HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

AUSTRALIAN FINANCIAL SERVICES AND LEASING PTY LIMITED — APPELLANT

AND

HILLS INDUSTRIES LIMITED & ANOR — RESPONDENTS

Australian Financial Services and Leasing Pty Limited v Hills Industries Limited
[2014] HCA 14
7 May 2014
S163/2013

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

C J Birch SC with M P Cleary and R L Gall for the appellant (instructed by Hilliard & Berry Solicitors)

I M Jackman SC with T M Thawley SC for the first respondent (instructed by King & Wood Mallesons)

B W Walker SC with L Gor for the second respondent (instructed by HWL Ebsworth Lawyers)

CATCHWORDS

Australian Financial Services and Leasing Pty Limited v Hills Industries Limited

Restitution – Payments made under mistake of fact – Defence of change of position – Where appellant made mistaken payments to respondents as result of fraud committed by third party – Where respondents applied payments to discharge third party's debts, ceased pursuing recovery of debts and continued to trade with third party – Whether retention of monies inequitable in all the circumstances.

Words and phrases – "change of position", "detriment", "detrimental reliance", "disenrichment", "unjust enrichment".

FRENCH CJ.

Introduction

1 When money is paid under a mistake of fact, the person paying the money may recover it from the recipient in a common law action for money had and received. Recovery depends upon whether it would be inequitable for the recipient to retain the benefit. Retention may not be inequitable if the recipient has changed its position on the faith of the receipt and thereby suffered a detriment. The circumstances under which the "change of position" defence may be invoked as a complete defence are in question in this appeal from the Court of Appeal of the Supreme Court of New South Wales.

2 The facts of the case[1], the reasoning of the primary judge[2], that of the Court of Appeal[3], and the arguments of the parties[4], are set out in the joint reasons[5]. Two suppliers of equipment, Hills and Bosch, the respondents to the appeal, received payment from the appellant, AFSL, a finance company, which they had been led to expect, by a common commercial client, Mr Skarzynski, was in reduction of the indebtedness to them of companies controlled by that client (referred to collectively as "TCP"). The payments, having been received, were treated by the suppliers as reducing that indebtedness. The first respondent, Hills, withdrew a threat of legal action and recommenced trading with TCP. The second respondent, Bosch, agreed to file consent orders setting aside default judgments supporting garnishee orders against TCP and TCP's directors, and resumed trading. However, the payments had been made by AFSL under a mistake of fact induced by Mr Skarzynski's fraud. He had supplied AFSL with forged invoices, apparently issued by Hills and Bosch, for goods to be acquired by AFSL from them and rented to TCP. Rental agreements were entered into by AFSL on the basis of those invoices.

3 The fraud having been discovered and TCP being insolvent, AFSL brought an action against the suppliers in the Supreme Court of New South Wales for recovery of the money it had paid to them. It obtained judgment

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1 Joint reasons at [39]–[46].

2 Joint reasons at [47]–[50].

3 Joint reasons at [52]–[60].

4 Joint reasons at [61]–[64].

5 The abbreviations used in the joint reasons are adopted in these reasons.

against Hills at first instance, but its claim against Bosch was dismissed[6]. On appeal by AFSL and by Hills, the Court of Appeal held that AFSL could recover from neither supplier[7]. AFSL now appeals by special leave to this Court[8].

4 The appeal should be dismissed. The respondents suffered an irreversible detriment when they decided, on the faith of the receipt of the payments made to them by the appellant, not to pursue their legal remedies against their fraudulent client and TCP. Change of position may apply as a pro tanto defence where the detriment can readily be quantified. This is not such a case. Contrary to the submissions of the appellant, change of position applies in this case as a complete defence to the appellant's claim.

The change of position defence

5 In *Moses v Macferlan*[9], Lord Mansfield pointed to the simplicity of the common law action for money had and received from the perspective of the plaintiff, who could declare generally "that the money was received to his use"[10]. The defendant could defend himself "by every thing which shews that the plaintiff, ex æquo & bono, is not intitled to the whole of his demand, or to any part of it."[11] In the latter proposition lay the seeds of the general change of position defence, although they were not to germinate for more than 230 years.

6 The class of cases in which an action for money had and received would lie was not closed in *Moses v Macferlan* and the decisions in the decades that followed, albeit it did not extend to recovery of money paid under mistake of

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6 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555.

7 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147.

8 [2013] HCATrans 191 (Hayne and Keane JJ).

9 (1760) 2 Burr 1005 [97 ER 676].

10 (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679]. The litigation is explained in detail in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 545–548 [76]–[83] per Gummow J; [2001] HCA 68; see also Swain, "Moses v Macferlan", in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Restitution*, (2006) 19.

11 (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

law[12]. The remedy was "available in any case in which money had been paid in circumstances where it was unjust for the defendant to retain it"[13]. The grounds upon which a defendant might contend that retention of the benefit would not be "unjust" were left open. Money "payable in point of honor and honesty, although it could not have been recovered ... [by the plaintiff] by any course of law" would not be recoverable[14]. Examples in that category included payment of a debt outside the Statute of Limitations, a debt contracted in infancy, principal and legal interest due on a usurious contract, and money fairly lost at gambling[15]. Lord Mansfield declared in *Sadler v Evans*[16] that a claim could be defended by "any equity that will rebut the action."[17]

7 Payment to an innocent recipient on forged bills of exchange was held irrecoverable in *Price v Neal*[18]. The rationale of the decision was not clear, although it was thought to be the progenitor of a special change of position defence[19]. Whether that was so is debatable[20]. Nor was the rationale much

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12 That limitation was enunciated by Buller J in *Lowry v Bourdieu* (1780) 2 Doug KB 468 at 471 [99 ER 299 at 300], although it has been taken as originating in *Bilbie v Lumley* (1802) 2 East 469 [102 ER 448]. For reference to early English cases see "Relief under Mistakes of Law", (1907) 7 *Columbia Law Review* 279. The limitation was held not to form part of the common law in Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; [1992] HCA 48.

13 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30] per French CJ, Crennan and Kiefel JJ; [2012] HCA 7.

14 (1760) 2 Burr 1005 at 1012 per Lord Mansfield [97 ER 676 at 680].

15 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 680–681]. See also *Bize v Dickason* (1786) 1 Term Rep 285 at 287 per Lord Mansfield CJ [99 ER 1097 at 1098].

16 (1766) 4 Burr 1984 [98 ER 34].

17 (1766) 4 Burr 1984 at 1986 [98 ER 34 at 35].

18 (1762) 3 Burr 1354 by Lord Mansfield delivering the judgment of the Court of King's Bench [97 ER 871].

19 Goff and Jones, *The Law of Restitution*, 5th ed (1998) at 838–841. And see Ames, "The Doctrine of Price v Neal", (1891) 4 *Harvard Law Review* 297 at 299 in which it was said the true principle was that as between two persons who have equal equities, one of whom must suffer, the legal title shall prevail.

20 Bant, *The Change of Position Defence*, (2009) at 16, fn 73.

clearer in those decisions which held that a payment received by an agent and paid over to the principal was not recoverable from the agent[21]. Lord Mansfield imported a change of position dimension into such cases in *Buller v Harrison*[22] when, holding that money paid to an agent and credited against the principal's indebtedness to the agent was recoverable, he said[23]:

> "In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, *no alteration in the situation which the defendant and his principals stood in towards each other*". (emphasis added)

Lord Atkinson, 130 years later in *Kleinwort, Sons, and Co v Dunlop Rubber Co*[24], cited *Buller v Harrison* and intervening authorities for the proposition that the liability of an agent depended upon[25]:

> "whether, before the mistake was discovered, he had paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund."

The last disjunctive circumstance appeared to foreshadow a distinct change of position defence.

8 It was accepted in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*[26] ("the ANZ Case") that if the defence of payment over by an agent to his principal had to be justified in terms of detriment or

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21 A principle established in *Buller v Harrison* (1777) 2 Cowp 565 [98 ER 1243] and applied in many later cases — see *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662; [1988] HCA 17; *Kleinwort, Sons, and Co v Dunlop Rubber Co* (1907) 97 LT 263; *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766; *Transvaal & Delagoa Bay Investment Co Ltd v Atkinson* [1944] 1 All ER 579; and see generally, Goff and Jones, *The Law of Restitution*, 5th ed (1998) at 833–835; Burrows, *The Law of Restitution*, 3rd ed (2011) at 561–566.

22 (1777) 2 Cowp 565 [98 ER 1243].

23 (1777) 2 Cowp 565 at 568 [98 ER 1243 at 1245].

24 (1907) 97 LT 263.

25 (1907) 97 LT 263 at 265.

26 (1988) 164 CLR 662.

change of position, "the payment by the agent to the principal of the money which he has received on the principal's behalf, of itself constitutes the relevant detriment or change of position."[27] Some academic writing has supported, or at least acknowledged, the proposition that payment over by an agent can be treated as an aspect of the change of position defence. Professor Virgo, commenting on Lord Atkinson's observation in *Kleinwort*, wrote[28]:

> "Essentially, the defence will only be available to the extent that the agent's circumstances have changed because the principal has effectively received the benefit from the agent."

In so saying, Professor Virgo acknowledged that "[t]he rationale of the agent's defence is a matter of some uncertainty."[29]

9 Meagher JA, in the Court of Appeal, referred to the "payee agent's defence" as one "which rested on notions of change of position"[30]. He cited the Restatement Third, Restitution and Unjust Enrichment for the proposition that it is a "specific application of the general defense [of change of position] differing from the ordinary rule only by its more generous definition of the acts by the agent/recipient that constitute a change of position"[31]. However, as his Honour found, the appellant did not pay the respondents on the basis that they were agents for their client or TCP. Nor did the appellant intend that the respondents might pay or apply the moneys received as directed by their client or TCP[32].

10 An obscure invocation of change of position was also made in *Brisbane v Dacres*[33], in which a payment was held irrecoverable as made under a mistake of

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27 (1988) 164 CLR 662 at 682 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ — but not as a separate requirement of overall prejudice where money received by an agent is paid over to the principal — see at 683 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ.

28 Virgo, *The Principles of the Law of Restitution*, 2nd ed (2006) at 686; see also Burrows, *The Law of Restitution*, 3rd ed (2011) at 564–566; cf Bant, *The Change of Position Defence*, (2009) at 68–69.

29 Virgo, *The Principles of the Law of Restitution*, 2nd ed (2006) at 688.

30 (2012) 295 ALR 147 at 191 [198].

31 (2012) 295 ALR 147 at 191 [198] citing the Restatement Third, Restitution and Unjust Enrichment, §65.

32 (2012) 295 ALR 147 at 188 [186].

33 (1813) 5 Taunt 143 at 162 per Mansfield CJ [128 ER 641 at 648–649].

law. Chief Justice Mansfield, reflecting the sweeping language of Lord Mansfield 50 years earlier in *Moses v Macferlan*, said[34]:

> "it would be most contrary to æquum et bonum, if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life, he increases his expences, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: is he then, five years and eleven months after, to be called on to repay it?"

11 It has been suggested that in formulating this broad legal standard for restitution, Lord Mansfield was informed variously by Roman law, by the writings of Lord Kames and by Chancery practice[35]. Its origin has been the subject of judicial and academic contention[36]. Associate Professor Swain has suggested that the roots of English hostility to an equitable explanation of *Moses v Macferlan* go back to the nineteenth century and can be related to sensitivities about the relationship between law and equity[37].

12 Whatever the combination of influences upon Lord Mansfield, his concepts of "ex æquo & bono", "unjust" retention, and "equity that will rebut the action", were not confined to equitable doctrines. Nevertheless, equitable principles played their part in this, as in other areas of his jurisprudence. As Gummow J observed in *Roxborough v Rothmans of Pall Mall Australia Ltd*[38]:

> "With varying degrees of success, Lord Mansfield sought to translate equitable principles, doctrines, and procedures into the trial of actions at law; this reflected his appreciation of equitable doctrine for its flexibility and adaptability to modern needs, particularly in commercial law. Then, as today, 'equity is the spur to new thought and further remedy, and ... provides a means of introducing new policies'." (footnotes omitted)

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34 (1813) 5 Taunt 143 at 162 [128 ER 641 at 649].

35 Swain, "Moses v Macferlan", in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Restitution*, (2006) 19 at 26–28.

36 See generally Swain, "Unjust Enrichment and the Role of Legal History in England and Australia", (2013) 36 *University of New South Wales Law Journal* 1030 at 1042–1044.

37 Swain, "Unjust Enrichment and the Role of Legal History in England and Australia", (2013) 36 *University of New South Wales Law Journal* 1030 at 1048.

38 (2001) 208 CLR 516 at 548 [84].

His Honour gave emphasis to the way in which "notions derived from equity have been worked into and in that sense have become part of the fabric of the common law."[39] In the light of that observation, Ashburner's metaphor of the common law and equity as two streams of jurisprudence which run side-by-side in the same channel and "do not mingle their waters"[40] seems at odds not only with commonsense[41], but also with the reality of equity's influence on the common law[42].

13 The general application of equitable considerations to restitutionary actions, and with them the availability of a general change of position defence, were denied by Lord Mansfield's judicial descendants[43]. Restitutionary remedies were linked to the fiction of an implied contract[44]. In 1914, Lord Sumner in *Sinclair v Brougham* said[45]:

> "There is now no ground left for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."

Earlier, in *Baylis v Bishop of London*[46], as Lord Justice Hamilton, his Lordship had spoken disparagingly of the vague jurisprudence "which is sometimes

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39 (2001) 208 CLR 516 at 554 [100], referring subsequently to *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 376 per Deane and Dawson JJ; [1993] HCA 4.

40 *Ashburner's Principles of Equity*, 2nd ed (1933) at 18.

41 "The metaphor does not work" — see Watt, *Trusts and Equity*, 5th ed (2012) at 13. As Windeyer J observed in *Felton v Mulligan* (1971) 124 CLR 367 at 392; [1971] HCA 39 "physical metaphors can be misleading when applied to concepts."

42 Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World", (1994) 110 *Law Quarterly Review* 238 at 238–240.

43 See eg *Standish v Ross* (1849) 3 Ex 527 [154 ER 954]; *Newall v Tomlinson* (1871) LR 6 CP 405; *Durrant v Ecclesiastical Commissioners* (1880) 6 QBD 234; see also Goff and Jones, *The Law of Restitution*, 3rd ed (1986) at 695–699.

44 Goff and Jones, *The Law of Restitution*, 5th ed (1998) at 5–11; see also *Goff & Jones, The Law of Unjust Enrichment*, 8th ed (2011) at 5–9.

45 [1914] AC 398 at 456.

46 [1913] 1 Ch 127.

attractively styled 'justice as between man and man.'"[47] On that question, conflicting views were expressed in academic writings. Professor Hanbury wrote dismissively in 1924 that "equity in the mouth of a common lawyer is apt to mean equity in its ethical and somewhat nebulous sense."[48] Professor Winfield, writing in 1937, observed sceptically that the implied contract theory then underlying restitution was itself based on "compensation upon equitable principles"[49]. It was not the foundation of liability in this area of the law but "only the facade of it."[50] At least in appearance, however, the tide was running the other way. In 1957, Professor Jones wrote, referring to *Baylis v Bishop of London* and other decisions[51]:

> "*Moses v Macferlan* and its equitable offspring of change of circumstances were regarded as the excesses of the fertile mind of Lord Mansfield, and delicately forgotten."

