL's contention that the quantification of lost opportunities in tort, contract, and misleading conduct cases, need to be doctrinally
40 harmonised with the quantification of detriment in restitutionary matters. The Bosch submissions accept that these principles will be applicable in some contexts, denying that their application would be "a mandatory requirement" (BS at [42]).

8. Firstly, it would not be necessary to value the detriment if the recipient established on the balance of probabilities that the value of the detriment exceeded the amount of the

payment. No such proof was offered in this case. Secondly, the principles enunciated in *Malec* and *Sellers v Adelaide Petroleum* reveal the ability of the Court to take a practical approach to valuing lost opportunities. They are applicable in a wide variety of legal contexts. They are not so much rules regarding tort, contract, or the like, as rules regarding the nature of proof of economic loss. Economic loss is precisely the form of detriment that Hills and Bosch assert they have suffered through their change of position.

9. Hills contends that the appropriate analogy for determining detriment is with the principles governing equitable estoppel. While estoppel has some similarities with the change of position defence, it operates quite differently in the present context. Some English authorities view estoppel as necessarily operating, if at all, as a complete defence, in contrast to the pro tanto nature of the change of position defence (see *Avon County Council v Howlett* [1983] 1WLR 605). The Australian view of estoppel undoubtedly sees greater flexibility in the estoppel remedies. The law in Australia governing estoppel does not now embrace the minimum equity doctrine limiting the remedy to that measured by detriment (see *Giumelli v Giumelli* (1999) 196 CLR 101 at 125 ff). This distinction between change of position and estoppel is appropriate, given that an ingredient in estoppel is a representational promise that has induced detrimental reliance. The purpose of the remedy, at least in the context of proprietary estoppel, will be enforcing the equitable obligation to make good an expectation (see *Donis v Donis* (2007) 19 VR 77 per Nettle JA at [582]). AFSL made no representational promise to which it ought be held by equity. For the reasons discussed above, there was no fault by either party in the circumstances prior to the demand for repayment.

10. Hills and Bosh suggest that the valuation of the foregone opportunities should not be undertaken because of the difficulty or uncertainty of the exercise, however:-
    - Lack of certainty is the very factor that brings into play the broad brush approach, and application of the *Malec* or *Sellers* principles.
    - Hills and Bosch made only a perfunctory attempt at establishing the prejudice that they had suffered (see **AB 1571-1623**).
    - The approach of Hills and Bosch places a party who has not brought forward evidence of prejudice, but merely points to the difficulty in obtaining it, in a more favourable position than the party that marshals evidence to establish its detriment.
    - Bosch appears to contend for the view that a valuation of lost opportunities may be appropriate in some cases, but not others. The discrimin appears to be where the proof of detriment is too difficult, in which case the recipient is relieved of the obligation to make restitution (BS [43]).

    In a case such as the present, an absence of evidence of detriment, while being excused by the respondents on the ground of difficulty or uncertainty in establishing lost opportunity, is in fact no more or less than the demonstration that detriment has not been suffered, in the relevant sense.

Notices of Contention – Bona Fide Discharge

11. Both Hills and Bosch contend that if the payee uses the monies to discharge an existing debt of a third party, it ought not to matter whether the payer intended to discharge the debt

(AHS [63], BS [58] and [59]). Where the payer had no intention in regard to the discharge of a debt, then one cannot describe the payment as having discharged the debt as opposed to some other conduct of the payee. The reasoning of Meagher JA ought be preferred to that of Allsop P (**AB 2326 [186], AB 2327 [189], AB 2298 [113] and AB 2300 [116]**). Cases such as *Clarke v Abou-Samra* [2010] SASC 205 at [83]) suggesting the intention of the payer was not determinative, are cases where there have been intermediaries between the plaintiff and defendant, and in such cases the payer whose intention matters, may not be the original provider of funds (see the Analysis of Allsop P at **AB 2309 [138]**). For the same reason *Porter v Latec* discussed below does not assist the respondents.

