The Australian Change of Position Defence

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Change of position is arguably the most important defence available to a claim in unjust enrichment. Notwithstanding its central role, many aspects of the defence remain unclear. This article examines the Australian common law version of the defence. Focusing in particular on the distinctive Australian requirement of reliance and the possible role for fault as a limit to the availability of the defence, the authors suggest ways in which the uncertainties surrounding the defence might be resolved. The defence that emerges is generally broader in its operation than previously realised.

WESTERN AUSTRALIA offers a distinctive perspective on the emerging law relating to the defence of change of position. Although the defence has been expressly recognised by courts in Commonwealth jurisdictions only relatively recently,[1] Western Australian law has had two statutory versions of the defence since 1962. They now appear in section 65(8) of the Trustees Act 1962 (WA) and section 125(1) of the Property Law Act 1969 (WA).[2] Although the statutory defences have received little judicial consideration to date, increasing awareness of the common law defence may prompt more scrutiny in future of the statutory provisions and their relationship to the common law version of the defence.

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1. In Australia, the foundation case is *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. In England, recognition came slightly earlier in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.
2. Originally enacted as Law Reform (Property, Perpetuities and Succession) Act 1962 (WA) s 24(1).

In this article, we will examine the common law defence as it is developing in Australia. In a subsequent article, we will examine the content of the Western Australian statutory versions of the defence and consider the interaction between the two sections and also their interface with the common law defence. In doing so, we aim not merely to chart a course for those who must apply the Western Australian law; we also hope that the discussion may serve to highlight and clarify many of the issues currently debated in other Australian and Commonwealth jurisdictions in relation to the common law defence.

INTRODUCTION TO THE COMMON LAW DEFENCE

At common law, the change of position defence forms part of the law of unjust enrichment.[3] A defendant who can invoke the defence can avoid, either in whole or in part, its prima facie liability to make restitution to the plaintiff of the value of a benefit[4] it has received at the expense of the plaintiff. In Australia, the defendant must show that it has changed its position in good faith in reliance on its receipt of the benefit.[5] For example, a defendant may have received a mistaken payment of $2 000 and, thinking the money to be hers, spent $1 500 on a holiday she would otherwise not have taken. In this example, the defence would operate in relation to her expenditure of $1 500, leaving her liable to make restitution to the plaintiff to the extent of $500. In general terms, the defence operates to excuse the defendant from liability to restore the value of the enrichment that has been 'lost' in the period between the original receipt[6] and when the plaintiff seeks restitution of the payment.[7]

Although the issue has not been addressed in Australian courts, it is also possible that the defence might be available where the defendant has changed its position but has not lost the value of the enrichment.[8] In these cases, it would be

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3. Examples of claims in unjust enrichment are claims based on mistake, duress and failure of consideration: see *David Securities* supra n 1, 379.
4. Commonly, a mistaken payment.
5. *David Securities* supra n 1, 384, referring with apparent approval to the formulation of the defence in *ANZ Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662, 673.
6. At which time its prima facie liability to make restitution arises.
7. This aspect of the defence is often described as 'enrichment-related' in that it counteracts that part of an unjust enrichment claim which asserts that the defendant was 'enriched' (at the expense of the plaintiff): see eg P Birks *Restitution – The Future* (Sydney: Federation Press, 1992) 125-126, 128-139; R Nolan 'Change of Position' in P Birks (ed) *Laundering and Tracing* (Oxford: Clarendon Press, 1995) 135, 136. However, it must be appreciated that the defence does not rebut or even dispute the plaintiff's claim that the defendant was enriched at the time of receipt. Rather, it raises a separate issue, namely that the defendant was not still enriched at the time the plaintiff sought to recover the enrichment.
8. The Canadian decision in *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230 allowed the defence even though the defendant retained the enrichment. See infra pp 223-226.

necessary to identify some other factor that would make it unjust to require the defendant to make restitution of a benefit it still retains.[9] In our view, a compelling case for this aspect of the defence has yet to be made.

While some central points are clear, the full scope and operation of the defence is still very much in the process of development and clarification. In respect of each feature of the defence there remain important unresolved issues, to which we will now turn. We begin with the defence based on loss of enrichment before considering the possibility of a defence where the defendant has retained the benefit.

ELEMENTS OF THE COMMON LAW DEFENCE

1. The defendant's 'change of position'

The first element of the common law defence is that there must have been a 'change' in the defendant's position. Generally, this involves showing that the defendant is no longer enriched by the benefit transferred to it by the plaintiff. That does not mean that the defendant must show that it has lost the *exact* benefit transferred to it by the plaintiff.[10] Rather, the defendant must prove that it has irretrievably lost the *value* of the benefit originally received so that, if one were to add up all the defendant's assets and liabilities, one could see that in net terms it is no longer enriched to the extent of the benefit originally received.

It is widely accepted that expenditure of moneys by the defendant constitutes the classic example of a 'change' for the purposes of the defence.[11] Consistently with the focus on the defendant's 'net' enrichment, it is wasted expenditure, not expenditure on lasting assets, that counts.[12] If a defendant purchases an asset with

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9. This aspect of the defence is sometimes described as 'unjust-related', in that it would counteract that part of an unjust enrichment claim which asserts that the enrichment was obtained in circumstances (such as mistake, duress or failure of consideration) which make it unjust for the defendant to retain it: see eg Birks *Restitution – The Future* supra n 7, 125-126, 143-147; Nolan supra n 7, 172-173. Again, we note that the defence would not dispute the circumstances which made the original receipt 'unjust'. The defence would raise a separate issue, namely that in the circumstances existing at the time of the plaintiff's claim, it would not be unjust to retain the enrichment.

10. If it is assumed that the provision of 'pure' services by the plaintiff can constitute enrichment, restitution of the exact benefit would be impossible. However, the assumption is controversial: see eg J Beatson 'Benefit, Reliance, and the Structure of Unjust Enrichment' in J Beatson (ed) *The Use and Abuse of Unjust Enrichment* (Oxford: OUP, 1991) 21-44; D Byrne 'Benefits – For Services Rendered' in M McInnes (ed) *Restitution: Developments in Unjust Enrichment* (Sydney: Law Book Co, 1996) 87; M Garner 'Benefits – For Services Rendered: Commentary' in McMcInnes ibid, 109; R Grahtham & C Rickett *Enrichment and Restitution in New Zealand* (Oxford: Hart, 2000) 61.

11. *David Securities* supra n 1, 385-386.

12. *Dawson* supra n 8, 238, cited in *Gertsch v Atsas* [1999] NSWSC 898 (unreported, 1 Oct 1999) para 66.

money received from the plaintiff, it remains enriched to the extent of the value of that asset. The defence will be unavailable insofar as the purchased asset has not declined in value.

It is not only positive expenditure that counts as a change of position. As the case of *Gertsch v Atsas*[13] demonstrates, forgoing a benefit may also qualify. In that case, moneys were distributed to beneficiaries of a deceased estate, pursuant to an apparently valid will. It was subsequently discovered that the will was a forgery. In the meantime, the value of the moneys distributed to the second and third defendants had been dissipated. Foster AJ found that, in reliance on the security of her receipt, the third defendant, Mrs Hamilton, had effected a radical change of lifestyle. She had given up her paid employment and become a full-time student. It was this change of lifestyle (valued by reference to the forgone income) which constituted her change of position, rather than any particular expenditure incurred on her part.