14 A detrimental change of position could support a defence of estoppel if other necessary elements were present. In *Holt v Markham*[52], the plaintiffs,

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47 [1913] 1 Ch 127 at 140; see also at 133 per Cozens-Hardy MR, 137 per Farwell LJ. See generally *Sinclair v Brougham* [1914] AC 398 at 454–455 per Lord Sumner.

48 Hanbury, "The Recovery of Money", (1924) 40 *Law Quarterly Review* 31 at 35.

49 Winfield, "Notes", (1937) 53 *Law Quarterly Review* 447 at 448, an observation supported by *Sinclair v Brougham* [1914] AC 398 at 432–433 in which Lord Dunedin said that the English fiction of contract and the Roman fiction of implied contract "recognize the equitable rule, and proceed to carry it out according to the forms of their own development." See also the references in the joint reasons at [75] to *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd* (1910) 12 CLR 515 at 531 per Barton J; [1910] HCA 50 and *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251 at 268 per Gibbs CJ; [1986] HCA 21.

50 Winfield, "Notes", (1937) 53 *Law Quarterly Review* 447 at 448. See also Stone, *Legal System and Lawyers' Reasonings*, (1964) at 258, 262 describing the use of the implied contract as an example of "concealed circular reference"; Aroney, "Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases", (2008) 31 *University of New South Wales Law Journal* 107 at 115.

51 Jones, "Change of Circumstances in Quasi-Contract", (1957) 73 *Law Quarterly Review* 48 at 58. He also cited *Durrant v Ecclesiastical Commissioners* (1880) 6 QBD 234.

52 [1923] 1 KB 504. See also *Kelly v Solari* (1841) 9 M & W 54 at 58 per Lord Abinger CB, 58–59 per Parke B, 59 per Gurney B, 59 per Rolfe B [152 ER 24

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seeking recovery of money paid under mistake, were held to be estopped from asserting mistake of fact[53]. Scrutton LJ, after referring to *Sadler v Evans*, adopted the "very pungent criticisms which Lord Sumner has made upon that now discarded doctrine of Lord Mansfield"[54]. Little room was left for a general change of position defence, which, outside the framework of estoppel, would necessarily depend upon Lord Mansfield's equity. The incompatibility of the change of position defence with the implied contract theory of restitutionary claims was pointed out in the decision of the Supreme Court of Canada in 1975 in *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd*[55]. Martland J, delivering the judgment of the Court, observed that if the claim for recovery of the money was founded upon *Moses v Macferlan*, then the recipient could "defend himself by everything which shows that the plaintiff *ex æquo et bono* is not entitled to the whole of his demand, or to any part of it."[56] Martland J added[57]:

> "If, however, the obligation to repay is contractual, it does not depend upon whether the requirement to repay is just and equitable."

In the event, the disparaging references, sceptical rejoinders, pejorative dismissals and pungent criticisms were soon to retire onto the well-populated field of "old, unhappy, far-off things, And battles long ago". New contentions arose about the theory, bases and limits of restitutionary recovery and defences against it. Professor Burrows, writing in 2004, described the law of restitution as "the most debated subject in English private law over the last ten years."[58]

15 The latter part of the twentieth century saw the rejection of the implied contract as the foundation for such claims and the rise of "unjust enrichment". In 1988, this Court in the ANZ Case held that the basis of the common law action of

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at 26]; *Standish v Ross* (1849) 3 Ex 527 at 533 per Parke B [154 ER 954 at 956–957]; *Sinclair v Brougham* [1914] AC 398 at 452 per Lord Sumner.

53 [1923] 1 KB 504 at 511 per Bankes LJ, 512–513 per Warrington LJ, 514–515 per Scrutton LJ.

54 [1923] 1 KB 504 at 513.

55 [1976] 2 SCR 147 at 162 per Martland J.

56 [1976] 2 SCR 147 at 162.

57 [1976] 2 SCR 147 at 162.

58 Burrows, "The English Law of Restitution: A Ten-Year Review", in Neyers, McInnes and Pitel (eds), *Understanding Unjust Enrichment*, (2004) 11 at 14.

money had and received for recovery of money paid under "fundamental mistake of fact" should be recognised as lying not in implied contract, but in restitution or unjust enrichment[59]. That followed upon the rejection of implied contract as a basis for the action on quantum meruit in *Pavey & Matthews Pty Ltd v Paul*[60].

16 While legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience, the action for money had and received was described in the ANZ Case as "a common law action for recovery of the value of the unjust enrichment"[61]. The change of position defence was recognised in that case in the context of recovery of money paid under a mistake of fact. The law imposed a prima facie liability on the recipient of a mistaken payment to make restitution and[62]:

> "[b]efore that prima facie liability will be displaced, there must be circumstances (eg, that the payment was made for good consideration such as the discharge of an existing debt or, arguably, that there has been some adverse change of position by the recipient in good faith and in reliance on the payment) which the law recognizes would make an order for restitution unjust."

So a concept of injustice, redolent of Lord Mansfield's equity, informed the right of recovery and, at the same time, qualified and limited it. That normative concept resembled what Professor Stone called a "legal standard" in a "category of indeterminate reference"[63], albeit a standard informing guiding criteria for particular classes of case.

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59 (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ.

60 (1987) 162 CLR 221 at 227 per Mason and Wilson JJ, 256–257 per Deane J; [1987] HCA 5; see also *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 356–357 per Mason CJ; *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65; [1957] HCA 69 discussed in the reasons of Gageler J at [127] and *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

61 (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ.

62 (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ.

63 Stone, *Legal System and Lawyers' Reasonings*, (1964) at 263-264.

17 Recognition of a general change of position defence for restitutionary claims, also rooted in a broad concept of "equity", followed in the United Kingdom in 1991 in the judgment of Lord Goff of Chieveley in *Lipkin Gorman v Karpnale Ltd*[64]. That recognition had been foreshadowed in his Lordship's judgment as Robert Goff J in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*[65]. In that case he held, as a matter of deduction from previous authority, that a claim for money had and received may fail if the payee "has changed his position in good faith, or is deemed in law to have done so."[66] In *Lipkin Gorman*, he formulated the defence broadly so as not to inhibit its development on a case-by-case basis[67]:

> "At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."

He was there dealing with change of position as a defence to restitutionary claims generally, albeit he accepted that the claim for recovery of money paid under a mistake of fact was a prominent example of a case in which the defence could be invoked[68]. That defence provided what Professor Burrows called[69]:

> "the normative balance to the strict liability imposed by unjust enrichment: the defendant can have no objection to the reversal of the enrichment provided it is left no worse off than if it had not been enriched in the first place."

Consistently with the flexibility of its foundation standard, the defence could be applied pro tanto. Relevantly to the present appeal, that flexibility is not constrained by a global limitation based on a quantitative or pseudo-quantitative concept of disenrichment. As explained below, disenrichment, as propounded by the late Professor Birks, is at best a circumstance which may define a class of

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64 [1991] 2 AC 548.

65 [1980] QB 677.

66 [1980] QB 677 at 695 — a proposition said to be supported in part by *Kleinwort, Sons, and Co v Dunlop Rubber Co* (1907) 97 LT 263 at 264 per Lord Loreburn LC.

67 [1991] 2 AC 548 at 580.

68 [1991] 2 AC 548 at 580.

69 Burrows, "Good Consideration in the Law of Unjust Enrichment", (2013) 129 *Law Quarterly Review* 329 at 330.

case in which recovery could be held to be inequitable. It is not a unifying rule for the change of position defence.

18 In Australia, the principle enunciated in *Barclays Bank* was quoted with approval in *David Securities Pty Ltd v Commonwealth Bank of Australia*[70]. This Court decided in that case that the rule precluding recovery of a payment made under a mistake of law, enunciated in *Bilbie v Lumley*[71], was not part of the common law in Australia[72]. As that "rule" had not been much debated in the earlier stage of proceedings in the Federal Court, the change of position defence, raised for the first time in this Court, was not supported by relevant findings of fact. The question of its application in the particular case was remitted to the Federal Court. However, in holding that change of position was available as a defence to a claim for money paid under mistake of law (and also under mistake of fact), the plurality referred to *Lipkin Gorman* and to academic support for the defence, particularly in light of the inflexibility of estoppel, which it was thought could not operate pro tanto[73]. The plurality relied also upon support for the defence in Canada[74] and the United States[75] and its statutory recognition in Western Australia and New Zealand[76]. In the event, their Honours held that[77]:

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70 (1992) 175 CLR 353 at 380 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

71 (1802) 2 East 469 [102 ER 448].

72 (1992) 175 CLR 353 at 376 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, 393, 399 per Brennan J, 402 per Dawson J.

73 (1992) 175 CLR 353 at 385 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ referring to *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. See also at 406 per Dawson J. In *Lipkin Gorman*, reference is made (at 579 per Lord Goff) to *Avon County Council v Howlett* [1983] 1 WLR 605; [1983] 1 All ER 1073 — but see the extended discussion of that case in Wilken and Ghaly, *The Law of Waiver, Variation, and Estoppel*, 3rd ed (2012) at [9.109]–[9.128].

74 (1992) 175 CLR 353 at 385 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ referring to *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1976] 2 SCR 147.

75 (1992) 175 CLR 353 at 385 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ referring to Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts §69(1).

76 (1992) 175 CLR 353 at 374 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ referring to *Property Law Act* 1969 (WA), ss 124 and 125; *Judicature Act* 1908 (NZ), ss 94A and 94B, inserted by the *Judicature Amendment Act* 1958

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> "the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the *faith of the receipt*." (emphasis in original) (footnote omitted)

19 This Court has subsequently held restitutionary claims against governments in respect of overpayments of tax or tax paid under an invalid law to be subject to the same general principles and has discussed those principles in that context[78]. In *Roxborough*, Gleeson CJ, Gaudron and Hayne JJ quoted with approval the observation of Mason CJ in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* that[79]:

> "Restitutionary relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant whereby the defendant has been unjustly enriched."

20 In discussing so-called "unjust enrichment theory" in *Roxborough*, in the context of claims for money had and received, Gummow J referred to Lord Mansfield's observation that[80]:

> "General rules are ... varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law."

(NZ). See also *Law Reform (Property, Perpetuities, and Succession) Act* 1962 (WA), s 24; *Trustees Act* 1962 (WA), s 65(8).

77 (1992) 175 CLR 353 at 385 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, see also at 405–406 per Dawson J.

78 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

79 (2001) 208 CLR 516 at 529 [26] quoting *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75; [1994] HCA 61.

80 (2001) 208 CLR 516 at 544 [73] quoting *Ringsted v Lady Lanesborough* (1783) 3 Doug KB 197 at 203 [99 ER 610 at 613].

Unjust enrichment came to be seen not as a principle of "direct application in a particular case"[81] but rather as a taxonomical concept[82]. It was not at large. As this Court said in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[83], it was not to be determined[84]:

> "by reference to a subjective evaluation of what is unfair or unconscionable: recovery rather depends on the existence of a qualifying or vitiating factor falling into some particular category." (footnote omitted)

That being said, the equitable norm underlying the concept of unjust enrichment is to be found in *Moses v Macferlan*. Neither that case nor subsequent authority precluded the emergence of "novel occasions of unjust enrichment supporting claims for restitutionary relief."[85]

Change of position as a pro tanto defence

21 In his writings on the topic of restitution over many years, Professor Birks argued against a wide application of the change of position defence by reference to whether recovery would be "inequitable". That criterion he regarded as "a wholly unanalysed conception of justice."[86] He proposed instead that the defence should be limited by a concept of "disenrichment", which "ties the defendant's liability to the amount of his extant gain"[87]. He proposed that every unjust enrichment claim should be subject to the defence of disenrichment, unless for

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81 *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 [85] per Gummow, Hayne, Heydon, Kiefel and Bell JJ; [2009] HCA 44; see also *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 665 [85] per Gummow, Hayne, Crennan and Kiefel JJ; [2008] HCA 27.

82 (2001) 208 CLR 516 at 544–545 [74].

83 (2007) 230 CLR 89; [2007] HCA 22.

84 (2007) 230 CLR 89 at 156 [150].

85 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30] per French CJ, Crennan and Kiefel JJ.

86 Birks, *Restitution — The Future*, (1992) at 127.

87 Birks, *Unjust Enrichment*, 2nd ed (2005) at 208.

some specific reason the defendant was deprived of its protection[88]. That strict approach, as he acknowledged, did not find support in the English authorities.

22 In *Dextra Bank & Trust Co Ltd v Bank of Jamaica*[89], Lord Bingham of Cornhill and Lord Goff, delivering the judgment of the Privy Council, characterised a change of position defence as[90]:

> "a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim, or to pursue it in full."

The variety of ways in which recipients might change position to their detriment on the faith of a receipt of a mistaken payment was emphasised by Robert Walker LJ in *Scottish Equitable plc v Derby*[91]. That variety militates against confinement of the defence to a quantitative "disenrichment" analysis[92]. Acknowledging judicial support for a more broadly stated basis of the defence, Professor Birks suggested that the safe tactic would be to divide the wide defence in two, between disenrichment and non-disenriching change of position[93].

23 As a general proposition, the change of position defence should be applied in a way that is faithful to its origins in *Moses v Macferlan*, reflected in the general rubric of "inequitable" recovery adopted in *Lipkin Gorman*. The acceptance of that standard as the foundation of the defence does not involve the acceptance of an arbitrary judicial discretion. The application of the standard on a case-by-case basis, according to the common law process, as foreshadowed by Lord Goff, allows for the development of criteria adapted to particular classes of case. Disenrichment may be used, with a narrower application than contemplated by Professor Birks, as a term descriptive of a subset of cases in which a pecuniary change of position is invoked against a claim for recovery of money paid under a mistake of fact or law. There are many areas of the common law and of statute law which require the case-by-case application of broadly stated legal rules and standards and the judicial development of guiding criteria

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88 Birks, *Unjust Enrichment*, 2nd ed (2005) at 209.

89 [2002] 1 All ER (Comm) 193.

90 [2002] 1 All ER (Comm) 193 at 205 [38].

91 [2001] 3 All ER 818 at 827 [32].

92 See *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [66]–[67], [71]–[72] per Munby J.

93 Birks, *Unjust Enrichment*, 2nd ed (2005) at 209.

of liability within them[94]. Such criteria may be inspired, may rise, and may be modified or displaced by the fruitful incremental interaction of advocacy, judicial reasoning, and academic suggestion and critique[95]. Rarely, however, do they yield all-encompassing rules for the application of a foundation standard or norm. The limited utility of disenrichment in change of position cases involving mistaken payments does not support its characterisation in the appellant's submissions as "the central core of the defence" but, at best, as a guiding criterion to its scope in particular cases. As Professor Bant has pointed out, there may be changes of position which are difficult or even impossible to value which are not, on that account, irrelevant for the purpose of the defence[96]. She has proposed a criterion of "irreversible detriment", which looks to detriment at the point of demand for recovery and encompasses irreversible pecuniary change of position. Such change would usually satisfy the disenrichment approach[97]. The requirement that detriment be assessed at the time of demand for repayment is justified by reference to the analogous requirement in estoppel explained by Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*[98]:

> "the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it."

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94 The statutory prohibitions of "misleading or deceptive conduct" and "unconscionable conduct" are examples in Australian law: *Competition and Consumer Act* 2010 (Cth), Sched 2 — Australian Consumer Law, ss 18, 20, 21, 22. See also *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 88 ALJR 261 at 270 [17]–[18] per French CJ, 283–284 [71]–[72] per Hayne J; 304 ALR 1 at 9–10, 27; [2013] HCA 50 in relation to judicial development of the criterion of patentability that the claimed invention be "a manner of manufacture within the meaning of s 6 of the Statute of Monopolies".