12. No tripartite legal relationship existed between the relevant parties such that the payment by AFSL discharged the debt of the TCP companies. The discharge of the debt by both Hills and Bosch was a consequence of the decision by each respondent to appropriate the money received to discharge the debt. That conduct should fall to be assessed like any other conduct relied upon for change of position, namely, what net detriment did it cause the payee to suffer. The Bosch submissions suggest that it ought not to matter whether AFSL had remitted the money to TCP which had used that money to repay Bosch, or whether AFSL remitted the money directly to Bosch (BS [66]). The short response is that it matters enormously, because the restitutionary remedy lies against a recipient. In the first scenario that recipient is TCP. In the second it is Bosch. As with so many legal issues, an analysis looking only to net economic effect leads to error.

13. If the discharge of the debt is brought about by the recipient appropriating the monies to discharge the debt, then there could be no good reason for treating that as bringing about a complete defence to a restitutionary claim, while other uses of the monies such as to acquire property, on-lend it, or the like, would depend upon a determination of the actual financial loss suffered by the recipient.

Hills Contention No. 2 and Bosch's Contention – Contractual Allocation of Risk

14. Both Hills and Bosch point to the concurrent existence of the contractual entitlements AFSL had under the lease arrangements with the TCP companies, and argue that these preclude recovery. Both respondents rely on the decision in *Lumbers v W Cook Builders Pty Ltd* (2007) 232 CLR 635. They argue that AFSL should be relegated to its contractual rights in the leases it entered into with the TCP companies since it did not disavow those contracts on discovery of the fraud.

15. In *Lumbers* a building sub-contractor made a restitutionary claim against a property owner for the value of work performed on a property after being left substantially unpaid by the head contractor. The sub-contractor had made no mistake or laboured under any misunderstanding in regard to the issues. In an ordinary case a building sub-contractor does not have a restitutionary claim against the property owner. The contractual arrangements between the owner and head contractor, and head contractor and sub-contractor, dealt precisely with this issue (*Lumbers* at [46] and [49]). The contractual relationships that were relevant in *Lumbers* were addressed to the very issue that underlay the sub-contractor's claim, namely payment for the work that had been done. *Lumbers* demonstrates the necessity for careful analysis of the contractual relationships and the form

of restitutionary claim (*Lumbers* at [124] to 127]). The mere existence of a contractual relationship between the parties, is not an automatic answer to a restitutionary claim (per Allsop P see **AB 2280 [74]**).

16. In *David Securities v Commonwealth Bank of Australia,* there was a contractual relationship between the payer and payee. The Court emphasised the importance of careful analysis of the terms of the agreement to determine whether the restitutionary claim could be made within the contractual context (at p 381). There is no suggestion in *David Securities* that the contractual relationship needed to be avoided ab initio by the plaintiff to permit the restitutionary claim to be made.

17. In the present case there were agreements between AFSL and the TCP companies, but any contractual relationships between AFSL and Hills or Bosch were vitiated by mistake. The contractual relationships between the parties did not deal with the fraudulent inducement by the TCP companies to make payments to Hills or Bosch. Most importantly, Hills and Bosch did not make the payments in reliance upon a contract with AFSL.

18. The Bosch submissions rely upon the decision of *Porter v Latec Finance*. Contrary to the Bosch submissions (BS [63]) the majority did not maintain that the claim in that matter failed because *Latec* made the payment to *Porter* on behalf of the debtor and fraudster, rather than its own account, rather, the claim failed because the payment was in fact made by a solicitor found to be making the payment, not on behalf of *Latec,* but on behalf of the debtor (at p 185.5, 198.9 and 208.9). (See CA per Allsop P **AB 2285 [86]**).

19. Latec. the payer, lost because the recipient it sued was not the recipient of its payment. For that reason, the alternative finding by Barwick CJ, relied on by Bosch, relates to a wholly dissimilar case to the present.

Notices of Contention – Partial Defences

20. AFSL accepts that as a pro tanto defence some payments should be allowed. AFSL does not challenge the reductions made by the Trial Judge, but consistently, with principle, Hills should have received a reduction for the losses on further goods supplied to TCP, but not the rental payments or GST input credit received by AFSL.

21. In regard to the claim by Bosch, AFSL accepts the first item (payment of $52,326.35) should be allowed under the pro tanto principle. The other partial defences claimed by Bosch are not consistent with the legal principles discussed above

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