A broad approach to the question of what kinds of act will establish a 'change' was also applied in *Palmer v Blue Circle Southern Cement Ltd.*[14] In that case, an employee was mistakenly overpaid workers' compensation, which he spent on ordinary living expenses. On appeal, Bell J concluded that the defendant's relevant change of position was not his actual expenditure of money, but rather his consequential decision not to apply for or receive additional social security benefits. In other words, the plaintiff had abstained from action, and it was this, rather than any positive act on his part, which constituted his change of position. By abstaining from action, the defendant effectively lost the value of the original enrichment.[15]

It is important to note that, in order to attract the operation of the defence, the alleged change must be irreversible. In *Palmer*, for example, the defendant's loss was irreversible because, by the time the overpayments came to light, it was too late to claim the benefits that he had forgone.[16] An example to opposite effect is found in *Scottish Equitable plc v Derby*.[17] In that case, Mr Derby had received an overpayment of some £172 451 through the carelessness of his life assurance company. He had used part of the overpayment to purchase a pension from an

13. Ibid. See also *Morgan Guaranty Trust Co (NY) v Outerbridge* (1990) 66 DLR (4th) 517.
14. [1999] NSWSC 697 (unreported, 9 Jul 1999).
15. This recognition that value may be lost by abstaining from action is consistent with the view that a defendant can be enriched by the 'avoidance of necessary expenditure'. On the avoidance of necessary expenditure, see AS Burrows *The Law of Restitution* (London: Butterworths, 1993) 11.
16. *Palmer* supra n 14, para 4. In *Jeffrey v Fitzroy Collingwood Rental Housing Association Ltd* [1999] VSC 335 (unreported, 8 Sep 1999) para 40, Harper J appeared to reject the argument that the defendant's failure to obtain income from other sources could be a change of position. However, the decision can be explained on the basis that at all material times the defendant remained in a position to obtain the forgone income, so that the alleged loss was not irreversible.
17. [2001] 3 All ER 818.

insurance company. As the insurance company was prepared to 'unwind' the pension policy and refund the purchase price, the defendant had not irretrievably changed his position.[18]

In these cases, it was clear from the evidence whether the change was reversible or not. In other cases, it may be less clear whether the expenditure would be recoverable. For example, if a defendant relies on the receipt of a mistaken payment to make a gift to charity, it could be argued that if the defendant were required to make restitution, it could in turn recover the gift from the charity on the grounds that it was also made under a mistake. On the other hand, the charity might itself be able to resist such a claim by establishing that it had changed its position. In such a case, the prospects and incidental costs of recovery from the third party are much more unpredictable than, say, where the defendant has paid tax in respect of a mistaken payment. Consequently, it will be important to know who bears the burden of proof on the issue of irreversibility and the extent of proof required to discharge that burden.[19]

In our view, the irreversibility of the loss is integral to establishing the defendant's claim that it has, in substance, changed its position. It is therefore a matter to be proved by the defendant, unless admitted by the plaintiff.[20] This should not be difficult in cases where the defendant has paid a third party under a fully executed contract in respect of which no claim in unjust enrichment would lie. Similarly, an agent who has received a mistaken payment and accounted for it to its principal without knowing of the mistake can establish that it has changed its position,

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18. If the insurance company had not been willing to rescind the pension contract, the defendant might still have been denied the defence on the ground that he had obtained a valuable asset in the form of the pension. Assuming the court had the power to make such an order, the appropriate remedy would then be an order for periodic repayments to the plaintiff, to correspond with the defendant's receipt of the pension benefits. The Trustees Act 1962 (WA) s 65(8) and Property Law Act 1969 (WA) s 125(2) specifically provide for periodic payments.

19. In *Lipkin Gorman* supra n 1, 579, Lord Goff treated a gift to a charity in reliance on receipt as an example of a change of position, but he did not consider whether the defendant could have recovered the payment from the charity. This may be explained on the ground that in England at that time the defendant could not have recovered a payment made under a mistake of law: Nolan supra n 7, 135, 171. Compare the position in Western Australia: Property Law Act 1969 (WA) s 124. The mistake of law bar has since been lifted in both England and Australia: see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *David Securities* supra n 1.

20. *David Securities* supra n 1, 385; *State Bank of NSW Ltd v Swiss Bank Corp* (1995) 39 NSWLR 350, 355. In *Hinckley & Bosworth Borough Council v Shaw* [2000] BLGR 9, Bell J required the defendant to prove that tax paid on a mistaken payment would probably not be recoverable. See also *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 904.

unless, on discovering the mistake, the principal returns the payment to the agent.[21] However, the issue might be more significant in cases of gifts to third parties, payments to statutory bodies, entry into executory contracts and omissions to apply for benefits. In such cases a defendant would need to show legal or practical obstacles that would make recovery from the third party unlikely.

2. Reliance

In Australia, the defendant must have changed its position 'on the faith of',[22] or 'in reliance on',[23] the receipt. Proof of reliance involves establishing both a causal link between the receipt and the change and also a mental element, showing that the change was a conscious response to the receipt. We examine each of these components in turn.

(i) Causation

In order to establish the defence, it is not enough for a defendant merely to show that it has changed its position. As the High Court stated in *David Securities Pty Ltd v Commonwealth Bank of Australia,* 'the defendant [must] point to expenditure or financial commitment which can be ascribed to the mistaken payment'.[24] Accordingly, the defendant must show that its change of position would not have occurred but for the receipt. This causation requirement excludes as irrelevant any change which the defendant would have incurred in any event. An example[25] of an irrelevant change of position is where a defendant receives $50 by way of mistaken payment and puts the money in his right pocket. A thief then steals his wallet, which contains $20, from the other pocket. The defendant is now only 'net' enriched to the extent of $30. However, it is generally accepted that the receipt and the loss of enrichment are simply unconnected or too remotely

21. *ANZ Banking Group* supra n 5, 674. It is arguable that the defence of 'ministerial receipt' would provide the agent with an additional defence: see W Swadling 'The Nature of Ministerial Receipt' in Birks *Laundering and Tracing* supra n 7, 243, 256.
22. *David Securities* supra n 1, 385.
23. *ANZ Banking Group* supra n 5, 673; *Rogers v Kabriel* [1999] NSWSC 368 (unreported, 23 Apr 1999) para 67. P Key 'Change of Position' [1995] 58 MLR 505, 508 raises the possibility that the Australian case of *National Commercial Banking Corp of Aust Ltd v Batty* [1986] 160 CLR 251 may constitute an authority to the contrary. In that case, funds were paid into and withdrawn from a partnership account by a fraudulent partner, without the knowledge of the other innocent partner. However, the innocent partner avoided liability on the ground that he had not 'received' the funds in the account, rather than on the ground that he had changed his position by paying the funds to the fraudster: see *Batty* ibid, 264-269.
24. Supra n 1, 385.
25. This example comes from Birks *Restitution – The Future* supra n 7, 141-142.

connected to satisfy the causal link requirement.[26] The thief would have taken the $20, whether or not the mistaken payment had been received. The defendant's change of position was not causally related (and thus not relevant) to the receipt.