95 Proximity as a criterion of duty of care is an example — *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 210–212 [75]–[82] per McHugh J; [1999] HCA 36.

96 Bant, *The Change of Position Defence*, (2009) at 134. See also Edelman and Bant, *Unjust Enrichment in Australia*, (2006) at 320–321.

97 Bant, *The Change of Position Defence*, (2009) at 130–135. See also Edelman and Bant, *Unjust Enrichment in Australia*, (2006) at 322.

98 (1937) 59 CLR 641 at 674, McTiernan J agreeing at 682; [1937] HCA 58. See also *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at 830 [45] per Robert Walker LJ; *National Westminster Bank plc v Somer International (UK) Ltd* [2002] QB 1286 at 1309 [61] per Clarke LJ.

On the other hand, it could be argued that the normative foundation of the change of position defence would be consistent with an assessment of detriment at the point at which the recipient became aware that money it had received had been paid under a mistake. In this case, and probably in most cases, the distinction does not matter. There is no suggestion that the respondents became aware of the appellant's mistake until demand was made for repayment.

24 As Professor Bant points out, it is a difficulty with disenrichment as proposed by Professor Birks that it is to be assessed at the time at which the change of position occurred [99]. It may be that disenrichment is a criterion which, applied at the time of demand for repayment, defines a sufficient condition for the application of the change of position defence. It suffices to say, for present purposes, that irreversible detriment is a more useful and flexible guiding criterion to the examination of a change of position defence than disenrichment and is certainly more appropriate to the circumstances of this case.

25 Guiding criteria are indispensable to judicial decision-making in the application of broad normative standards to particular classes of case. Such decision-making is, in the end, a practical exercise. As McHugh J said in *Perre v Apand Pty Ltd*[100]:

> "attractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts arising from real life activities. While the training and background of judges may lead them to agree as to what is fair or just in many cases, there are just as many cases where using such concepts as the criteria for duty would mean that 'each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind'." (footnote omitted)

It is the practical exercise of the application of the standard, using the criterion of "irreversible detriment", that must now be considered. That consideration is necessarily undertaken within the factual framework of this case. It does not require an exploration of the limits of the concept of detriment for the purposes of this defence or the range of connections between detriment and receipt which would answer the requirement that change of position be "on the faith" of the

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99 Bant, *The Change of Position Defence*, (2009) at 135.

100 (1999) 198 CLR 180 at 211–212 [80].

receipt[101]. I agree with the observation in the joint reasons that detriment is not a narrow or technical concept[102].

The application of the change of position defence in the present case

26 The appellant's central proposition was that where the change of position relied upon by the recipient of a mistaken payment is a form of economic loss, including loss of an opportunity, the defence operates only to the extent of that value, which the court should determine as best it can. That proposition is too general and should not be accepted.

27 A recipient of a payment made under mistake may suffer a detriment by acting on the faith of the payment. If the detriment cannot be reversed at the time that demand is made of the recipient, the recipient can be said to have changed its position and to have a defence to a claim for repayment of the money as money had and received. Whether or not the defence is available depends upon whether it would be inequitable for the recipient to refuse to repay the money. That is a judgment which the recipient, properly advised, must be able to make within a reasonable time and at a reasonable cost.

28 Some such judgments will be straightforward. The recipient of $100,000 who has paid it into a bank account and who has given $2,000 to a charity may readily conclude that it should repay $98,000 to the payer. On the other hand, a recipient who has, on the strength of the payment, decided not to pursue its legal rights against a third party may have a more difficult task, particularly where time has passed since the receipt of the payment and actions taken on the faith of it. The question whether the defence should operate pro tanto in such a case may depend upon the extent to which the detriment suffered by the recipient is quantifiable when demand is made. Where a loss of economic opportunity is concerned, it is not sufficient to say that courts frequently assess loss of opportunity as an aspect of tortious damages. The criterion for judging change of position must be capable of practical application. If not, it departs from the norm which underlies it. It also tends to undermine the stability and finality of transactions, necessarily qualified by the action for money had and received, of which the defence is protective[103].

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101 Gummow, "Moses v Macferlan: 250 years on", (2010) 84 *Australian Law Journal* 756 at 761–762.

102 Joint reasons at [88]. See discussion in Edelman and Bant, *Unjust Enrichment in Australia*, (2006) at 322.

103 Joint reasons at [92].

29 In this case, at the time when the appellant demanded repayment, the respondents had suffered economic detriment of a kind that falls well within the class of detriment relevant to the change of position defence. Whatever prospect had existed of the respondents recovering all or part of the moneys owed to them by TCP before the appellant made the payments in August and September 2009, it no longer existed. The existence of that detriment did not depend upon whether the debts owed to the respondents by TCP could be said to have been discharged or released, irreversibly or otherwise. The detriment was attributable in part to the passage of time from when the payments were made to the date of demand. That is not to say the delay was the appellant's fault. Fault is not relevant to the outcome of this appeal.

30 Any attempt to value the detriment suffered by the respondents would involve the consideration of more than one counterfactual with varying degrees of probability. There are, as the plurality observed in *Sellars v Adelaide Petroleum NL*[104]:

> "peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts."

The extent of the defence of change of position is not to be determined according to the outcome of an exercise which can only be undertaken long after demand is made and which involves an elaborate and potentially expensive process of assessment. I agree also with the rejection in the joint reasons of the contention that it is appropriate to apply to a detriment constituted by loss of economic opportunity, the kind of valuation approach undertaken in an assessment of damages for loss of opportunities[105]. Such assessments are undertaken upon an entirely different basis from that which informs the change of position defence[106].

31 The respondents' change of position in this case was a complete defence to the claims made by the appellant. It is therefore unnecessary to consider other matters raised in the judgment of the Court of Appeal and on the notice of contention.

Conclusion

32 The appeal should be dismissed with costs.

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104 (1994) 179 CLR 332 at 355 per Mason CJ, Dawson, Toohey and Gaudron JJ; [1994] HCA 4.

105 Joint reasons at [83].

106 Joint reasons at [83].

33 HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. The question in this appeal is whether, in the circumstances of the case, a claim to recover money paid by mistake should have been refused because of the recipients' change of position.

34 The essential facts which gave rise to this question may be shortly stated. The payer, a financier, made payments to suppliers of goods who were trade creditors of a customer of the payer. The payer was induced to make these payments by the fraud of the customer. At the customer's request, the recipients applied the payments to the discharge of the customer's debts. When the payer discovered the fraud and demanded repayment, the recipients resisted the claim on the basis that they had changed their position on the faith of the payments.

35 Between the receipt of the payments and the payer's demand on the recipients for repayment more than six months elapsed, during which time each recipient treated the debts previously owed by the customer as repaid, ceased to pursue repayment of those debts from the customer and continued to trade with it. The payer also continued to trade with the customer. The customer itself continued to trade with other businesses.

36 The recipients' reliance upon the actions which they took, consequent upon the receipt of the monies mistakenly paid by the payer, as making out a defence of change of position, directs attention to the question whether they would suffer a detriment if they were required to repay. The payer's principal contention was that a conclusion on this question could not be reached by reference only to abandonment of the opportunity to recover the debts owed by the customer and the mere entry into further transactions. It was necessary to value what had been lost in order to determine whether a recipient was "worse off" in economic terms and this had not been done.

37 The payer's contention enjoyed mixed success at trial[107] but was rejected by the Court of Appeal of New South Wales[108].

38 The payer appealed to this Court. For the reasons which follow, the payer's appeal should be dismissed.

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107 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555; [2011] NSWSC 267.

108 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147.

Background

39 The appellant, Australian Financial Services and Leasing Pty Ltd ("AFSL"), was a business financier and the respondents, Hills Industries Ltd ("Hills") and Bosch Security Systems Pty Ltd ("Bosch"), were manufacturers and suppliers of commercial equipment.

40 In August and September 2009, Mr Skarzynski, a director and shareholder of various companies in the Total Concept Projects group (referred to collectively as "TCP"), created false invoices suggesting the purchase of equipment by TCP from each of Hills and Bosch[109]. He presented these false invoices to AFSL. AFSL agreed to purchase the equipment and lease it back to TCP[110].

41 AFSL paid the amounts of each invoice directly to Hills and Bosch respectively, by electronic transfers[111]. AFSL's documentation did not manifest an intention to discharge TCP's debt to Hills or Bosch[112]; but, as requested by Mr Skarzynski, each of Hills and Bosch credited TCP's accounts with the amount of the payments[113].

42 AFSL, in making the electronic transfers, was acting under the mistaken impression that it was paying for the purchase of the equipment for the purposes of leasing it back to TCP. In truth, the items of equipment referred to in the false invoices did not exist. Nevertheless, from time to time, TCP made payments to

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109 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 558 [4]-[5].

110 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 559 [8]-[10].

111 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 559 [11].

112 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 153 [23].

113 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 149 [5].

AFSL under the lease agreements[114]. Mr Skarzynski's fraud went undetected until late March or early April 2010, when AFSL discovered its mistake[115].

43 During October, November and December 2009, before discovering its mistake, AFSL entered into further lease agreements with TCP[116]. In early November 2009, AFSL took secured guarantees from Mr Skarzynski and his associates in respect of TCP's obligations under the various subsisting lease agreements[117]. In February 2010, Mrs Skarzynski executed a mortgage over the Skarzynskis' home at Strathfield in support of TCP's obligations[118]. On 27 September 2012, the Supreme Court of New South Wales ordered that $512,000, being the net proceeds of the sale of the property, be paid to AFSL, together with any interest accrued on that amount[119].

44 On 12 April 2010, the Commonwealth Bank of Australia, a secured creditor of TCP, appointed receivers and managers to TCP[120]. And on 5 July 2010, a liquidator was appointed to TCP[121]. On 22 July 2010, a sequestration

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114 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 149 [6].

115 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 157 [48].

116 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 155-156 [38]-[41].

117 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 155 [39].

118 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 156 [46], 157 [53].

119 *Australian Financial Services and Leasing Pty Ltd v All Up Finance Pty Ltd* [2012] NSWSC 1004.

120 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 157 [50].

121 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 157 [54].

order was made in relation to the estate of Mr Skarzynski[122]. In relation to TCP, the liquidator's report of 27 July 2010 stated that its total realisable assets were zero, and that its total liabilities were $11,143,322.

45 On or about 6 April 2010, AFSL made demand upon each of Hills and Bosch for repayment of the money it had paid to them by mistake[123]. Each rejected the demand and AFSL commenced proceedings. It claimed that the payments had been mistakenly made and that Hills and Bosch had therefore been unjustly enriched[124].

46 Hills and Bosch each resisted AFSL's claim on the basis of their change of position. In particular, they relied upon the application of the payments to the discharge of TCP's debts, and upon the circumstances that they ceased pursuing the recovery of the debts and continued to trade with TCP. It is convenient to refer to these circumstances in greater detail in the course of summarising the decisions of the primary judge and of the Court of Appeal.

Decision of the primary judge

47 The primary judge (Einstein J) held that, as against each of the recipients, AFSL was prima facie entitled to restitution of the amount mistakenly paid (less some deductions, which, given that AFSL's appeal must be dismissed, need not be considered).

48 Hills applied the money it received from AFSL on 25 August 2009 to discharge TCP's existing debt of $308,000[125]. Hills' case was that, if the payment of 25 August 2009 had not been received, Hills would have pressed

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122 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 157 [55].

123 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 149 [6], 157 [49].

124 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 559-560 [15]-[19].

125 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 153 [28].

Mrs Skarzynski for a mortgage of land owned by her[126] and commenced recovery proceedings against TCP and the guarantors of its indebtedness to Hills[127]. Hills, having received payment, did not pursue these courses of action, but reopened TCP's account, advanced further credit and continued to supply equipment to TCP on credit[128]. In April 2010, when the fraud was discovered, TCP owed Hills an amount of $21,739.03[129].

49 The primary judge rejected[130] Hills' defence of change of position. Given "the precarious financial position of TCP and the extent to which it is unlikely that given TCP's debts and other creditors Hills would have been able to recover significant sums from TCP", Hills had "failed to show any real detriment arising out of a change of position."[131]

50 On the other hand, the primary judge held that Bosch had made out its change of position defence because it was able to establish "real detriment by way of actual extinguishment of [a] legal claim to TCP's property."[132] In this regard, by mid-May 2009, TCP owed Bosch approximately $193,000 and Bosch

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126 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 565-566 [74]; *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 153-154 [29].

127 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 152 [19], 153-154 [29], 186 [176].

128 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 153 [28].

129 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 153 [28], 186 [176].

130 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 566 [77].

131 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 566 [76]-[77].

132 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 576 [150].

had ceased to supply TCP other than on the basis of cash on delivery[133]. Bosch had obtained a number of default judgments against TCP and its directors and shareholders in July and August 2009[134]. By 28 August 2009, Bosch had placed garnishee orders on the bank accounts of TCP[135]. On 2 September 2009, TCP's solicitor requested a stay of certain garnishee orders on the basis that $198,000 would be paid within 48 hours[136]. On 3 September 2009, Bosch received payment of $198,000 from AFSL[137]. On 15 September 2009, Bosch consented to the setting aside of the default judgments and discontinued its proceedings against TCP[138].

51 AFSL appealed against the decision of the primary judge to uphold Bosch's change of position defence. Hills appealed against the decision of the primary judge to reject its change of position defence.

The decision of the Court of Appeal

52 The Court of Appeal (Bathurst CJ, Allsop P and Meagher JA) dismissed AFSL's appeal and allowed Hills' appeal.

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133 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 573 [117].

134 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 573 [118]-[119]; *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 151 [14].

135 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 573 [121]; *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 151 [14].

136 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 151 [15].

137 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 574 [125]-[126].

138 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 574 [129].

53 Allsop P (with whom Bathurst CJ[139] and Meagher JA[140] agreed on this point) upheld[141] the defence of change of position based on the view that each of Hills and Bosch had lost a valuable opportunity to pursue its claims against TCP and was unable to demonstrate the extent of the detriment resulting from that loss of opportunity.

54 Allsop P rejected[142] the view that "purely monetary and expenditure based considerations" determine the availability of the change of position defence. Allsop P said[143] that "to require the measurement of the payee's position in terms only of the currency of the payer's mistake may unfairly or mechanically restrict the just reconciliation of the competing rights." In his Honour's view, restitution's "equitable roots … tend against overly constricting the operation of the defence by requiring in all circumstances proof of sums certain as irreversibly lost on the faith of the receipt."[144]

55 It is not without importance that these transactions took place in a commercial context. The issue to be determined does not involve the simple receipt and retention by an individual of the benefit of the mistaken payment. All the parties to the transactions were involved in trade. Further, the primary judge declined to make any finding adverse to the parties by reference to their conduct in trade[145]. The conduct of parties in their business dealings and the extent of any

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139 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 149 [1]-[3].

140 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 195 [215]-[216].

141 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 179 [148], 181-182 [156]-[157], 183 [165].

142 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 181 [153].

143 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 181 [153].

144 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 181 [154].

145 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 562 [33], [41], 573 [114]-[115].

risk assumed by them may, in some cases, be relevant to the question whether it is inequitable to deny recovery or require repayment of monies[146]. But in this case, the primary judge relevantly considered that, having regard to "commercial realities", neither Hills' nor Bosch's conduct was commercially unacceptable[147]. It would appear that his Honour had in mind that the exigencies of business constrained the possibility of "a thorough, or indeed any, investigation as to the original source of the funds or their true ownership at the time of their receipt."[148]

56 On AFSL's behalf, complaint was directed to the observation by Allsop P[149] that AFSL could "be seen to be responsible to some real degree for its own predicament, both in the making of the mistake and in the time it has taken to retrieve the effects of the mistake". It was said on behalf of AFSL that this criticism was unfounded, given that the primary judge rejected any suggestion that AFSL "had acted inappropriately at any stage" and found that "[w]hen the fraud was discovered [AFSL] acted as quickly as practicable in the circumstances."[150] AFSL went on to argue that this unwarranted attribution of fault to AFSL by Allsop P affected his Honour's conclusion adversely to it on this point. In this regard, Allsop P referred[151] to the circumstance that the opportunities previously available to Hills and Bosch to enforce or secure payment of the debts owed to them by TCP "cannot now be taken" and that those opportunities have been "arrogated to the benefit of AFSL" by its taking of

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146 See *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] 2 All ER (Comm) 705 at 741 [135]; *Abou-Rahmah v Abacha* [2007] 1 All ER (Comm) 827 at 840-841 [48], 855-856 [99].

147 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 562 [41], 573 [114]-[115].

148 *Port of Brisbane Corporation v ANZ Securities Ltd (No 2)* [2003] 2 Qd R 661 at 673 [17].

149 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 181 [153].

150 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555 at 562 [33].

151 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 184 [165].

security. Allsop P observed[152] that "[t]he events of the 6 months cannot be undone" and further that, while it may be speculative to ascribe "a precise monetary value" to the opportunities forgone by Hills and Bosch, "the difficulty in that regard stems from the timing and duration of AFSL's mistake. This length of time (inimical to the security of receipt of Bosch and Hills), and the difficulty of proof flowing from it, are relevant to the sufficiency of what has been proved in the assessment of injustice".

57 It is apparent that AFSL goes too far in suggesting that Allsop P reached his conclusion on this aspect of the case by the attribution of blame to AFSL for its delay in discovering the fraud. His Honour regarded the length of time taken to discover the fraud, and the circumstance that AFSL took the opportunity during this period to seek the benefit of security for TCP's indebtedness, as matters of fact which bear upon the question whether it would have been inequitable to require Hills and Bosch to repay AFSL when it made its demand. But his Honour's reasoning does not suggest that the attribution of any commercial impropriety to AFSL affected his conclusion. In this regard, Allsop P said[153]:

> "that Hills and Bosch gave up, on the faith of the receipt, both the debts owed by the TCP companies by way of discharge and a real and potentially valuable commercial opportunity to enforce or secure payment from their trade debtors. It would, in my view, be unjust between these commercial parties in this commercial context to order repayment of the sums received."

58 Allsop P also held that each of Hills and Bosch was entitled to resist AFSL's claim, "irrespective of the assessment of the then commercial worth of the TCP debt, either because of a bona fide discharge or because such, with the payment away, can be seen as a change of position."[154]

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152 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 184 [165].

153 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 184 [165].

154 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 179 [145].

59 Meagher JA did not agree with Allsop P that Hills and Bosch were entitled to succeed on the basis of a separate defence of bona fide discharge of debt[155]. Meagher JA held that the discharge by each of Hills and Bosch of the debts owed to it by TCP gave rise to a defence of change of position because it was equivalent to each of them paying the monies received from AFSL to TCP and receiving the money back in discharge of the debt[156].

60 It may be noted from the discussion of the defence of bona fide discharge of debt in the Court of Appeal that it would appear that no question was raised as to whether the discharge may have been reversible as between the recipients and TCP or its liquidator by reason of the circumstance that the payments were procured by the fraud of TCP.

AFSL's argument in this Court

61 AFSL submitted that the position of each of Hills and Bosch was a case of bare receipt, not a receipt associated with or related to a valid legal transaction. The enquiry should be into the net enrichment of each recipient as a result of the receipt. On that basis, a court presented with a change of position defence based on the discharge of a debt, or loss of an opportunity to recover payment of a debt, must place a value on the debt which is repaid, or upon the lost opportunity to recover the debt, because the defence operates only pro tanto to the extent of that proven value. Otherwise, the recipient will remain unjustly enriched by the mistaken payment.

62 AFSL submitted that, in this case, the debts owed by TCP to Hills and Bosch were worthless because TCP was unable to pay. The opportunities to recover payment by enforcing or securing repayment were therefore of minimal value. Accordingly, it was submitted that it would be unjust to permit Hills and Bosch to retain the whole of the mistaken payments and that the Court of Appeal erred in dispensing with the need for a recipient to prove, on the balance of probabilities, that its change of position caused any detriment and the extent of that detriment. Since Hills and Bosch did not part with any money in treating TCP's debts as discharged, they ought to be seen as having given away nothing of value.

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155 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 191-192 [199]-[200].

156 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 194-195 [209]-[214].

63 It is worth observing that, whilst AFSL argued that TCP's debts to Hills and Bosch and their choses in action were valueless at the time AFSL made demand, AFSL itself continued to trade with TCP and receive monies from it between the time of the mistaken payments and demand.

64 It should be emphasised that AFSL did not suggest on this appeal that the actions of Hills or Bosch were commercially unacceptable. Nor did Hills or Bosch suggest AFSL's actions in making the payments ought to be so characterised. As in the Court of Appeal, the relevant findings of the primary judge were not challenged.

The relevant enquiry: whether retention of monies unconscionable

65 The entitlement to recover money mistakenly paid to another in an action for money had and received has its roots in the decision of the Court of King's Bench led by Lord Mansfield in *Moses v Macferlan*[157]. Lord Mansfield expressly founded the action to recover money had and received to the use of the payer on the notion that retention of the money by the payee would be "against conscience"[158].

66 Lord Mansfield explained[159] that, in the case of mistaken payment, a plaintiff need not show special circumstances and may simply declare that the money was received by another to his use. His Lordship went on to say that, equally beneficially, a defendant "may go into every equitable defence, upon the general issue; he may claim every equitable allowance; … in short, he may defend himself by every thing which shews that the plaintiff, ex aequo et bono, is

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157 (1760) 2 Burr 1005 [97 ER 676]. See Gummow, "Moses v Macferlan: 250 years on", (2010) 84 *Australian Law Journal* 756. It is not necessary to trace in any detail the general history of the development of the law in this area. A description of the history can be found in several places, including, for example, Jackman, "Why the History of Restitution Matters", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law, Volume II: Commercial Common Law*, (2013) 234.

158 (1760) 2 Burr 1005 at 1011 [97 ER 676 at 680].

159 (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

not intitled to the whole of his demand, or to any part of it." In *Sadler v Evans*[160], it was said that "[t]he defence is any equity that will rebut the action."

67 Thus, in *David Securities Pty Ltd v Commonwealth Bank of Australia*[161], it was said that payment caused by mistake is sufficient to give rise to a prima facie obligation on the part of the recipient to make restitution. Before that prima facie liability is displaced, the recipient must point to circumstances which would make an order for restitution unjust. In words which echo those of Lord Mansfield in *Moses v Macferlan*, it was said that, in order to show that retention of the payment is not unjust, the recipient is entitled to raise "by way of answer any matter or circumstance".

68 There can be no denying the equitable roots of the principle by which a claim for restitution of money had and received to the use of the payer is to be determined. In *Dale v Sollet*[162], Lord Mansfield said of the action: "This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience and equity entitled to". In *Clarke v Shee*[163], his Lordship referred to the action as "a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action."

69 In *Roxborough v Rothmans of Pall Mall Australia Ltd*[164], Gummow J explained that the "equitable notions" of which Lord Mansfield wrote have been absorbed into the "fabric of the common law" right of action for money had and received. In this regard, it is to be noted that any reference to equitable notions does not invite a balancing of competing equities as between the parties, based on considerations such as fault. The question here is whether it would be inequitable in all the circumstances to require Hills and Bosch to make restitution. The answer to that question is not at large, but neither is it simply a

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160 (1766) 4 Burr 1984 at 1986 [98 ER 34 at 35].

161 (1992) 175 CLR 353 at 379; [1992] HCA 48.

162 (1767) 4 Burr 2133 at 2134 [98 ER 112 at 113].

163 (1774) 1 Cowp 197 at 199-200 [98 ER 1041 at 1042].

164 (2001) 208 CLR 516 at 554-555 [100]; [2001] HCA 68.

measure of the monetary extent to which the recipient remains enriched by the receipt at the time of demand for repayment.

70 In the United States, in *Atlantic Coast Line Railroad Co v Florida*[165], Cardozo J said:

> "The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."

71 The continuing influence of Lord Mansfield's view that the cause of action for money had and received depends on legal rules framed by reference to considerations of good conscience is also apparent in the judgment of Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[166] and in the decision of the Supreme Court of the United States in *Great-West Life & Annuity Insurance Co v Knudson*[167].

72 In *Lipkin Gorman (a firm) v Karpnale Ltd*[168], Lord Goff of Chieveley stated that a defendant may rely upon a defence of change of position whenever "it would be inequitable in all the circumstances to require him to make restitution". Lord Templeman referred[169], with evident approval, to the observations of Lord Wright in *Fibrosa* in a way which suggests that Lord Templeman identified an unjust enrichment as a benefit that it would be against "conscience" to retain.

73 *Lipkin Gorman* also proceeded upon the basis that English law had accepted unjust enrichment as a legal principle to be applied as a ground for liability. By reference to what was said by Lord Goff in that case respecting the

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165 295 US 301 at 309 (1935).

166 [1943] AC 32 at 63.

167 534 US 204 at 213-214 (2002).

168 [1991] 2 AC 548 at 580. See also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 405-406; *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at 204 [36].

169 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 559.

defence of change of position[170], it would appear that the principle of unjust enrichment may have been intended to operate more widely than the action for money had and received, which requires the presence of vitiating factors such as mistake. In *David Securities*[171], the submission that unjust enrichment was a definitive legal principle was rejected. That position has since been maintained consistently by this Court[172]. In *Friend v Brooker*[173], it was said that the concept of unjust enrichment was not a principle supplying a sufficient premise for direct application in a particular case. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[174], it was commented that there was potential for unjust enrichment as a principle to distort equitable doctrine and to generate new fictions. In *Roxborough*[175], Gummow J pointed out that:

> "[S]ubstance and dynamism may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things. Then various theories will compete, each to deny the others."

74 More recently, *Equuscorp Pty Ltd v Haxton*[176] confirmed that unjust enrichment does not found or reflect any "all-embracing theory of restitutionary

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170 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 578.

171 (1992) 175 CLR 353 at 378.

172 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151]; [2007] HCA 22; *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 665 [85]; [2008] HCA 27; *Friend v Brooker* (2009) 239 CLR 129 at 141 [7]; [2009] HCA 21; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 [86]; [2009] HCA 44.

173 (2009) 239 CLR 129 at 141 [7].

174 (2007) 230 CLR 89 at 156 [151].

175 (2001) 208 CLR 516 at 545 [74].

176 (2012) 246 CLR 498 at 516 [30] per French CJ, Crennan and Kiefel JJ; [2012] HCA 7.

rights and remedies"[177]. That case identified unconscionability as relevant and as derived from general equitable notions which find expression in the action for money had and received[178]. As this Court acknowledged in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*[179], "contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience".

75 In Australia, the equitable roots of the action for money had and received were early recognised in *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd*[180]. There, Barton J observed[181] that recovery "depends largely on the question whether it is equitable for the plaintiff to demand or for the defendant to retain the money." In *National Commercial Banking Corporation of Australia Ltd v Batty*[182], Gibbs CJ said:

> "Whether the action is based on an implied promise to pay, or on a principle designed to prevent unjust enrichment, the emphasis on justice and equity in both old and modern authority on this subject supports the view that the action will not lie unless the defendant in justice and equity ought to pay the money to the plaintiff".

76 This is not to suggest that a subjective evaluation of the justice of the case is either necessary or appropriate. The issues of conscience which fall to be resolved assume a conscience "properly formed and instructed"[183] by established equitable principles and doctrines. As was said in *Kakavas v Crown Melbourne*

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177 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [72] per Gummow J.

178 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 517 [32].

179 (1988) 164 CLR 662 at 673; [1988] HCA 17.

180 (1910) 12 CLR 515; [1910] HCA 50.

181 *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd* (1910) 12 CLR 515 at 531.

182 (1986) 160 CLR 251 at 268; [1986] HCA 21.

183 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 227 [45]; [2001] HCA 63.

Ltd[184], "[t]he conscience spoken of here is a construct of values and standards against which the conduct of 'suitors' – not only defendants – is to be judged[185]."

Change of position and detrimental reliance

77 As Gummow J, writing extra-judicially, has said[186]: "[I]t is important to appreciate that 'change of position' is a species of the genus 'inequitable', not a synonym for it." One category of case in which it would be inequitable to require a recipient to repay is where the recipient has so far altered its position in relation to the receipt that it would be a detriment to it if it were now required to repay.

78 The approach argued by AFSL does not involve an enquiry as to whether it would be inequitable to require the recipient to repay. Instead, AFSL's approach focuses upon the extent to which Hills and Bosch have been "disenriched"[187] subsequent to the receipt. This approach seeks to give effect to an understanding of unjust enrichment as a principle of direct application, which operates by measuring the extent of enrichment or, where a defence of change of position is invoked, the extent of disenrichment subsequent to that receipt. Such a "principle" does not govern the resolution of this case because the concept of unjust enrichment is not the basis of restitutionary relief in Australian law. The principle of disenrichment, like that of unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia. Disenrichment operates as a mathematical rule whereas the enquiry undertaken in relation to restitutionary relief in Australia is directed to *who* should properly bear the loss and *why*. That enquiry is conducted by reference to equitable principles.

79 In §65 of the *Restatement of the Law Third, Restitution and Unjust Enrichment*, under the rubric "Change of Position", the American Law Institute states:

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184 (2013) 87 ALJR 708 at 713 [16]; 298 ALR 35 at 39; [2013] HCA 25.

185 Gummow, *Change and Continuity: Statute, Equity, and Federalism*, (1999) at 44-51.

186 Gummow, "Moses v Macferlan: 250 years on", (2010) 84 *Australian Law Journal* 756 at 760.

187 Birks, *Unjust Enrichment*, 2nd ed (2005) at 208-212. See also Burrows, *The Law of Restitution*, 3rd ed (2011) at 526-527.

> "If receipt of a benefit has led a recipient without notice to change position in such manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient's liability in restitution is to that extent reduced."

80 In *Lipkin Gorman*[188], Lord Goff used similar language in explaining the basis of the change of position defence:

> "[W]here an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution."

81 In *David Securities*, reference was made to what was said in *Lipkin Gorman* concerning the defence. It was observed[189] that in *Lipkin Gorman*, Lord Bridge of Harwich, Lord Ackner and Lord Goff said that the defence should be recognised by English law but declined to define its scope. However, in *David Securities* the "central element" of the defence was identified as being "that the defendant has acted to his or her detriment on the *faith of the receipt*[190]" (emphasis in original). Whether English cases subsequent to *Lipkin Gorman* have taken a wider view of the defence, one which eschews a requirement of detrimental reliance in favour of a mere causal link[191], cannot alter what was said in *David Securities* regarding the defence. Whether the conclusion reached in the English cases, including *Lipkin Gorman*, is different from that which would be reached by reference to equitable principles is a moot point. In any event, consistently with an enquiry as to whether it is unconscionable for the recipient to retain the monies, it is necessary in cases such as the present to consider what was done by the recipient in reliance upon the receipt.