Although it is said that the defendant must have changed its position, this does not mean the defendant must have been *responsible* for the loss. In the example above, if the thief had stolen the $50 from the right pocket, the defendant can be said to have changed his position in the relevant sense. But for the receipt of the mistaken payment, he would not have placed the $50 in his pocket and would not have incurred the loss. Similarly, if the defendant has used a mistaken payment to purchase assets such as shares, which have subsequently declined in value for reasons beyond his control, it has still changed its position.

The causation requirement explains why it is said that a defendant's expenditure must have been 'otherwise than in the ordinary course of things'.[27] If the defendant would have incurred the expenditure in any event, then, whether or not the *actual* moneys received have been spent, the defendant remains 'net enriched' for the full amount of the receipt and there is accordingly no relevant change of position.

Commentators have sometimes described this, in shorthand fashion, as a requirement that the defendant must have incurred 'extraordinary expenditure'.[28] That description invites confusion. First, it could be understood as implying that the only acts on the part of the defendant that count towards establishing a 'change' for the purposes of the defence are those comprising positive expenditure. As we have seen, that is not the case. Secondly, the word 'extraordinary' could be understood as requiring that the change must be 'extravagant', so that expenditure on more 'everyday' items must be excluded.[29] This impression is also incorrect.

In *Philip Collins Ltd v Davis*,[30] for example, the defendants geared their expenditure to the level of royalties paid to them by the plaintiff, which happened to be more than the defendants were owed. Although the expenditure went at least partly towards general living expenses, the court allowed the defence to the extent

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26. Burrows supra n 15, 426; P Birks *An Introduction to the Law of Restitution* (Oxford: OUP, 1985) 330. In this regard, Burrows ibid, 426-427 adopts a 'remoteness' test, as does Nolan supra n 7, 149-151.
27. *David Securities* supra n 1, 385-386; *Lipkin Gorman* supra n 1, 580; *Dawson* supra n 8, 238. The same point is sometimes made by saying that there is no change of position where the defendant has spent money on ordinary living expenses: see *David Securities* 386. Similarly, in *Rogers v Kabriel* supra n 23, para 67, Young J stated that 'there must be a change of position, not merely an adjustment of lifestyle.'
28. PD Maddaugh & JD McCamus *The Law of Restitution* (Ontario: Law Book Co, 1990) 232-234; GH Jones 'Change of Circumstances in Quasi-Contract' (1957) 73 LQR 48, 55.
29. *Rogers* supra n 23, para 67.
30. [2000] 3 All ER 808. See also *Clay v James* [2001] WASC 101 (unreported, 27 Apr 2001) para 6; *Gertsch v Atsas* supra n 12, paras 129-142.

to which the defendants had spent more than they otherwise would. Thus, expenditure need not be 'extraordinary', in the sense of 'extravagant', in order to attract the defence. Indeed, even extravagant expenditure will not qualify, if that expenditure would have been incurred by the defendant in any event. In *Gertsch v Atsas,*[31] for example, the court found that, even without the bequest, Mr Fidirikkos (the second defendant) would have stretched his resources to the limit to provide sumptuous weddings for his daughters. Accordingly, the court took into account only part of that expenditure for the purposes of assessing the extent of his defence.

Obviously, if the relevant expenditure is extravagant, it may be easier to identify and quantify for the purposes of gauging the defendant's remaining enrichment. However, if the defendant can point to 'ordinary' or 'everyday' expenditure that it would not have made but for the receipt, it may still succeed. The defendant is more likely to discharge this burden by showing an increase in its overall level of expenditure, rather than by proving expenditure on particular items. In this regard, it is worth noting that Foster AJ in *Gertsch v Atsas*[32] adopted the view of the Newfoundland Court of Appeal in *RBC Dominion Securities Inc v Dawson*, regarding the burden borne by a defendant in proving the defence. In that case, the court said:

> To require that a private individual, who believed she was spending her own money, prove her expenditures as if she were claiming damages in an action for negligence would be most unfair. It was the plaintiff's error that put her in the funds in the first place and led her to believe that the funds were hers to spend without having to account to anyone for her expenditures.[33]

In such circumstances, the court could be 'satisfied with reasonable estimations'.[34] In all cases, the defendant must still demonstrate that there has been a relevant change caused by the receipt, which can be quantified in money terms (so that it can be said that the enrichment received by the defendant has effectively been lost). In this regard, the court identifies and quantifies the relevant 'change' by comparing the defendant's actual position with what it would have been but for the receipt. For example, in the *Palmer* case, had Mr Palmer not received the mistaken payments, he would have applied for and obtained social security benefits which would have been at least commensurate with the level of the mistaken payment.[35]

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31. Ibid, para 141.
32. Ibid, para 66.
33. *Dawson* supra n 8, 240.
34. Ibid. See also *Philip Collins* supra n 30, 827; *Derby* supra n 17, 827.
35. *Palmer* supra n 14, para 35. Bell J expressly noted that 'there is nothing to suggest that the weekly payments of $127 were in excess of the weekly payments which the appellant would otherwise have received in the way of Department of Social Security benefit payments'.

As a result of abstaining from action, he had lost the value of the enrichment he had gained from the mistaken payments.

By contrast, in *Scottish Equitable plc v Derby,* the defendant argued that, as a result of receiving the mistaken payment, he had forgone the opportunity to obtain gainful employment. However, the court found that, given his age, there was little he could have done to improve his financial position.[36] In the circumstances, this aspect of his change of position defence failed.[37]

It is also worth noting that the defence failed notwithstanding the hardship Mr Derby would face after refunding the mistaken payment. Not only would he feel 'bitter disappointment', he would also return to his prior impoverished state. Indeed, his financial position would be even worse, because of certain intervening events which were unrelated to the mistaken payment. Despite the court's sympathy for his predicament, there was no basis for mitigating his hardship where his position after repayment would be no worse in material terms than if he had never received the mistaken payment.[38]

(ii) Anticipatory changes of position

A related issue is whether a change of position made in anticipation of a receipt is relevant for the purposes of the defence. Suppose a woman is mistakenly informed by a lottery operator that she has won $2 000 in a lottery. In anticipation of receiving the prize, she books and pays $1 500 for a holiday, which she could not otherwise have afforded. She subsequently receives and banks a cheque for $2 000 from the lottery operator. Later, the operator advises her of the mistake and demands restitution. Should she be entitled to rely on the defence to the extent of her expenditure on the holiday?