82 In *David Securities*, in the passage in which reference is made to a recipient acting on the faith of the receipt, it was said that a common element in

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188 [1991] 2 AC 548 at 579.

189 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385.

190 Birks, *An Introduction to the Law of Restitution*, (1989) at 410.

191 *Scottish Equitable plc v Derby* [2001] 3 All ER 818 (CA); *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663.

cases in Canada and the United States, where the defence has been accepted, is that it is necessary that the defendant point to "expenditure or financial commitment" which can be ascribed to the mistaken payment[192]. The passage does not provide precise direction as to the resolution of the issue in this case, but it is tolerably clear that their Honours did not suggest that the defence was available only to a recipient who was able to demonstrate monetary disenrichment on the faith of the mistaken payment.

83 AFSL argued that it is necessary and appropriate to assess, forensically, the value of TCP's debts to Hills and Bosch, or their prospects of recovery, in order to measure the extent to which they remained enriched by AFSL's mistaken payments. AFSL's argument in this regard relied upon cases such as *The Commonwealth v Amann Aviation Pty Ltd*[193] and *Sellars v Adelaide Petroleum NL*[194]. However, these cases concerned the assessment of damages by way of compensation for breach of contract or statutory or common law norms of conduct predicated upon proof of loss by reason of the breach. Here, Hills and Bosch had done AFSL no wrong that gave rise to an obligation to compensate AFSL for the loss suffered by it as a result. As Lord Goff observed in *Lipkin Gorman*, restitutionary claims are not founded upon a wrong done to the payer[195].

84 More importantly, under Australian law, a mathematical assessment of enduring economic benefit does not determine the availability of restitutionary remedies. The equitable doctrine which protects expectations, with which the notion of "detriment" is associated, is not concerned with loss caused by a wrong or a breach of promise[196]. As Deane J observed in *The Commonwealth v Verwayen*[197], "[e]quity has never adopted the approach that relief should be

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192 *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1976] 2 SCR 147 at 164; *Grand Lodge, AOUW of Minnesota v Towne* 161 NW 403 at 407 (1917).

193 (1991) 174 CLR 64, especially at 83-84, 89-94, 100-104, 112-113, 118-126, 138, 145-147, 157-158; [1991] HCA 54.

194 (1994) 179 CLR 332 at 349-350, 368; [1994] HCA 4.

195 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 578.

196 *Crabb v Arun District Council* [1976] Ch 179 at 198-199; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 415, 429; [1990] HCA 39.

197 (1990) 170 CLR 394 at 448.

framed on the basis that the only relevant detriment … is that which is compensable by an award of monetary damages." The equitable doctrine concerning detriment is concerned with the consequences that would enure to the disadvantage of a person who has been induced to change his or her position if the state of affairs so brought about were to be altered by the reversal of the assumption on which the change of position occurred[198]. On this view, the injustice which precludes such a result lies in the disadvantage which would result to the recipient if the payer were to be permitted to recover payments as mistakenly made where they have been applied by the recipient.

85 This view accords with the understanding of detrimental reliance sufficient to ground an estoppel, as explained in *Grundt v Great Boulder Pty Gold Mines Ltd*[199] by Dixon J. The fundamental purpose of an estoppel is to provide protection against the detriment which would flow from a party's change of position if the assumption which led to it were deserted[200].

86 While it may be accepted that estoppel affords a level of protection to expectations different from that afforded by the change of position defence[201], and estoppel is also concerned with the manner in which expectations are created, both estoppel and the defence are grounded in that body of equitable doctrine that prevents the unconscientious assertion of what are said to be legal rights[202]. In *Grundt*, Dixon J explained the precise ground on which estoppel

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198 *Legione v Hateley* (1983) 152 CLR 406 at 437; [1983] HCA 11; *Riches v Hogben* [1985] 2 Qd R 292 at 300-302; *Giumelli v Giumelli* (1999) 196 CLR 101 at 121-124 [35]-[44]; [1999] HCA 10; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at 486 [5], 491 [41]-[42].

199 (1937) 59 CLR 641 at 674-675; [1937] HCA 58. See also *Prime Sight Ltd v Lavarello* [2014] 2 WLR 84; [2013] 4 All ER 659.

200 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 410.

201 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 579.

202 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 33; [1963] HCA 21; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 415, 429, 445; cf *Crabb v Arun District Council* [1976] Ch 179 at 195, 198-199; *Riches v Hogben* [1985] 2 Qd R 292 at 300-302.

precludes an otherwise good claim. Although lengthy, it is worthwhile setting his Honour's explanation out in full[203]:

> "[I]t is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice."

87 It will be observed that Dixon J saw that a party's position, which had changed on the basis of an assumed state of affairs that is now sought to be altered, provided the necessary detriment. The passage makes clear that the detriment must flow from reliance upon that assumption[204], when that assumption is to be departed from.

88 Detriment has not been considered to be a narrow or technical concept in connection with estoppel. So long as it is substantial, it need not consist of expenditure of money or other quantifiable financial detriment, as Robert Walker LJ observed in *Gillett v Holt*[205]. His Lordship went on to say that the requirement of detriment must be approached as "part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the

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203 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674-675.

204 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 415.

205 [2001] Ch 210 at 232-233, referring with approval to *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.

circumstances." In the context of mistaken payments, the question is whether it would be unconscionable for a recipient who has changed its position on the faith of the receipt to be required to repay.

89 *Campbell*[206] is an example of a case where the continuance of an assumed state of affairs in business over a period of time and the disruption which would be caused if one or more payments were to be corrected were held to be determinative. Griffith CJ held[207] that it would be inequitable to require repayment from the defendant, which had, over a long time, received mistaken payments on a regular basis and took them into account in estimating and directing annual profits. His Honour dismissed the plaintiff's action for money had and received.

90 In *London and River Plate Bank v Bank of Liverpool*[208], Mathew J referred to the detrimental effect of the passage of time in the context of business:

> "A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment … but even in such a case it is manifest that the position of a man of business may be most seriously compromised, even by the delay of a day."

91 In *Lipkin Gorman*[209], Lord Goff referred to *London and River Plate Bank* as, on one possible view, an example of the change of position defence. These considerations have also, as Meagher JA observed below[210], influenced courts in

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206 (1910) 12 CLR 515.

207 *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd* (1910) 12 CLR 515 at 525.

208 [1896] 1 QB 7 at 11-12.

209 [1991] 2 AC 548 at 578-579.

210 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 194 [211].

the United States in decisions such as *Stephens v Board of Education of the City of Brooklyn*[211] and *Banque Worms v BankAmerica International*[212].

92 What was said in *London and River Plate Bank* may be understood to refer to the concern which has often been expressed in decisions of the courts about the finality of transactions and the security of receipts. In *Kleinwort Benson Ltd v Lincoln City Council*[213], Lord Goff suggested that defences such as change of position are concerned to protect the stability or finality of transactions. It may perhaps be more accurate to say that, where the defence of change of position is made out, finality is the result that is achieved. But the desirability of "certainty of receipts" cannot itself dictate the outcome of the enquiry respecting the actions taken by a recipient where a mistaken payment is made in a commercial context. It is necessary to recall that the action for money had and received is itself a qualification upon what the law otherwise regards as the overriding importance attached to the security of actual receipts[214].

93 Here, Hills and Bosch not only continued to trade on the basis of the payments received, they discharged TCP's debts and no longer sought to recover them. In the *Restatement of the Law Third*, the American Law Institute acknowledges forbearance as relevant to the defence of change of position[215].

The disadvantage which Hills and Bosch would suffer

94 AFSL sought to rely upon this Court's decision in *Australia and New Zealand Banking Group*[216], where a distinction was drawn between a case in which the change of position was constituted by a payment that had involved a true parting with money, and a case in which there was no physical payment but

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211 79 NY 183 at 186-188 (1879).

212 77 NY 2d 362 at 372-373 (1991).

213 [1999] 2 AC 349 at 382, 384.

214 As observed by Gummow J in "Moses v Macferlan: 250 years on", (2010) 84 *Australian Law Journal* 756 at 757.

215 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment*, (2010), §65, Comment e.

216 (1988) 164 CLR 662.

a credit entry had been made in the books of the recipient for or on behalf of another party. In that context, it was said that[217]:

> "the courts will pay regard to the substance rather than to the form of what has occurred. Thus, the cases indicate that a mere book entry which has not been communicated to the third party or which can be reversed without affecting the substance of transactions or relationships will ordinarily not suffice".

95 It is not accurate to characterise the payments to Hills and Bosch as "bare receipts" or "mere book entries", the amount of which affords a measure of unjust enrichment. It is an unattractive aspect of the approach urged by AFSL that a recipient who honestly appropriates a payment to discharge a debt owed to it is in the same position, so far as the change of position defence is concerned, as a recipient who receives a payment by way of advance against the supply of goods in the future. Even if it were accepted that AFSL neither entertained, nor expressed, an intention to discharge TCP's debts to Hills and Bosch, it is nevertheless the case that, as between each of Hills and Bosch on the one hand and TCP on the other, the payments were made and applied to discharge TCP's indebtedness to Hills and Bosch. Even if the discharges were legally reversible for some reason, such as TCP's fraud against AFSL, the consequence of such a reversal would be that Hills and Bosch would become unpaid creditors of TCP in its liquidation. In a practical sense, the receipts had consequences for Hills and Bosch beyond the simple fact of the receipt and these consequences were irreversible as a practical matter of business. Moreover, neither Hills nor Bosch was able to reverse the consequences of its decision to continue trading with TCP and the commercial risks that decision entailed.

96 In the circumstances of this case, the disadvantages which would enure to Hills and Bosch if they were required to repay the monies that each received from AFSL are such that it would be inequitable to require them to do so.

97 It will be observed that these conclusions are not reached by first attempting to state comprehensively what is encompassed by the notion of a change of position, or the circumstances in which a defence described in that way is available to meet a claim for recovery of money paid under mistake. As has

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217 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 674.

been explained, to apply reasoning of that kind[218] would be sharply at odds with the established doctrine and unchallenged decisions of this Court in this area[219].

98 Attempts to describe the defence comprehensively, or to chart its metes and bounds, are apt to mislead by distracting attention from the content of the principle to the manner of its expression. Not only that, as Deane J rightly observed in *Verwayen*[220]:

> "It is undesirable to seek to define exhaustively and in the abstract the content or operation of any general legal doctrine. Inevitably, there will be unforeseen and exceptional cases. Ordinarily, there will be borderline areas in which the interaction of the doctrine with other doctrines will be uncertain. Most important, it is part of the genius of the common law that development on a case-by-case basis enables its adaptation to meet changing circumstances and demands."

Other issues on appeal

99 What has been said is sufficient to require that the appeal be dismissed. It is, therefore, not strictly necessary to refer to the other grounds on which the Court of Appeal held that AFSL's claim should be rejected. However, lest it be thought that this Court's decision involved some tacit acceptance of those other grounds, it is desirable to refer briefly to them.

100 In *David Securities*[221], the respondent, in addition to a defence of change of position, relied upon a defence that the payments in question had been made

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218 See *McGinty v Western Australia* (1996) 186 CLR 140 at 232 per McHugh J; [1996] HCA 48. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [73] per Gummow J.

219 See, for example, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 661-663 [75]-[78] per Gummow, Hayne, Crennan and Kiefel JJ; *Friend v Brooker* (2009) 239 CLR 129 at 150-151 [47] per French CJ, Gummow, Hayne and Bell JJ; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 300 [90]-[91] per Gummow, Hayne, Heydon, Kiefel and Bell JJ.

220 (1990) 170 CLR 394 at 443.

221 (1992) 175 CLR 353.

for good consideration. It was noted[222], with approval, that Goff J had included both defences in his formulation in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*[223]. It was there said that, although a person paying money to another under a mistake of fact is entitled prima facie to recover it, his claim may nevertheless fail, inter alia, if "the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt".

101 As Meagher JA correctly observed[224], in rejecting AFSL's argument below, AFSL's payments were not made to discharge TCP's debts to Hills and Bosch. The payments to Hills and Bosch were not made or received in the circumstances envisaged by Goff J. To these observations, it may be added that it is doubtful whether the fraud practised on AFSL by TCP was irrelevant to whether there had been any discharge of TCP's debts to Hills and Bosch.

102 The alternative basis for the rejection of AFSL's claim, which commended itself to Meagher JA, was based upon a view of the effect of the receipt upon the relationship of creditor and debtor. His Honour treated Hills and Bosch as if they had advanced the amount of their respective debts to TCP and then received payment back. In fact, neither creditor made a decision to make a fresh advance to TCP; and given TCP's credit history, it is somewhat artificial to view the transaction in this way. Indeed, this approach involves the kind of fiction deprecated by Gummow J in the passage from *Roxborough*[225] set out above, which was cited with approval in *Farah Constructions*[226]. In any event, there remains the difficulty of regarding the discharge as irreversible, given that it was founded in TCP's fraud against AFSL.

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222 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379-380.

223 [1980] QB 677 at 695.

224 *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147 at 192 [200].

225 (2001) 208 CLR 516 at 545 [74].

226 (2007) 230 CLR 89 at 156 [151].

Orders

103 The appeal should be dismissed with costs.

104 GAGELER J. This case concerns the nature of the defence of change of position to a common law action for restitution of money paid under a mistake. The nature of the defence is informed by the nature of the action.

The nature of the action

105 The nature of the action for restitution of money paid under a mistake was explained in *David Securities Pty Ltd v Commonwealth Bank of Australia*[227]. The *David Securities* explanation was recently summarised in *Equuscorp Pty Ltd v Haxton*[228]. Within that explanation, "unjust enrichment" is rejected as "a definitive legal principle"[229] but is embraced as a "unifying legal concept"[230].

106 The explanation comes to this. The fact that a payment is caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the recipient to make restitution. That is because causative mistake is a circumstance which the law recognises to be prima facie sufficient to make the recipient's receipt, and retention, of the payment unjust. To displace that prima facie obligation, the recipient must establish some other circumstance which the law recognises would make an order for restitution unjust. The defence of change of position comprehends one of those circumstances. The defence, if established, results in the prima facie obligation of the recipient being in whole or in part displaced at the time an order for restitution is sought.

107 The significance of that distinct two-stage analysis can only be appreciated when *David Securities* is placed in historical perspective. The point is not to look back to "an assumed golden age" but rather "to help us to see more clearly the shape of the law of to-day by seeing how it took shape"[231].

108 The development of the action for restitution of money paid under a mistake was described in Australia not long before *David Securities* as "complex, indeed tortuous"[232]. The development is not easily recounted and cannot be

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227 (1992) 175 CLR 353 at 379; [1992] HCA 48.

228 (2012) 246 CLR 498 at 515-517 [29]-[30]; [2012] HCA 7.

229 (1992) 175 CLR 353 at 378.

230 (1992) 175 CLR 353 at 375.

231 *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 496; [1967] HCA 3, quoting *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 595; [1962] HCA 37.

232 *Commercial Bank of Australia Ltd v Younis* [1979] 1 NSWLR 444 at 447.

recounted at all without some reference to common law procedure long made obsolete by statutory reform.

109 By the eighteenth century, the common law permitted a form of action, known as *indebitatus assumpsit*, for "money 'had and received [by the defendant] to [or for] the use of the plaintiff'"[233]. For a plaintiff, that form of action had procedural advantages over an action of debt. One advantage was the brevity of the pleading. Another was that a defendant could not meet the action by "wager of law": that is, by formally swearing that he owed nothing in circumstances where he was able to bring to court "compurgators" or "oath-helpers" who would swear that his oath was not perjured[234]. Wager of law remained a defence to an action of debt until abolished by statute in 1833[235].

110 The pleading of an action of *indebitatus assumpsit*, although brief, required the plaintiff to aver breach by the defendant of a promise to pay a debt to the plaintiff[236]. In some cases, the pleaded promise was a fiction. One of them was *Moses v Macferlan*[237]. There, in 1760, the Court of King's Bench held that the debt would be implied and the action would lie "as it were upon a contract ('quasi ex contractu,' ...)" where "the defendant be under an obligation, from the ties of natural justice, to refund"[238]. Examples given included money "paid by mistake; or upon a consideration which happens to fail"[239]. Using terminology of a kind he would often later repeat[240], Lord Mansfield described *indebitatus*

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233 See generally Baker, *An Introduction to English Legal History*, 4th ed (2002) at 368-377.

234 Maitland, *The Forms of Action at Common Law*, (1965) at 15-16.

235 Section 13 of the *Civil Procedure Act* 1833 (UK).

236 Explained *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 356; [1993] HCA 4. Eg Chitty, *A Practical Treatise on Pleading*, (1809), vol 1 at 334-335; Maitland, *The Forms of Action at Common Law*, (1965) at 91-92.

237 (1760) 2 Burr 1005 [97 ER 676]. Also reported as *Moses v Macpherlan* (1760) 1 Black W 219 [96 ER 120].

238 (1760) 2 Burr 1005 at 1008 [97 ER 676 at 678].

239 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 681].

240 *Sadler v Evans* (1766) 4 Burr 1984 at 1986 [98 ER 34 at 35]; *Dale v Sollet* (1767) 4 Burr 2133 at 2134 [98 ER 112 at 113]; *Clarke v Shee* (1774) 1 Cowp 197 at 199-200 [98 ER 1041 at 1042]; *Stevenson v Mortimer* (1778) 2 Cowp 805 at 807 [98 ER 1372 at 1373]; *Longchamp v Kenny* (1779) 1 Doug 137 at 138 [99 ER 91 at

(Footnote continues on next page)

assumpsit as an "equitable action" for "money which, ex aequo et bono, the defendant ought to refund"[241]. Lord Mansfield said that "[o]ne great benefit" to a plaintiff was that "he may declare generally, 'that the money was received to his use;' and make out his case, at the trial"[242]. As to the position of a defendant, deprived of defences which would have been available to him had the plaintiff chosen another form of action, Lord Mansfield said[243]:

> "It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff, ex aequo & bono, is not intitled to the whole of his demand, or to any part of it."

111 Different views have been expressed as to the extent to which Lord Mansfield can be taken, by those and similar references to "natural justice", "conscience" and "equity", to have been drawing on the body of legal principle then separately administered by the Court of Chancery[244]. What is of some contemporary significance is that, after the statutory abolition of the forms of action[245], and the statutory fusion in England of the administration of law and

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91]; *Towers v Barrett* (1786) 1 TR 133 at 134 [99 ER 1014 at 1015]; *Bize v Dickason* (1786) 1 TR 285 at 286-287 [99 ER 1097 at 1098].

241 (1760) 2 Burr 1005 at 1012 [97 ER 676 at 680].

242 (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

243 (1760) 2 Burr 1005 at 1010 [97 ER 676 at 679].

244 Gummow, "Moses v Macferlan: 250 years on", (2010) 84 *Australian Law Journal* 756 at 757; Kremer, "The Action for Money Had and Received", (2001) 17 *Journal of Contract Law* 93 at 99-100; Baker, "The Use of Assumpsit for Restitutionary Money Claims 1600-1800", in Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, (1995) 31 at 56; Restatement Third, Restitution and Unjust Enrichment §4, Comment b at 30; Swain, "Unjust Enrichment and the Role of Legal History in England and Australia", (2013) 36 *University of New South Wales Law Journal* 1030 at 1045.

245 *Common Law Procedure Act* 1852 (UK).

equity[246], it was able to be stated confidently in the English Court of Appeal in *Rogers v Ingham* that[247]:

> "[T]he law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations."

112 That statement was quoted in the High Court of Australia in 1910 in *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd*[248]. Lord Mansfield's language in *Moses v Macferlan* had by then been paraphrased in standard legal texts[249] and repeated in courts still administering common law separately from equity[250]. Lord Mansfield's language was soon afterwards to be reflected in judicial statements in the High Court[251] and the Privy Council[252].

113 Yet the scope of the equitable considerations potentially indicated by Lord Mansfield's language had by then been confined. Just how that occurred is of some importance to an understanding of *David Securities*. Two critical decisions in the first half of the nineteenth century were those of the Court of Common Pleas in *Brisbane v Dacres*[253]and of the Court of Exchequer in *Kelly v Solari*[254].

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246 *Supreme Court of Judicature Act* 1873 (UK).

247 (1876) 3 Ch D 351 at 355.

248 (1910) 12 CLR 515 at 531-532; [1910] HCA 50.

249 Eg Blackstone, *Commentaries on the Laws of England*, (1768), bk 3 at 162; Chitty, *A Practical Treatise on the Law of Contracts*, 2nd ed (1834) at 475; Bullen and Leake, *Precedents of Pleadings in Actions in the Superior Courts of Common Law*, (1860) at 25.

250 Eg *Smith v Jones* (1842) 1 Dowl PC (NS) 526 at 527; *Shire of Rutherglen v Kelly* (1878) 4 VLR (L) 119 at 121; *Lyons v Hardy* (1881) 2 NSWLR (L) 369 at 373-374; *White v Copeland* (1894) 15 NSWLR (L) 281 at 288, 290.

251 *R v Brown* (1912) 14 CLR 17 at 25; [1912] HCA 6.

252 *Royal Bank of Canada v The King* [1913] AC 283 at 296.

253 (1813) 5 Taunt 143 [128 ER 641].

254 (1841) 9 M & W 54 [152 ER 24].

114 *Brisbane v Dacres*[255] decided that the action would not lie for the recovery of money paid under a mistake of law. As to the defendant who had received the mistaken payment in that case, Mansfield CJ there said[256]:

> "I find nothing contrary to aequum et bonum, to bring it within the case of *Moses v Macfarlane*, in his retaining it. So far from its being contrary to aequum et bonum, I think it would be most contrary to aequum et bonum, if he were obliged to repay it back."

115 *Kelly v Solari*[257] decided that carelessness on the part of the payer, and delay in bringing the action, provided no answer to an action founded on a mistake of fact. What made it unconscientious for the recipient to retain the money was said to lie simply in the circumstances of its payment and receipt. Parke B said[258]:

> "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake."

To similar effect, Rolfe B said[259]:

> "With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it."

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255 (1813) 5 Taunt 143 [128 ER 641]. See also *Milnes v Duncan* (1827) 6 B & C 671 at 677, 679 [108 ER 598 at 600, 601].

256 (1813) 5 Taunt 143 at 162 [128 ER 641 at 648-649].

257 (1841) 9 M & W 54 [152 ER 24]. See also *Bell v Gardiner* (1842) 4 Man & G 11 at 20 [134 ER 5 at 9].

258 (1841) 9 M & W 54 at 58 [152 ER 24 at 26].

259 (1841) 9 M & W 54 at 59 [152 ER 24 at 26].

116 Consistently with *Kelly v Solari*, the Court of Exchequer held in *Standish v Ross*[260] that it was no defence to an action founded on a mistake of fact "that the defendant had applied the money in the meantime to some purchase which he otherwise would not have made, and so could not be placed in statu quo"[261].

117 The implications of *Kelly v Solari* were later spelt out by the Court of Common Pleas in *Townsend v Crowdy*[262]. Willes J there said[263]:

> "This is the simple case of one paying another money which both at the time suppose to be due, but which afterwards turns out in consequence of a mistake of fact on the part of the payer, not to have been really due. In such a case the law clearly is that the money may be recovered back. The only distinction is between error or mistake of law, for which the payer is responsible, and error or mistake of fact, for which he is not."

Williams J said[264]:

> "No doubt, at one time the rule that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shewn that the party seeking to recover it back had been guilty of no laches. But, since the case of *Kelly v Solari*, … it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry."

Byles J said that *Kelly v Solari* was authority for the proposition "that you may always rip up accounts which have been settled between parties who have acted under mistake or misapprehension of the facts". Byles J continued[265]:

> "Here, the money was paid by the plaintiff under a mistake, both parties being under an impression that it was due. That being so, it was manifestly against conscience that the defendant should retain it. The law very properly casts upon the person who makes the payment the burthen

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260 (1849) 3 Ex 527 [154 ER 954].

261 (1849) 3 Ex 527 at 534 [154 ER 954 at 957].

262 (1860) 8 CB (NS) 477 [141 ER 1251].

263 (1860) 8 CB (NS) 477 at 494-495 [141 ER 1251 at 1259].

264 (1860) 8 CB (NS) 477 at 494 [141 ER 1251 at 1259].

265 (1860) 8 CB (NS) 477 at 495 [141 ER 1251 at 1259].

> of shewing that it was made under a mistake. That being proved, it would be inequitable not to permit him to recover it back."

118 In the result, as Hamilton J explained in *Baker v Courage & Co*[266]:

> "The question whether money can be recovered as having been paid under a mistake of fact depends upon the state of mind of the plaintiff at the time when the money was paid, just as in an action of deceit the liability of the defendant depends upon the untruth of the representation having been present to his mind at the time that the representation was made. You may be slow to believe the plaintiff if he says he had known the true facts but had forgotten them, but if you once arrive at the conclusion that he had in fact forgotten them and had paid the money under a misapprehension as to those facts, then he is entitled to recover the money unless he is already barred by the Statute of Limitations."

The cause of action to recover money paid under a mistake of fact was there held to accrue at the date of payment[267], the applicable limitation period being six years[268].

119 The potential for the common law action brought at any time within the limitation period to result in the ripping up of settled accounts was kept in check by rigidly maintaining the distinction between: on the one hand, a payment made under a mistake of fact (in respect of which it had been settled by *Kelly v Solari* that the action would lie); and, on the other hand, a payment made under a mistake of law (in respect of which it had been established in *Brisbane v Dacres* that the action would not lie).

120 The significance of that distinction was highlighted in *Rogers v Ingham*[269]. In language quoted with approval by all members of the High Court in *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd*[270], Mellish LJ there observed that "the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be

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266 [1910] 1 KB 56 at 64-65. See also *R E Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 696.

267 See also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 386, 409.

268 Section 3 of the *Limitation Act* 1623 (21 Jac I c 16).

269 (1876) 3 Ch D 351 at 357.

270 (1910) 12 CLR 515 at 524, 532, 538.

recovered back" was "an equitable and just rule" applicable at law and in equity. By way of explanation, Mellish LJ said that nothing "would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some Court of Justice, upon a similar contract, gave to it a different construction from that which the parties had put on it"[271]. In the same case, James LJ pointed out that equity had not "adhered strictly to the rule that a mistake in law is not always incapable of being remedied" but that equitable relief had "never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties"[272].

121 As to money paid under a mistake of fact, it was held in *Durrant v Ecclesiastical Commissioners*[273], and again in *Baylis v Bishop of London*[274], that an action would lie against a recipient who (without notice of the mistake) had paid the money in good faith as a principal to a third party from whom the recipient could not recover. With reference to the language of Lord Mansfield, Hamilton LJ explained in the second of those cases in 1912: that "both the equitable and the legal considerations applicable to the recovery of money paid under a mistake of fact have been crystallized in the reported common law cases"; that "[t]he question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back"; that "[t]o ask what course would be ex aequo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried in *Standish v Ross* and *Kelly v Solari*"; and that "[w]hatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'"[275]

122 Two years later, Hamilton LJ had become Lord Sumner. As Lord Sumner, he said in *Sinclair v Brougham*[276] that the action for money had and

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271 (1876) 3 Ch D 351 at 357.

272 (1876) 3 Ch D 351 at 355-356. See generally New South Wales Law Reform Commission, *Restitution of Benefits Conferred Under Mistake of Law*, Report No 53, (1987) at 17 [3.5].

273 (1880) 6 QBD 234 at 236.

274 [1913] 1 Ch 127.

275 [1913] 1 Ch 127 at 140 (footnotes omitted).

276 [1914] AC 398 at 453-454, 456.

received could not be extended beyond the principles illustrated in the decided cases and that there was "no ground left for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer". Lord Sumner's "pungent criticisms"[277] gave impetus to what was to become the predominant view in Australia, as in the United Kingdom, for much of the twentieth century: that Lord Mansfield's views were too vaguely expressed to be accepted as the foundation of a common law action for the recovery of money paid under a mistake[278], and that the true foundation of the action lay in the implication of a promise to pay[279].

123 Despite the course of decisions having to that point rejected any defence based simply on a recipient's change of position, it had been accepted as early as 1825 that a recipient's alteration of position could give rise to a defence by way of estoppel if induced by the payer[280]. The defence was applied by the Court of Appeal in 1923 in *Holt v Markham*[281] and acknowledged in the House of Lords three years later in *R E Jones Ltd v Waring and Gillow Ltd*[282]. As explained by Dixon J in 1937 in *Grundt v Great Boulder Pty Gold Mines Ltd*[283], in the course of illustrating an analysis of the doctrine of estoppel in pais, to which it will be necessary to return, *Holt v Markham* was a case in which[284]:

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277 *Holt v Markham* [1923] 1 KB 504 at 513.

278 Eg *Smith v William Charlick Ltd* (1924) 34 CLR 38 at 57, 70; [1924] HCA 13; *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539 at 550-551; *Bank of New South Wales v Murphett* [1983] 1 VR 489 at 493, 496.

279 Eg *Hirsch v Zinc Corporation Ltd* (1917) 24 CLR 34 at 57-58; [1917] HCA 55; *Smith v William Charlick Ltd* (1924) 34 CLR 38 at 55-57, 70; *Oxley v James* (1938) 38 SR (NSW) 362 at 381; *Turner v Bladin* (1951) 82 CLR 463 at 474; [1951] HCA 13, citing *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551.

280 *Skyring v Greenwood* (1825) 4 B & C 281 [107 ER 1064]; *R v Blenkinsop* [1892] 1 QB 43 at 46; *Deutsche Bank (London Agency) v Beriro and Co* (1895) 1 Comm Cas 123; affd (1895) 1 Comm Cas 255.

281 [1923] 1 KB 504.

282 [1926] AC 670.

283 (1937) 59 CLR 641; [1937] HCA 58.

284 (1937) 59 CLR 641 at 675.

> "the fact that the defendant had spent the money sued for, believing it to be his own to spend, was treated as a sufficient alteration of his position to estop the plaintiff from departing from the assumption which he had induced[. T]he harm or detriment giving rise to the estoppel was that which would be done by requiring the defendant to repay money which he no longer had."

124 That, relevantly, was the common law in the United Kingdom and Australia in 1942 when the House of Lords decided *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[285]. Distancing himself from the approach of Lord Sumner, Lord Wright then observed that "any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep" and that "[s]uch remedies in English law … are now recognized to fall within a … category of the common law which has been called quasi-contract or restitution". Referring specifically to *Moses v Macferlan*, Lord Wright continued[286]:

> "This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalizations, it has needed and received qualifications in practice. … The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it."