Under the prevailing Australian view, the defence only protects changes which are caused by or attributable to the *receipt*.[39] This suggests that an anticipatory change does not qualify, since a prior change of position cannot have been caused by a subsequent receipt.[40] The woman would have already spent the money on the holiday whether or not she subsequently received the lottery payout. Thus the change would have occurred in any event. Admittedly, it might be said that she would not have changed her position but for the *expectation* that she would receive

36. *Derby* supra n 17, 828.
37. Ibid. A further example may be found in *Jeffrey* supra n 16, paras 40-41.
38. *Derby* supra n 17, 828, 832.
39. *David Securities* supra n 1, 385.
40. In *South Tyneside Borough Council v Svenska International plc* [1995] 1 All ER 545, the court relied on this reasoning to exclude anticipatory change from the English common law defence. In *Philip Collins* supra n 30, 827 Parker J indicated, obiter, that the question was still open on the authorities.

the payment. However, expenditure based on an expectation would not, under the current law, give rise to a defence of change of position. Instead, the defendant would need to look to the law of contract or estoppel for protection of her expectation interest.[41]

However, it is arguable that the defence should be capable of a wider operation.[42] In our example, the woman would not have spent the money but for her assumption that she was entitled to the lottery winnings, and the value of the enrichment she ultimately received was diminished by the expenditure on the holiday. In this regard, her position is no different from one who paid for a holiday after receipt of the lottery winnings. Thus, the defence might be expanded to include those who change their position in the expectation that they will receive property and who subsequently do receive it.

Such an approach would avoid some of the difficulties involved in applying the defence to a series of payments. Suppose an employer mistakenly overpays an employee for a number of years. Over time, the employee may in good faith incur exceptional expenditure to match her inflated income. Sometimes the expenditure may occur after receipt of a particular overpayment, and sometimes before. In the employee's mind, it is irrelevant whether the expenditure precedes or follows the receipt of the overpayments, particularly if she purchases items on credit. The important thing for her is that she assumes that she is entitled to receive wages at the inflated rate, and incurs expenditure accordingly. In these circumstances, it is arguable that it would be both unreasonable and impractical to confine her defence to those expenditures made after receipt. The defence would not be protecting her expectation of receiving payment, for that expectation has been fulfilled by the plaintiff.[43] Rather, the defence would protect the defendant from having to restore a benefit which she no longer has, as a result of conduct based on the anticipated receipt of that benefit.

(iii) Knowledge

Reliance is a conscious act, in which the actor behaves in a way that is consistent with its knowledge of the matter on which it relies. In the context of the defence, this

41. Burrows supra n 15, 424-425; see also *R v Equiticorp Industries Group Ltd* [1998] 2 NZLR 481, 654, 730, in which Smellie J adopted Burrows' reasoning.
42. Eg Nolan supra n 7, 163-170; Key supra n 23, 513; Birks *Laundering and Tracing* supra n 7, 328-329. For an example of the wider operation in the context of a statutory version of the defence, see *Re Island Bay Masonry Ltd* (1998) 8 NZCLC 261, discussed by P Watts 'Company Law' [1999] NZ L Rev 23, 39-40.
43. Accordingly, it would not matter whether the expectation was a reasonable one, nor even whether it was formed on the basis of the words or conduct of the plaintiff. It would be sufficient that the defendant acted on the basis of an expectation which in fact was fulfilled.

means that the defendant must prove that it consciously acted (or abstained from acting) on the basis of the receipt. Hence, a defendant must at least have known of the receipt when it acted, as it is impossible to rely on something of which one has no knowledge.[44]

Further, it seems that a defendant will only be able to show reliance on the receipt if it acted consistently with its knowledge as to the terms or basis on which it received the benefit. For example, a defendant that knew that a benefit was being conferred on a conditional basis and, before the condition was fulfilled, acted as if its interest were absolute, would not be entitled to the defence.[45] Assuming good faith on its part, it would have been acting on the chance that the condition would be fulfilled rather than on the strength of its conditional receipt.

On this basis, we would argue that a defendant who has received a payment while knowing that the payment ought to be refunded can still establish reliance on the receipt if it applies the funds for the payer's benefit. This can be illustrated by the facts in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd.*[46] In that case, a bank mistakenly paid moneys to the defendant, notwithstanding the latter's repeated protests that it was not entitled to the payment. Aware that the bank would eventually discover its mistake and seek repayment, the defendant placed the moneys on deposit with a small finance company, secured initially by a marked transfer of government stock and later by a first mortgage over a development property. By the time the bank realised its mistake, the finance company had gone into liquidation and, '[f]or reasons which [were] not entirely clear, the security was worthless'.[47]

Although the defendant knew that the payment was made under a mistake, it is arguable that its defence could still have succeeded under the Australian common law.[48] It could be said that the defendant had relied on the receipt, in the sense that

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44. In cases where the defendant does not know of the receipt, there is a prior question of whether the defendant has been 'enriched' at all. If not, there can be no cause of action in unjust enrichment. In *Batty* supra n 23, the court held that the defendant was not enriched because it did not know that moneys had been credited to its account. A mere 'technical receipt' was insufficient. However, the court also accepted that in exceptional cases a defendant may have received a benefit without knowing it. This could occur, for example, where the defendant did not know, but ought to have known, that it had possession or control of an asset. In such a case, the defendant could not mount a defence of change of position: it could not show that it had relied on a receipt of which it had no knowledge.
45. It is for this reason that the defence may not be available where the plaintiff's claim is based on failure of consideration.
46. [1999] 2 NZLR 211.
47. Ibid, 215. The New Zealand Court of Appeal allowed the change of position defence, in part, on a broad assessment of the equities, without considering whether the defendant could be said to have relied on the receipt.
48. The defence would not succeed under the Property Law Act 1969 (WA) s 125(1), where the defendant must have relied on the *validity* of the payment.

it acted consistently with its knowledge as to the nature of the receipt. The court in *Waitaki* accepted that the defendant had invested the money so that it would be available to repay the plaintiff at a later time. This was consistent with the defendant's knowledge that the money was repayable and that the plaintiff was then unwilling to be repaid. However, the position would have been different if the defendant had chosen to invest the money for its own personal gain. By doing so, it would not have been acting in reliance on the receipt; by using the money for its own purposes, it would have taken the risk that the funds might be lost.[49]

On the view we have advanced above, acting inconsistently with actual knowledge of a vitiating factor will preclude reliance. However, a defendant that has wilfully shut its eyes to an obvious vitiating factor, or deliberately abstained from inquiring into a suspect transaction in order to remain in ignorance of the relevant vitiating factor,[50] also cannot be said to have relied on its receipt. By not acknowledging or investigating the true position, it has taken the risk that it may not be entitled to the receipt. It has not acted on the basis that it believed itself entitled to receive the benefit, but on the chance that it might retain a windfall.[51]

Even where the defendant does act in accordance with its belief, it may be that the defence will be denied where the belief was unreasonable.[52] The belief might be regarded as unreasonable if it could have been dispelled by inquiries that *the recipient* could reasonably have been expected to make in the circumstances.[53] For example, the defence may be unavailable to a defendant which fails to check with the payer after receiving a sum that it could not have expected to receive. Similarly, where a defendant claims to have relied on its belief that the payment was intended to benefit a third party, the defence may fail if the belief was unreasonable.[54] This