125 In so explaining *Moses v Macferlan* as supplying the juristic concept by reference to which the common law provides a remedy in cases of "unjust enrichment", Lord Wright was influenced by developments in the United States[287]. The mainstream position in the United States was then founded squarely on Lord Mansfield's conception. It was also considerably less canalised. Delivering an opinion of the Supreme Court in 1935, Cardozo J said with reference to *Moses v Macferlan* that "[a] cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function"[288] and explained that "[t]he claimant to prevail must show that the money was received in such circumstances that the possessor

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285 [1943] AC 32 at 61.

286 [1943] AC 32 at 62-63.

287 Wright, "Book Reviews (Restatement of the Law of Restitution)", (1937) 51 *Harvard Law Review* 369.

288 *Atlantic Coast Line Railroad Co v Florida* 295 US 301 at 309 (1935).

will give offense to equity and good conscience if permitted to retain it"[289]. Delivering an opinion of the Supreme Court in 1937, Stone J said, again with reference to *Moses v Macferlan*, that the action was used "to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff" and that "[s]ince, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right"[290].

126 The Restatement of the Law of Restitution ("the First Restatement"), adopted by the American Law Institute in 1936, has been described as carrying Lord Mansfield's propositions in *Moses v Macferlan* to their logical conclusions[291]. On the premise that "[t]he principles by which a person is entitled to restitution are the same whether the proceeding is one at law or in equity"[292], the First Restatement stated the basic rule to be that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other"[293]. Another rule, explained to be "applicable to all proceedings for restitution"[294], was that "[t]he right of a person to restitution from another because of a benefit received because of mistake is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution"[295]. With some changes of drafting style, rules in those same terms continue to appear in the Restatement Third, Restitution and Unjust Enrichment, adopted by the American Law Institute in 2010[296]. Unjust enrichment is there explained to be a "term of art" "concerned with identifying those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability" in the application of the

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289 295 US 301 at 309 (1935).

290 *Stone v White* 301 US 532 at 534-535 (1937).

291 Kull, "James Barr Ames and the Early Modern History of Unjust Enrichment", (2005) 25 *Oxford Journal of Legal Studies* 297 at 300.

292 First Restatement at 4.

293 First Restatement, §1.

294 First Restatement, §69, Comment a.

295 First Restatement, §69(1).

296 §1 and §65.

"equitable conception of the law of restitution ... crystallized by Lord Mansfield's famous statement in Moses v Macferlan"[297].

127 Lord Wright's speech in *Fibrosa* was quoted and applied in the Full Court of the Supreme Court of New South Wales in 1954[298]. It was echoed in 1957 in the High Court's description of the "rule under which an action of money had [and] received lies in cases of payment by mistake" as one under which the action is available "when the payee cannot justly retain the money paid to him because it would not have come to his hands if it had not been for a false supposition of fact on the part of the payer causing the latter to believe that he was compellable to make the payment or at all events that he ought to make it"[299]. The influence of the speech can be seen in the statement of Windeyer J two years later that "[p]rovided it be recognized that the action for money had and received is not only the origin of but, as developed, still determines the scope of the English law of quasi-contract, it seems to me not inapt to describe it as a law of 'unjust enrichment.'"[300]

128 In 1964 Barwick CJ remarked: "as yet the subject of money paid under mistake is not fully exhausted by decision"[301]. And in 1986, Gibbs CJ said[302]:

> "Whether the action is based on an implied promise to pay, or on a principle designed to prevent unjust enrichment, the emphasis on justice and equity in both old and modern authority on this subject supports the view that the action will not lie unless the defendant in justice and equity ought to pay the money to the plaintiff".

129 Against that background, the formulation of the action for restitution of money paid under a mistake which came to be adopted in *David Securities* in 1992 is to be understood in the context of two decisions of the High Court in

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297 Restatement Third, Restitution and Unjust Enrichment at 4.

298 *Watney v Mass* (1954) 54 SR (NSW) 203 at 206, 222. See also *Deposit & Investment Co Ltd v Kaye* [1963] SR (NSW) 453 at 457.

299 *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 at 75; [1957] HCA 69.

300 *Mason v New South Wales* (1959) 102 CLR 108 at 146; [1959] HCA 5.

301 *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177 at 187; [1964] HCA 49.

302 *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251 at 268; [1986] HCA 21.

the immediately preceding five years: *Pavey & Matthews Pty Ltd v Paul*[303] and *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*[304].

130 *Pavey* established that a *quantum meruit*, which had been another of the forms of action in *assumpsit*, "rests, not on implied contract, but on a claim to restitution or one based on unjust enrichment", which arose in that case "from the respondent's acceptance of the benefits accruing to the respondent from the appellant's performance of [an] unenforceable oral contract"[305]. Deane J said of unjust enrichment in *Pavey*[306]:

> "It constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case".

131 *Westpac* stated that the basis of the common law action of money had and received for recovery of an amount paid under a mistake of fact "should now be recognized as lying not in implied contract but in restitution or unjust enrichment" and noted that "contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience"[307]. The High Court unanimously explained: that "receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment"; and that "[b]efore that prima facie liability will be displaced, there must be circumstances … which the law recognizes would make an order for restitution unjust"[308].

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303 (1987) 162 CLR 221; [1987] HCA 5.

304 (1988) 164 CLR 662; [1988] HCA 17.

305 (1987) 162 CLR 221 at 227.

306 (1987) 162 CLR 221 at 256-257.

307 (1988) 164 CLR 662 at 673.

308 (1988) 164 CLR 662 at 673.

132 Citing *Pavey* and *Westpac*, Dawson J was able to observe in *David Securities* that "[t]here is now no longer any question that there is in this country a law of restitution based upon the concept of unjust enrichment which encompasses what was previously the common law of quasi-contract"[309].

133 The principal issue addressed in *David Securities* was whether the common law of Australia should recognise an action to recover money paid under a mistake of law. Rejecting *Brisbane v Dacres* and cases which had followed it, the majority held that mistakes of law were to be treated in the same way as mistakes of fact had been treated in *Westpac*[310]. The same approach to payments under mistakes of law had just before been taken in Canada[311] and would soon afterwards be taken in the United Kingdom[312].

134 Before turning separately to consider the defence of change of position, the joint reasons for judgment in *David Securities* considered and rejected a distinct argument against the approach the majority in that case then took. The argument was that, if a cause of action for money paid under a mistake were to be recognised, "a plaintiff should be required to prove that retention of the moneys by the recipient would be unjust in all the circumstances before recovery should be granted"[313]. The precise argument was that money paid under a mistake of law should "only be recoverable in so far as the recipient has been unjustly enriched at the expense of the payer, such that it would be unconscionable for the recipient not to give restitution to the payer"[314]. The joint reasons explained that the argument embodied an approach "not greatly different" from the approach favoured by the majority, but that it had "important consequences in relation to the elements of the action which the plaintiff must plead and prove"[315]. The joint reasons also explained that the argument appeared to proceed "from the view that in Australian law unjust enrichment is a definitive

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309 (1992) 175 CLR 353 at 401.

310 (1992) 175 CLR 353 at 376, 402.

311 *Air Canada v British Columbia* [1989] 1 SCR 1161.

312 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

313 (1992) 175 CLR 353 at 378.

314 (1992) 175 CLR 353 at 378.

315 (1992) 175 CLR 353 at 378.

legal principle according to its own terms and not just a concept", which was inconsistent with *Pavey* and *Westpac*[316].

135 The point that unjust enrichment is not a definitive principle in Australian law was in that way made in *David Securities* in answer to an argument that abolition of the longstanding distinction between payment under a mistake of fact and payment under a mistake of law should result in a rule that would make recovery from a recipient turn on a test of "unconscionability".

136 The joint reasons had earlier referred to the recognition in *Pavey* and *Westpac* of "the 'unifying legal concept' of unjust enrichment"[317]. The joint reasons continued by explaining that the concept of unjust enrichment informed both: the circumstances in which, if proved by a plaintiff, enrichment of the defendant at the expense of the plaintiff will be prima facie unjust and in which the law will therefore recognise a prima facie obligation to make restitution of a payment; and the circumstances which, if proved by the defendant, will "show[] that his or her receipt (or retention) of the payment is not unjust" and in which the law will therefore recognise a defence[318].

137 *Baltic Shipping Co v Dillon*[319] was decided several months after *David Securities*. Mason CJ then explained the basis of a claim to recover a prepaid purchase price on the ground that the consideration for which it was paid had wholly failed as being that "the continued retention by the defendant is regarded, in the language of Lord Mansfield, as 'against conscience' or, in the modern terminology, as an unjust enrichment of the defendant"[320]. To the same effect, Deane and Dawson JJ said that "[i]ts historical antecedent in terms of forms of action is the old indebitatus count for money had and received to the use of the plaintiff" but that "[i]ts modern substantive categorization is as an action in unjust enrichment" in that "the receipt of a payment of money for a consideration which wholly fails 'is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution … to the person who has sustained the countervailing detriment'"[321]. Their Honours went on to state that[322]:

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316 (1992) 175 CLR 353 at 378-379. See also at 405-406.

317 (1992) 175 CLR 353 at 375.

318 (1992) 175 CLR 353 at 379.

319 (1993) 176 CLR 344.

320 (1993) 176 CLR 344 at 359.

321 (1993) 176 CLR 344 at 375.

> "[I]n a modern context where common law and equity are fused with equity prevailing, the artificial constraints imposed by the old forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law. In particular, the notions of good conscience, which both the common law and equity recognized as the underlying rationale of the law of unjust enrichment, now dictate that, in applying the relevant doctrines of law and equity, regard be had to matters of substance rather than technical form."

Later that year, four members of the High Court cited that passage for the proposition that "[t]he ordinary requirement of the principles of unjust enrichment" is "that regard be paid to matters of substance rather than technical form"[323].

138 The coherent principle which had by then come to exist in the common law of restitution in Australia, following removal in *Pavey* and *Westpac* of the constraint imposed by the form of action for money had and received, lay in the two-stage analysis formulated in *Westpac* and confirmed in *David Securities*. Consistently with underlying notions of good conscience or equity tracing to Lord Mansfield, but updated to adopt modern terminology, that overall analysis was explained (as distinct from defined) by reference to the juristic concept of unjust enrichment. *Equuscorp* confirms the continuing utility of the two-stage *David Securities* analysis, and of the "taxonomical function" which unjust enrichment performs within that analysis[324].

139 Coherent legal principle should never be elevated to all-embracing legal theory. As Gummow J emphasised in *Roxborough v Rothmans of Pall Mall Australia Ltd*, the concept of unjust enrichment would lose its utility were it to be pressed so far as to conceal "why the law would want to attribute a responsibility to one party to provide satisfaction to the other"[325]. The force of that observation has been reinforced by subsequent reiteration of points made in *David Securities* itself: that the concept of unjust enrichment provides a link between what might otherwise appear to be distinct categories of liability; that it can assist, by the

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322 (1993) 176 CLR 344 at 376. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 554 [100]; [2001] HCA 68.

323 *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111; [1993] HCA 54.

324 (2012) 246 CLR 498 at 516 [30].

325 (2001) 208 CLR 516 at 543 [70], quoting Finn, "Equitable Doctrine and Discretion in Remedies", in Cornish et al (eds), *Restitution: Past, Present and Future*, (1998) 251 at 252.

ordinary processes of legal reasoning, in the development of legal principle; and that it is not a sufficient premise for direct application in a particular case[326].

140 No less than its traditional synonyms, "unconscionable" and "unconscientious", "unjust" has the potential to "mask[] rather than illuminate[] the underlying principles at stake"[327]. Having noted that "[t]he notion of unconscionability is better described than defined", Deane J pointed out in a related context that a question whether conduct is or is not unconscionable in the circumstances of a particular case "involves a 'real process of consideration and judgment' in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case"[328]. The question is not to be resolved "by reference to some preconceived formula framed to serve as a universal yardstick"[329].

141 Appearing at each stage of the *David Securities* analysis, the notion of injustice conveyed by the word "unjust" is to be understood in that same sense: as descriptive, accumulative and incremental. That was the sense in which the notion was explained (as distinct from defined) by Campbell J in *Wasada Pty Ltd v State Rail Authority of New South Wales (No 2)*[330]:

> '"Unjust' is the 'generalisation of all the factors which the law recognises as calling for restitution'. Because we need to search for *recognised* factors, examination of which involves an analysis of case law, the reference to 'injustice' as an element of unjust enrichment, is not a

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326 *Friend v Brooker* (2009) 239 CLR 129 at 141 [7]; [2009] HCA 21. See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [150]-[151]; [2007] HCA 22; *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 665 [85]; [2008] HCA 27; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 [86]; [2009] HCA 44.

327 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 73 [43]; [2003] HCA 18, citing *Snell's Equity*, 30th ed (2000), Preface. See also *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409-410 [34]; [1998] HCA 48.

328 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 440, 441; [1990] HCA 39, citing *Harry v Kreutziger* (1978) 95 DLR (3d) 231 at 240.

329 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 445.

330 [2003] NSWSC 987 at [16], citing Mason and Carter, *Restitution Law in Australia*, (1995) at 59-60 (emphasis in original). See also *Goff & Jones, The Law of Unjust Enrichment*, 8th ed (2011) at 7 [1-08].

reference to judicial discretion. Normal judicial processes are involved and it is only in cases where there is no recognised basis for saying that injustice has arisen that problems can arise."

142 It is also important to recognise that there is no inherent reason why the notion of "enrichment", having informed the first stage of the two-stage *David Securities* analysis, must necessarily reappear at the second. There may well be circumstances in which it would not be unjust to make an order for restitution against a recipient who, having initially been enriched by receipt of a mistaken payment, was no longer enriched at the time of the making of the order by reason of intervening circumstances. It might well be, for example, that no defence to an action for restitution of money paid under a mistake is available to a recipient who is no longer enriched at the time of the order because of an intervening theft[331].

The nature of the defence

143 The defence of change of position having been located at the second stage of an analysis founded ultimately on notions of conscience and explained (as distinct from defined) by the concept of unjust enrichment, the nature and content of the defence itself can now be addressed.

144 By the time of *David Securities*, a defence of change of position to an action for the restitution of money paid under a mistake had been recognised by the Supreme Court of Canada in *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd*[332], and by the House of Lords in *Lipkin Gorman v Karpnale Ltd*[333]. In *Storthoaks*, Martland J had adopted the change of circumstances rule set out in the First Restatement, noting its consistency with *Moses v Macferlan*[334]. In *Lipkin Gorman*, Lord Goff of Chieveley had used language similar to that rule when he said that "the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full"[335].

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331 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 543-544 [71], noting *Martin v Pont* [1993] 3 NZLR 25.

332 [1976] 2 SCR 147.

333 [1991] 2 AC 548.

334 [1976] 2 SCR 147 at 162-164.

335 [1991] 2 AC 548 at 580.

145 After *David Securities*, in *Dextra Bank & Trust Co Ltd v Bank of Jamaica*[336], the Privy Council (in a speech delivered by Lord Bingham of Cornhill and Lord Goff) was again to use similar language in stating that "[t]he defence should be regarded as founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim, or to pursue it in full"[337]. The Privy Council emphasised that the defence looks to practicalities not technicalities, is not concerned solely with the security of the receipt of payments, and looks to the position of the defendant not to the relative fault of the parties[338].

146 There is no reason to consider any of those descriptions to be inapplicable to the defence of change of position as recognised in *David Securities*. The explanation of the nature of the change of position defence in *David Securities* reveals, however, a more precise focus[339]. The joint reasons first referred to the defence in terms "that in reliance upon receipt of the payments the [recipient], in good faith, changed its position to its detriment"[340]. Turning later specifically to the content of the defence, and the necessity for its adoption, the joint reasons continued[341]:

> "If we accept the principle that payments made under a mistake of law should be prima facie recoverable, in the same way as payments made under a mistake of fact, a defence of change of position is necessary to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be *unjust*. This does not mean that the concept of unjust enrichment needs to shift the primary focus of its attention from the moment of enrichment. From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched. However, the defence of change of position is relevant to the enrichment of the defendant precisely because

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336 [2002] 1 All ER (Comm) 193.