49. See also P Watts 'Restitution' [1999] NZ L Rev 373, 380-381.
50. *Orix Aust Corp Ltd v M Wright Hotel Refrigeration Pty Ltd* [2000] SASC 57 (unreported, 8 Mar 2000) para 44. The facts of *R v Equiticorp Industries Group* supra n 41 provide an example which might also be explained on this ground. The Crown was denied the defence on the basis, inter alia, that it was a 'wrongdoer', since it either wilfully shut its eyes or wilfully and recklessly failed to make inquiries regarding the vitiating factor. In our view, it could have been said that the Crown did not act in reliance on the receipt.
51. In any event, it is unlikely to be able to satisfy the good faith requirement, discussed infra pp 220-221.
52. Compare Administration Act 1969 (NZ) s 51, which expressly requires that the defendant acted 'in the reasonably held belief that the distribution was properly made and would not be set aside'. See also P Watts 'Judicature Amendment Act 1958 – Mistaken Payments' in NZ Law Comm *Contract Statutes Review* Report No 25 (Wellington, 1993) 200, paras 4.43-4.46.
53. The test might thus be more demanding of, say, a bank than a recipient who is naïve in financial dealings. For a more objective test, see P Birks, 'Change of Position: the Nature of the Defence and its Relationship to Other Restitutionary Defences' in M McInnes (ed) *Restitution: Developments in Unjust Enrichment* (Sydney: Law Book Co, 1996) 49, 58.
54. *Orix* supra n 50, para 44. In that case, the defendant received a cheque from the plaintiff. Reasonably believing that the funds had been advanced by the plaintiff to a third party to

may explain the decision in *State Bank of New South Wales Ltd v Swiss Bank Corporation.*[55] There, the defendant bank received $20 million from the plaintiff bank to be credited to a customer's account. The plaintiff's instructions failed to indicate the relevant customer. Nevertheless, the defendant credited $20 million to a company which claimed to be the intended payee. The court found that the defendant had acted honestly, but not sensibly. It held that, in the circumstances, the defendant could not rely on a belief derived from sources other than the plaintiff, since only the plaintiff could have identified the intended payee.

Some commentators[56] argue that insistence on reliance may unduly restrict the development of the defence. They favour the 'wide' version of the defence, as adopted in England,[57] which merely requires that the defendant's circumstances have changed as a result of receiving the enrichment; conscious reliance is not essential. The wide version is thought to provide appropriate relief in cases not covered by the narrower version accepted in Australia. For example, in *Scottish Equitable plc v Derby,* the English Court of Appeal stated that '[i]n many cases either test produces the same result, but the wide view extends protection to (for instance) an innocent recipient of a payment which is later stolen from him'.[58] However, it may be that this overestimates the difference between the two versions of the defence.

Once it is accepted that the defendant need not be *responsible* for the loss,[59] the innocent recipient from whom the payment is stolen would also be protected under the narrow version, provided it acted consistently with its knowledge of, or reasonable belief about, the facts. It is only where a defendant acts inconsistently with its knowledge of, or reasonable belief about, the state of affairs,[60] that it loses protection under the Australian approach. In our view, this achieves a satisfactory allocation of risk and justifies the retention of the reliance requirement. In any event, a similar outcome is often likely under the English approach, in that where a defendant does act inconsistently with its knowledge of the state of affairs, the defence would probably fail for want of good faith.[61]

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finance the purchase of equipment that the defendant could no longer supply, the defendant repaid the sum to the third party. The defence of change of position succeeded.

55. Supra n 20; leave to appeal was refused by the High Court.
56. Eg Nolan supra n 7, 145-147; Key supra n 23, 513.
57. *Derby* supra n 17, 827. The Court of Appeal distinguished the 'wide version' of the defence from the 'narrow version' in which proof of detrimental reliance is required.
58. Ibid, 827.
59. See supra p 214.
60. Eg where it pays away moneys that it knows must be returned, or applies a benefit for one party while knowing it was intended for another.
61. See infra p 221.

3. Good faith

The defence is only open to a defendant who has changed its position 'in good faith'.[62] There is little doubt that in Australia the onus of proving good faith falls on the defendant.[63] This seems appropriate, as the defendant should be required to prove an element that is so much within its own sphere of knowledge. Further, this approach is consistent with the statutory defences.

Good faith is subjectively assessed, in the sense that a defendant may fail to discover the true circumstances of its enrichment through inadvertence, carelessness or stupidity and yet still change its position in good faith. This can be seen in the case of *Scottish Equitable plc v Derby*, in which the court accepted that Mr Derby (an honest witness, although naïve in pension matters[64]) did not realise that his insurance company had miscalculated his payment, notwithstanding the fact that the mistake had the effect of quadrupling his fund in five years and that his financial adviser might have been expected to have noticed the error.

Although a court assesses the motivations and conduct of the particular defendant, it is submitted that good faith should be measured against an objective standard.[65] A person who has his own standards of morality cannot expect the protection of the defence. Thus, if Mr Derby had realised the payment was excessive, he could not be said to have acted in good faith if he spent the money on the basis that, as a poor man, he was more entitled to it than a wealthy insurance company.

4. Impact on third parties

An order to make restitution may adversely affect not only the defendant but also third parties. If, for example, a third party had extended credit to the defendant on the basis of its apparent assets, it might be prejudiced by an order that the defendant restore part of those assets to the plaintiff. However, the position at common law seems to be that the defence is either established or not according to the 'injustice' to the defendant[66] and that the potentially adverse impact on a third party cannot influence the outcome.[67]

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62. *David Securities* supra n 1, 384.
63. In England, the position is slightly more uncertain in that in *Lipkin Gorman* supra n 1. Lord Goff refers to it as part of the positive defence and also identifies 'bad faith' as a bar to the defence. However, cases since *Lipkin Gorman* seem to have proceeded on the basis that it forms part of the positive defence and that the onus of proof thus rests with the defendant: see *Derby* supra n 17; *Philip Collins* supra n 30, 827.
64. *Derby* supra n 17, 821.
65. A similar approach to honesty was taken in *Royal Brunei Airlines v Philip Tan Kok Ming* [1995] 2 AC 378, 390.
66. *Lipkin Gorman* supra n 1, 580.
67. By contrast, the WA statutory defences require a court to consider the implications for third parties of granting relief against the defendant.

CHANGE OF POSITION WHERE THE ENRICHMENT HAS BEEN RETAINED

We have seen that, as part of establishing the change of position defence, a defendant generally must prove that it no longer retains the value of the enrichment it originally received. However, in *RBC Dominion Securities Inc v Dawson*,[68] the court held that the defendant could rely on the defence, notwithstanding that she remained enriched as a result of the plaintiff's mistaken payment. In reliance on the payment, Ms Dawson had replaced some existing household furniture with new pieces. Although she had thereby acquired more valuable assets, her defence succeeded in respect of her expenditure on these items. This result suggests that there are grounds beyond the loss of enrichment which can establish the change of position defence.

However, the court's reasoning sheds little light on what those grounds might be. There is more than a hint that the court inclined to the view that the plaintiff should not recover because it was responsible for the original overpayment. Yet this reason cannot be accepted without undermining the fundamental principle that a plaintiff is entitled to restitution of a mistaken payment, regardless of the fact that the error was of its making.

It may be possible to explain the case as one where the defendant did lose the enrichment, by employing a concept of 'subjective revaluation'.[69] Nolan argues that a defendant has the right to *revalue* the benefit received, once it becomes aware of the operative unjust factor. So, in *Dawson*, the defendant could have legitimately argued that, had she been aware of the mistake, she would not have chosen to spend the money in the way she did. She could say that she no longer valued the furniture she purchased, because her choice at the time was affected by her own mistake.

While this notion of subjective revaluation has some attractions, it suffers from the problem that the court in *Dawson* clearly accepted that the defendant remained 'net enriched'.[70] Further, there seems to be no particularly good reason why the defendant should be permitted to re-value (downwards) assets she herself chose to purchase. There is a real difference between being lumbered with something you did not want (in which case the notion of subjective devaluation applies) and being obliged to pay for something you do value, but now find that you cannot afford.[71]

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68. Supra n 8.
69. Nolan supra n 7, 139-141.
70. *Dawson* supra n 8, 239.
71. We are grateful to our colleague Robyn Honey (formerly associate lecturer in law, UWA) for this point.

Nolan posits, as an alternative explanation, that *Dawson* may be a case where it is 'unjust' to require a defendant to repay a benefit *it has retained,* as opposed to the usual case where the defendant has not retained the benefit.[72] In his view, this version of the defence would apply where the defendant could show that 'money cannot adequately compensate him for any incidental prejudice to which he may be put in fulfilling a prima facie obligation to make restitution to the plaintiff'.[73]

We consider that it will be rare that money could not adequately compensate the defendant for such incidental prejudice.[74] The law assumes elsewhere that money can compensate for, if not cure, an enormous range of losses, whether financial, physical, or mental. Nor is the law generally deterred by the difficulty of quantifying a loss. It simply makes the best possible estimation. Even so, there may be cases where the incidental costs to the defendant of making restitution will be greater than the gain to the plaintiff.[75] In such cases, we would agree that the defendant should not be required to make restitution. After all, the function of a claim in unjust enrichment is to reverse the defendant's enrichment. It should not do more than that by imposing on the defendant further hardship.[76]

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72. This is the 'unjust-related' version of the defence, as to which see supra n 9.
73. Nolan supra n 7, 175. Nolan points out that considerations similar to those which govern the availability of specific performance may be relevant in applying this version of the change of position defence (eg, whether money can adequately compensate the defendant for the order to make restitution). See also our earlier comments regarding the 'unjust-related' version of the defence: supra n 9.
74. On the operation of the same principle where counter-restitution is said to be impossible, see Burrows supra n 15, 133-137. In that context, Burrows argues that it should always be possible to return the parties to the status quo ante.
75. It is not entirely clear what 'incidental prejudice' Ms Dawson would have suffered if required to make restitution for the surviving enrichment. Perhaps it lay in the practical difficulties she would have encountered and exertions that would have been required if she had chosen to realise the benefit by selling her newly acquired furniture and replacing it with furniture of a similar standard to that which she had previously sold. These 'costs' to the defendant could not easily have been included in any assessment of her surviving benefit from the overpayment. Accordingly, a court might have regarded these as too great a burden to impose on an innocent defendant in order to restore a relatively modest amount to the plaintiff. In other cases, incidental costs might include the trouble and expense of pursuing recovery of the enrichment from a third party, or even psychological harm to the defendant through losing a perceived improvement in its financial position. In that regard, compare *Commonwealth v Verwayen* (1990) 170 CLR 394, where several members of the court accepted that the potential psychological harm to the defendant through the plaintiff's withdrawal of a benefit could constitute detriment sufficient to support a claim in estoppel.
76. An example of this principle applying in the context of a proprietary claim may be found in *Re Diplock* [1948] 1 Ch 465. See also R Grantham & C Rickett 'On the Subsidiarity of Unjust Enrichment' [2001] 117 LQR 273, 275; Key supra n 23, 506-507; and *Gertsch v Atsas* supra n 12, para 92, where Foster AJ referred to the need to 'distinguish between two situations: one, where the defendant, notwithstanding the expenditure, can repay the amount expended from other funds at his or her disposal, and the other, where the

However, any such principle should not be confined to cases where the defendant has changed its position in some way. It should limit the availability of restitutionary relief in general. In theory,[77] it ought to be available even where the defendant has retained the benefit in its original form, but would suffer excessive harm in having to restore the benefit to the plaintiff. If that is right, then the principle is not an aspect of the defence of change of position at all. Accordingly, that defence can properly be confined to cases where the defendant has lost the value of the original enrichment.

BARS TO THE DEFENCE

To date, the issue of whether there are bars to the defence has received limited consideration in Australian courts. However, in principle, one would expect any bars to relate to conduct by the defendant which would disentitle it to the benefit of the protection otherwise allowed to a defendant which has changed its position. Most obviously, a dishonest defendant should be denied the benefit of the defence. However, this is achieved by the requirement that the defendant prove good faith. Beyond that instance, the defendant might be denied relief where it has contributed in some other culpable way to the plaintiff's loss, either in bringing about the original enrichment or in dealing with the enrichment once received. We now consider each of those situations.

1. Fault in causing the receipt

Australian courts have tended to view the defendant's fault in causing the receipt as relevant only to the issue of good faith. For example, in *Mercedes-Benz (NSW) Pty Ltd v National Mutual Royal Savings Bank Ltd,*[78] the plaintiff argued that the defence of change of position should either be denied or reduced on account of the defendant's negligence in causing the mistaken payment to be made. Ultimately, the argument failed because the defendant had not been negligent. Nevertheless, Palmer AJ, at first instance, indicated that involvement in some wrongdoing by which the payment was made was insufficient to defeat the defence; the defendant must also have had sufficient knowledge of the facts for its conduct to constitute

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defendant has no access to other funds and the requirement to repay would occasion great financial hardship, even penury or perhaps bankruptcy'.

77. In practice, it might be more difficult to establish that sufficient harm would follow in such a case – mere disappointment in losing a perceived benefit is unlikely to suffice: see *Derby* supra n 17.

78. (Unreported) NSW Court of Appeal 1 Apr 1996 CA 40583/92.

bad faith.[79] The New South Wales Court of Appeal, in upholding the judgment below, appeared to endorse that view.[80]

Similarly, in *Jeffrey v Fitzroy Collingwood Rental Housing Association Ltd,*[81] the court denied the defence by treating the defendant's fault in causing the payment as bad faith. In that case, the defendant had infringed the Rooming Houses Act 1990 (Vic) in setting the rent to be paid by the plaintiff. It sought to resist the plaintiff's claim to recover the excess rent on the basis that it had changed its position. In rejecting the defence, Harper J held that the defendant had not acted in good faith: 'Good faith which is based upon a failure to obey the law, albeit through ignorance, is not the good faith [required by the defence of change of position.]'[82]

However, the decision in *Jeffrey* suggests that bad faith is an inadequate explanation for denying the defence. On the facts, there was no suggestion of any dishonesty or conscious wrongdoing on the part of the defendant. Rather, the defendant had set the rent in ignorance of the statutory requirements. This suggests that the defence may be denied where the plaintiff's payment has been made in response to the defendant's unlawful demand, at least where the demand contravened provisions enacted for the protection of persons like the plaintiff.[83]