337 [2002] 1 All ER (Comm) 193 at 205 [38].

338 [2002] 1 All ER (Comm) 193 at 204-205 [38], 207 [45].

339 Cf *Citigroup Pty Ltd v National Australia Bank Ltd* (2012) 82 NSWLR 391 at 404-405 [62]-[65].

340 (1992) 175 CLR 353 at 379.

341 (1992) 175 CLR 353 at 385 (emphasis in original).

its central element is that the defendant has acted to his or her detriment on the *faith of the receipt*".

The joint reasons referenced, in that respect, a then current text by Professor Birks in which he likened the change of position defence to "estoppel with the requirement of a representation struck out": "[i]n other words the enriched defendant succeeds if he can show that he acted to his detriment on the faith of the receipt"[342].

147 Professor Birks was later to change his view. He came to argue that the change of position defence was justified by reference to a concept of "disenrichment" applicable where a recipient initially enriched by receipt suffers a causally related loss or detriment which reduces the extent of that initial enrichment[343]. The gist of his argument was that a recipient ought to be obliged only to give restitution of any net enrichment. The recipient ought for that purpose to be entitled to offset loss against gain, detriment against benefit. Treating change of position as a species of estoppel, he said, "would be adding a fifth wheel to the coach"[344].

148 Professor Birks' argument has powerful academic supporters[345]. It also has powerful academic detractors[346]. Whatever its merits were the slate to be clean, the argument cannot stand with the formulation of principle in *David Securities*. Nor is its adoption necessary to serve the underlying rationale of the law of unjust enrichment once the analogy to estoppel in pais to which the joint reasons in *David Securities* alluded is more fully worked through in an Australian context.

149 The doctrine of estoppel in pais is concerned with estoppel by conduct[347]. The principle on which it is founded is that explained by Dixon J in *Thompson v*

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342 Birks, *An Introduction to the Law of Restitution*, (1985) at 410.

343 Birks, *Unjust Enrichment*, 2nd ed (2005) at 208-210.

344 Birks, "Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences", in McInnes (ed), *Restitution: Developments in Unjust Enrichment*, (1996) 49 at 68.

345 Eg Burrows, *The Law of Restitution*, 3rd ed (2011) at 526-527.

346 Eg Edelman and Bant, *Unjust Enrichment in Australia*, (2006) at 320-321; Bant, *The Change of Position Defence*, (2009) at 126-130.

347 See *Legione v Hateley* (1983) 152 CLR 406 at 430-432; [1983] HCA 11; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 445; [1988] HCA 7.

Palmer[348] (where the doctrine was relied on as a defence to a claim in equity) and in *Grundt*[349] (where the doctrine was relied on as a defence to an action at law). The principle is that the law does not permit an unjust departure by a party from an assumption which that party has had some part in occasioning another party to adopt or accept for the purpose of their legal relations. What makes such a departure "unjust" – what might in the present context be said to be the relevant "unjust factor" – is that, if departure were permitted, the other party would be left in a position of material detriment through having made the assumption the other party caused to be adopted. That is to say[350]:

> "[T]he basal purpose of the doctrine ... is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it."

150 The foundation of an estoppel lying in a change of position to the prejudice of the party asserting the estoppel, the burden of proof lies with that party[351]. The "real detriment or harm" which that party must prove to ground an estoppel can be any "material disadvantage" which would arise from permitting departure from the assumption on the faith of which that party acted or refrained from acting[352]. Material disadvantage must be substantial[353], but need not be quantifiable in the same way as an award of damages[354]. Material disadvantage can lie in the loss of a legal remedy[355], or of a "fair chance" of obtaining a

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348 (1933) 49 CLR 507 at 547-549; [1933] HCA 61.

349 (1937) 59 CLR 641 at 674-677.

350 (1937) 59 CLR 641 at 674.

351 *Thompson v Palmer* (1933) 49 CLR 507 at 549.

352 *Thompson v Palmer* (1933) 49 CLR 507 at 547. See also *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 734-735; [1935] HCA 33.

353 *Donis v Donis* (2007) 19 VR 577 at 583 [20].

354 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 448, 461-462.

355 *Thompson v Palmer* (1933) 49 CLR 507 at 549, referring to *Greenwood v Martins Bank Ltd* [1933] AC 51.

commercial or other benefit which "might have [been] obtained by ordinary diligence"[356].

151 The joint reasons in *David Securities* noted[357] that the defence of change of position had been recognised in *Lipkin Gorman*, against the background of two perceived inadequacies or rigidities in the doctrine of estoppel as it had then developed in the United Kingdom[358]. One was the perceived need for a representation by the payer to the effect that the recipient was entitled to retain the money paid[359]. The other was the perceived operation of the doctrine as no more than a rule of evidence so as always to produce an all-or-nothing consequence: the payer being held to the assumption to which the recipient was induced, so as to recover nothing in a case where the doctrine was found to be applicable, irrespective of the degree of detriment that would flow to the recipient were the induced assumption to be abandoned[360].

152 The doctrine of estoppel in pais has not developed so rigidly in Australia, at least since *The Commonwealth v Verwayen*[361]. First, even outside the area of conventional estoppel, in which it has long been accepted that belief in the correctness of an assumed state of affairs is not always necessary[362], the doctrine is not necessarily confined to assumptions induced by representations[363]. The doctrine is capable of principled extension to another category of induced assumption from which departure would be unconscionable[364]. The doctrine, as has long been observed, is particularly apt to provide a defence to an action to

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356 *Thompson v Palmer* (1933) 49 CLR 507 at 527-528, citing *Knights v Wiffen* (1870) LR 5 QB 660 at 665 and *Dixon v Kennaway & Co* [1900] 1 Ch 833.

357 (1992) 175 CLR 353 at 384-385.

358 [1991] 2 AC 548 at 578-579.

359 *R E Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 692.

360 *Avon County Council v Howlett* [1983] 1 WLR 605 at 622-624; [1983] 1 All ER 1073 at 1087-1088, applying *Ogilvie v West Australian Mortgage and Agency Corporation Ltd* [1896] AC 257 at 270. See also *National Westminster Bank plc v Somer International (UK) Ltd* [2002] QB 1286 at 1302-1303 [36]-[37].

361 (1990) 170 CLR 394 at 431-446.

362 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 676-677.

363 *Thompson v Palmer* (1933) 49 CLR 507 at 547.

364 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 444-445.

enforce a potentially onerous obligation which can arise without fault on the part of the obligor[365].

153 Secondly, whatever other differences might exist between its operation in various specific categories of circumstances, the doctrine now operates at law as in equity as a substantive rule of law[366]. As a substantive rule of law, there is no reason to consider that the doctrine should be confined to producing an all-or-nothing consequence where that consequence would undermine the rationale for its operation. To the contrary, "the substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption"[367]. That is to say, "the prima facie entitlement to relief based on the assumed state of affairs" is "qualified if it appears that that relief would exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party"[368].

154 To be more precise[369]:

> "Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded. ...
>
> In particular, the prima facie entitlement to relief based upon the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party. In such a case, relief framed on the basis of the assumed state of affairs represents the outer limits within which the relief appropriate to do justice between the parties should be framed."

The precise relief which flows from an estoppel operating as a defence, whether to an action at law or to a claim in equity, is in this way tailored so as not to be

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365 *Thompson v Palmer* (1933) 49 CLR 507 at 544-545.

366 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 413, 444, 487. Contra at 454, 500. See earlier *Canadian and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at 56.

367 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 487.

368 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 442.

369 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 443-446, applied in *Giumelli v Giumelli* (1999) 196 CLR 101 at 123-125 [40]-[50]; [1999] HCA 10; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at 485-486 [3]-[5], 495 [77].

disproportionate to a measurable detriment. There is no reason in principle why that tailoring of relief cannot involve the reduction pro tanto of an order for restitution[370].

155 The joint reasons in *David Securities* invoked the language of estoppel when it emphasised the "central element" of the defence of change of position to be that the defendant "has acted to his or her detriment on the *faith of the receipt*"[371]. There is much to be said for treating the defence of change of position as there articulated as a particular application of that doctrine. The doctrine has always been recognised to operate as a defence to a common law action for money had and received although, for so long as the action lay for money paid under a mistake of fact but not for money paid under a mistake of law, it was understandable that it would be thought appropriate that it be constrained only to operate where there was a representation on the part of the payer. The doctrine is itself founded on notions of good conscience indistinguishable in concept from those underlying the law of unjust enrichment. In the flexible form in which it has developed in Australia, the doctrine provides a principled basis for determining circumstances in which it would be inequitable or unjust to require the innocent recipient of a mistaken payment to make restitution or full restitution. The doctrine employs established concepts capable of predictable application. Treating the defence of change of position as a particular application of it would avoid both the uncertainty of defining a separate content for the change of position defence and the complication of attempting then to determine whether, and if so how, circumstances giving rise to the defence might separately give rise to an estoppel[372].

156 Whether or not the defence of change of position is ultimately so to be assimilated to estoppel, however, is a larger question than that which need now be determined. It is sufficient for present purposes to recognise that the coherence of the law is enhanced if commonality of concept results, so far as possible, in commonality of principle. That commonality of principle, in my view, ought to produce the following result.

157 The defence of change of position is established where a defendant proves the existence of two conditions. The first condition is that the defendant has acted (that is, done something the defendant would not otherwise have done) or

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370 Cf Handley, *Estoppel by Conduct and Election*, (2006) at 96-97 [5-033]; *R E Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 685.

371 (1992) 175 CLR 353 at 385 (emphasis in original).

372 Cf *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at 830-831 [45]-[48]; *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230 at 237. See Bant, *The Change of Position Defence*, (2009) at 225.

refrained from acting (that is, not done something the defendant would otherwise have done) in good faith on the assumption that the defendant was entitled to deal with the payment which the defendant received. The defendant need not for the purpose of meeting this condition have acted on knowledge derived from the payer[373]. Whether the defendant needs also to have acted reasonably is a question which does not now arise for determination. The second condition is that, by reason of having so acted or refrained from acting, the defendant would be placed in a worse position if ordered to make restitution of the payment than if the defendant had not received the payment at all. The detriment constituted by that difference in position need not, in every case, be financial or pecuniary. If financial or pecuniary, it need not, in every case, be established with precision. It can be an opportunity forgone[374]. It must, in every case, be shown by the defendant to be substantial.

158 Where the defence is so established, the prima facie entitlement of the defendant is to maintain the assumption on which the defendant acted and, on that basis, to retain the whole of the payment. That entitlement is qualified to the extent that retention of the whole of the payment can be shown to be disproportionate to the degree of the detriment. Where the detriment is financial or pecuniary, can be quantified, and is less than the amount received, the entitlement of the defendant to retain the payment is reduced pro tanto.

Application of the defence in this case

159 Turning to the application of the defence in this case, I am grateful to adopt the statement of facts and abbreviations in the joint reasons for judgment. There being no dispute that Hills and Bosch each acted in good faith (and reasonably) on the faith of receipt of the mistaken payments from AFSL, the application of the defence turns on the nature and extent of the detriment Hills and Bosch each would have suffered were they to have been ordered to make restitution of the mistaken payments.

160 There are some differences between the position of Hills and the position of Bosch, but I do not consider them to be material. It is therefore convenient to proceed by examining the position of Hills, addressing the arguments of all parties in that process.

161 Hills sought to identify four sources of detriment. They were that Hills: discharged $308,000 of the debt owed to it by TCP; re-opened TCP's account and

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373 *Port of Brisbane Corporation v ANZ Securities Ltd (No 2)* [2003] 2 Qd R 661 at 672 [15]; *Citigroup Pty Ltd v National Australia Bank Ltd* (2012) 82 NSWLR 391 at 394 [4]-[6].

374 Eg *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318.

continued trading with it; ceased taking the steps it had proposed of engaging lawyers and seeking security and repayment; and was placed in a position of being unable to demonstrate what would or may have happened if it had not so acted on the faith of the payment. They are best examined separately.

162 Hills did not argue that any part of the debt owed to it by TCP was discharged merely by its receipt of the mistaken payment of $308,000 from AFSL. Nor did Hills argue that any part of that debt was discharged merely by its choice to credit that mistaken payment to the trading account TCP maintained with it. Hills accepted that payment of a debt by a third person (not jointly liable for the debt) does not discharge the debt unless the payment is made by the third person as agent for the debtor and with the debtor's prior authority or subsequent ratification[375]. Hills also accepted that an uncommunicated book entry alone can be of no consequence[376]. To the extent Bosch put arguments contrary to those principles, I would reject them.

163 Hills' argument that it discharged $308,000 of the debt owed to it by TCP was, rather, based on an inference, to be drawn from correspondence, of an agreement between Hills and TCP that the amount of $308,000 would be applied in discharge of TCP's indebtedness. The argument is in truth that there was an agreement between Hills and TCP to release TCP from its indebtedness to Hills rather than that there was in some way a discharge by performance of TCP's obligation to pay. The problem with the argument is that the inferred agreement on which Hills relied must fail for want of consideration moving from TCP. To the extent Hills purported to release TCP from its indebtedness, it was a release for which TCP provided no consideration. This was not a case of accord and satisfaction. The fraud of Mr Skarzynski ruled out any question of the purported release giving rise to an estoppel. The debt TCP owed to Hills remained. The debt was enforceable at law by Hills against TCP notwithstanding its purported discharge and was provable by Hills in the liquidation of TCP.

164 Hills and Bosch sought to gain some support for the argument that there had been a discharge of TCP's indebtedness by drawing on an analogy between what in fact occurred and a hypothetical scenario which involved Hills paying the $308,000 to TCP for no consideration and then immediately receiving the $308,000 back from TCP in discharge of the debt. The problem with that argument from analogy, like many arguments from analogy, is that it does not come to grips with what in fact occurred. The course of action analogised is not

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375 *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177 at 191-192; *Chitty on Contracts*, 31st ed (2012), vol 1 at 1578-1579 [21-042].

376 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 674.

a satisfactory way of explaining what in fact occurred. It makes no commercial sense, absent perhaps the fraud of Mr Skarzynski.

165 Hills' re-opening of TCP's account and continued trading with TCP was an undoubted source of detriment to Hills. But that detriment can be precisely quantified: as the $21,739.03 TCP owed to Hills at the time the fraud of Mr Skarzynski was discovered in April 2010. Standing alone, it would not give rise to an entitlement on the part of Hills to retain more than that amount.

166 By ceasing to take the steps it had proposed of engaging lawyers and seeking security and repayment of the $308,000 debt owed to it by TCP, however, Hills gave up a commercial opportunity the substantial value of which Hills has now lost by reason of the intervening liquidation of TCP. Having given up that opportunity, Hills would be placed in a worse position if ordered to make restitution of the $308,000 paid to it by AFSL than if Hills had not received that payment at all. That is enough to entitle Hills to retain the whole of the payment unless it were to appear that the value of the commercial opportunity forgone was able to be quantified as some other, lesser amount. It is not necessary for Hills to go so far as to show that it has been placed in a position of being unable to demonstrate what would or may have happened if it had not so acted on the faith of the payment.

Orders

167 The appeal should be dismissed with costs.