Once it is recognised that conduct falling short of bad faith may be sufficient to deny a defence, it is necessary to revisit the conclusion in *Mercedes-Benz* that negligence in causing the benefit to be conferred cannot preclude the defence. In our view, there is a good case for concluding that a defendant that is responsible for its own enrichment should not be permitted to rely on the change of position defence. This is because, having been the author or instigator of the transfer, it does not lie in the defendant's mouth to deny the plaintiff's prima facie right to restitution. The argument is perhaps strongest in cases where the benefit was originally conferred as a result of an illegal demand or duress,[84] but without bad faith. However, it is arguable that even negligence in causing the enrichment should disentitle the defendant to relief. If, for example, the defendant negligently miscalculates the amount it is owed by the plaintiff and the plaintiff consequently overpays the defendant, it

79. See also *Rogers* supra n 23, para 67: the defendant must not have knowingly contributed to the making of the payment.
80. The cases cited by the court were drawn from the 19th century, long before the current form of the defence was acknowledged. In any event, they do not seem to support the need for bad faith. In cases such as *Miller v Aris* (1800) 3 Esp 231; 170 ER 598 and *Steele v Williams* (1853) 8 Ex 625; 155 ER 1502, the defendant demanded a greater payment than was allowed by law, but there was no suggestion of conscious overcharging.
81. Supra n 16.
82. Ibid, para 41.
83. For an old example of the principle, see *Miller* supra n 80.
84. Or, in the case of unlawful demand by public authorities, the doctrine of colore officii, as in *Waikato Regional Airport Ltd v A-G (NZ)* [2001] 2 NZLR 670, 715.

seems more appropriate that the defendant should bear the risk that the money may be dissipated before the mistake comes to light.

In many cases, both parties may share some culpability for the transfer. In the previous example, the plaintiff might also have been at fault in not checking the defendant's calculations. This raises the question of how the resulting loss would be allocated between the parties, assuming fault were accepted as relevant.

One solution would be to allocate the loss according to the parties' respective fault, as is done in cases of contributory negligence. A defendant that is 25 per cent to blame for the original transfer would remain liable for 25 per cent of the loss flowing from the change of position. If this were seen as too difficult to apply in practice, a simpler approach might be to identify a threshold point where the defendant's culpability in causing the transfer would preclude it from relying on the defence. An obvious point would be where the defendant was more to blame for the original transfer than the plaintiff.[85]

On either of these approaches, it is inevitable that the culpability of the plaintiff would also be assessed. At first, this seems odd, since the plaintiff's carelessness is generally irrelevant for the purposes of establishing its prima facie entitlement to restitution of the enrichment[86] – so why should its fault suddenly become relevant for the purpose of establishing the defence? The difference is justifiable, we would argue, because of the different context in which it appears. Where there is surviving enrichment following a vitiated transfer, the plaintiff has a better claim to it than the defendant, despite the plaintiff's fault. However, where the issue is who is to bear the loss flowing from a change of position, then respective fault in creating the precondition for the loss may well be relevant.[87] Even so, it should only be relevant in deciding whether the defendant should lose a defence that would otherwise be available. The plaintiff's fault cannot in itself create a defence. To hold otherwise would threaten the principle that a plaintiff is entitled to restitution of a mistaken payment, even where the error was of its making. Hence, where the plaintiff is found

85. Key supra n 23, 515. See also American Law Institute *Restatement of the Law of Restitution* (St Paul: ALI Publishers, 1937) s 142(2), which states that: 'Change of circumstances may be a defense or partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.' Note that this approach also takes account of fault in dealing with the enrichment, a view with which we disagree: see infra pp 227-228.

86. *Kelly v Solari* (1841) 9 M&W 54; 152 ER 24; R Grantham & C Rickett 'Change of Position in New Zealand' [1999] NZBLQ 75, 77-78; R Grantham & C Rickett 'Change of Position and Balancing the Equities' [1999] 7 RLR 158, 162-163. Exceptionally, if the plaintiff has deliberately abstained from enquiring into the facts, it may be regarded as having made a voluntary payment.

87. Watts supra n 52, 373-374. Note however that much of Watts' subsequent discussion of the role of fault is heavily influenced by the requirement, found in many of New Zealand's statutory change of position defences, that the defendant's belief in the validity of its receipt is 'reasonable'.

to be entirely at fault (or more at fault than the defendant on the 'threshold' approach), the question of fault in causing the transfer would cease to be relevant; there would simply be no bar to the defendant relying on the defence.

From one perspective, it may appear that the court in *Waitaki* went further than this, in using the plaintiff's fault to *increase* the scope of the defendant's prima facie defence. Having found the defendant could establish a prima facie defence for two-thirds of the lost payment,[88] the court then increased the defence to 90 per cent of the loss because of the plaintiff's fault in making the initial payment. In effect, the plaintiff's fault in causing the payment appears to have given the defendant a defence it would not otherwise have had. However, it would be more accurate to say that, because of the plaintiff's fault, the court restored to the defendant a defence it would otherwise have lost by reason of its own carelessness in investing the funds. This is consistent with the principle that the plaintiff's fault is only relevant to whether the defendant should lose a defence otherwise open to it. It is more contentious, however, whether the defendant's carelessness in handling the investment provided a good reason for denying the defence. That is the next issue to which we turn.

2. Fault in losing the enrichment

From an Australian perspective, the conduct of the defendant in dealing with the benefit is primarily relevant to the reliance requirement. If the defendant has acted inconsistently with its knowledge of the basis on which it received the benefit, it cannot satisfy the reliance requirement. Conversely, provided it has acted consistently with that knowledge, and in good faith, there seems to be no reason to deny it a defence because it may have been imprudent in its use of the benefit. For example, if the defendant acts on the basis that it is entitled to the payment it has received, it should not matter that it spends the money extravagantly or invests it unwisely. It should not be penalised for taking risks with what it thought was its own money.

The issue is more difficult where the defendant knows that the money should be refunded and acts consistently with that knowledge by retaining it or investing it pending an opportunity to return it. The decision in *Waitaki* suggests that if, in these circumstances, the defendant fails to take reasonable steps to secure the funds, its defence may be adversely affected. In that case, the defence was initially discounted by one-third because the defendant failed to ensure that there was sufficient security for the invested funds.[89]

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88. Although all the funds had been lost, the defence was reduced by one-third on account of the defendant's careless investment after receipt.
89. This aspect of the decision is difficult to follow. If, on the court's view, the defendant's fault

Professor Birks has explained this on the basis that, by deciding to preserve the specific funds received until repayment was required, the defendant adopted the role of a trustee of the funds, with its attendant duty to act prudently in investing them.[90] While we accept that there might be cases where the defendant becomes a trustee of the funds for the plaintiff, we do not think *Waitaki* was one of them. If in that case the defendant had paid the mistaken funds into a trust account for the plaintiff, and failed to secure the account, it would have been a trustee and possibly liable for breach of an express trust, rather than in unjust enrichment.[91] However, it is doubtful that the defendant did in fact take on the role of a trustee. Merely setting aside funds with a view to being able to pay an anticipated demand does not make one a trustee of the funds.[92]

If the recipient is not a trustee, it is difficult to see how the change of position defence should be affected by a supposed failure to act prudently in preserving the value of the enrichment received. In our view, the defendant's dealing with the benefit should only be relevant to the issue of reliance.

THE AVAILABILITY OF THE DEFENCE OUTSIDE UNJUST ENRICHMENT CLAIMS

The main remaining debate centres on the extent to which the defence is available in actions other than those based on unjust enrichment. The change of position defence has generally been regarded as operating *solely* within the law of unjust enrichment.[93] It has never been part of, for example, the law of conversion.[94] If a defendant innocently receives stolen property, it is no defence to a claim in conversion that the defendant changed its position in reliance on its receipt.[95]

Some commentators have suggested that the change of position defence should be permitted to apply to other causes of action. For example, it has been suggested

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in investing the funds was relevant, one might have expected the defendant to be prima facie liable for the entire loss, rather than only one-third of it.

90. P Birks 'A Bank's Mistaken Payments: Two Recent Cases and Their Implications' [2000] 6 NZBLQ 155, 164.

91. The creation of an irrevocable trust for the plaintiff would constitute a change of position by the defendant, in reliance on its understanding that the payment was made under a mistake.

92. See also *DFC New Zealand Ltd v Goddard* [1992] 2 NZLR 445, 447-448, in which Cooke P noted that use of the phrase 'the funds' in an investment context may give 'a colour of plausibility to the notion of a trust', when in truth what is in issue is simply a debt.

93. P Birks 'Overview: Tracing, Claiming and Defences' in *Laundering and Tracing* supra n 7, 325-326.

94. Conversion forms part of the law of torts or 'wrongs'.

95. See Sale of Goods Act 1895 (WA) s 21, confirming the general law position. See also W Swadling 'Some Lessons from the Law of Torts' in P Birks (ed) *The Frontiers of Liability* (Oxford: OUP, 1994) vol 1, 41, 47.

that where the same factual circumstances give rise to alternative possible analyses in the law of unjust enrichment and the law of torts,[96] or where restitution of a profit or gain is sought as the remedy to the particular cause of action,[97] then the change of position defence should be available to the defendant wrongdoer, whatever the classification of the action actually brought by the plaintiff.[98] The issue is of particular significance for an 'innocent wrongdoer' that may be strictly liable pursuant to the law of torts or equitable wrongs for a benefit it has received, notwithstanding that it acted without fault or moral turpitude.

One argument advanced on behalf of such a defendant is that if counter-restitution is available to such a wrongdoer, the change of position defence should also apply.[99] The point is that both counter-restitution and the change of position defence have the same aim, namely to prevent the defendant being put in a worse position as a result of being required to make restitution. So, for example, if a fiduciary may obtain counter-restitution for services carried out in breach of its duty, why should it not also have a defence where it has changed its position in reliance on the receipt?

This argument is weakened, however, if the aim of the counter-restitution principle is not to protect the defendant from hardship when required to make restitution. Professor Burrows[100] has convincingly argued that counter-restitution has the object of preventing the plaintiff from being unjustly enriched. It is thus focused on the position of the plaintiff, rather than that of the defendant. There is no reason, then, to assume that change of position should be available wherever counter-restitution is allowed.

At the end of the day, the extent to which the change of position defence will be allowed will depend on the balance between the policy underlying the particular grounds for liability and the arguments for protecting innocent wrongdoers. In the past, this issue has tended to be resolved against the wrongdoer. For example, the law of conversion has attached greater weight to the policy of protecting a plaintiff's proprietary interests than to protecting defendants who innocently change their position. Similarly, equity has attached great significance to the policy of deterring

96. C Harpum 'Knowing Receipt: the Need for a New Landmark – Some Reflections' in WR Cornish, R Nolan, J O'Sullivan & G Virgo (eds) *Restitution – Past, Present and Future* (Oxford: Hart, 1998) 247.
97. P Hellwege 'The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study' [1999] 7 RLR 92.
98. A likely area for this kind of development would be the law imposing liability on recipients of misapplied trust property: see D Nicholls 'Knowing Receipt: the Need for a New Landmark' in Birks *Laundering and Tracing* supra n 7, 231; Harpum supra n 96; Swadling supra n 95; P Creighton & E Bant 'Recipient Liability in Western Australia' (2000) 29 UWAL Rev 205.
99. Such as Hellwege supra n 97, 99; Nolan supra n 7, 154.
100. Burrows supra n 15, 133.

fiduciaries from breaching their duties, by holding them strictly liable to account for any unauthorised gains, even if they have acted innocently throughout. However, the recognition in the law of unjust enrichment that the policy of restoring unjustly acquired benefits may need to yield where it would operate harshly against an innocent defendant, may at least prompt reconsideration of the issue in other contexts. Indeed, the Western Australian statutory versions of the defence, which appear to be applicable beyond claims in unjust enrichment, may provide examples of just such a reassessment.

CONCLUSION

In our view, the common law defence can properly be confined to cases where the defendant no longer retains the value of the enrichment it originally received. Even so, it is potentially of much wider application than may have previously been thought. We have demonstrated that both positive expenditure and benefits forgone can constitute relevant changes of position, provided they are irretrievable and exceptional in the sense that they would not have occurred but for the defendant's original receipt. Further, the Australian insistence on reliance is not as restrictive as is often assumed, in that reliance includes any exceptional change by the defendant that is consistent with its knowledge of the terms or circumstances of the receipt. The Australian version of the defence thus departs from the English approach principally by excluding a defendant with knowledge of a vitiating factor, and then only when it acts inconsistently with that knowledge. Finally, we take the view that fault has only a very limited role to play as a 'bar' to the defence. In particular, the defence should only be lost through the defendant's fault in causing the benefit to be conferred, rather than through its careless dealing with the benefit after receipt.

Of course, in Western Australia the common law defence cannot be viewed in isolation. It is also necessary to consider the statutory versions of the defence, which are in some respects wider and in other ways narrower than the common law. These provisions raise further questions not yet considered by the common law and thus may be of interest and significance in other jurisdictions. However, a detailed examination of the operation of the statutory defences and their relationship to the common law is a matter for a future issue of this journal.

ADDENDUM

The judgment of the Privy Council in *Dextra Bank & Trust Company Ltd v Bank of Jamaica*[101] was handed down after completion of this article. The advice

101. (Unreported) Privy Council 26 Nov 2001.

delivered by Lords Bingham and Goff contains significant contributions to the understanding of two aspects of the change of position defence, namely anticipatory reliance and the role of fault. On the first of these issues, their Lordships' conclusions accord with the arguments advanced above; on the second, they differ.

The case arose when the plaintiff was induced by fraudsters to pay nearly US$3 million to the defendant. The plaintiff understood this sum to be a loan to the defendant, whereas the defendant was deceived by the fraudsters into thinking that the plaintiff was intending to use the sum to purchase Jamaican currency. In anticipation of the receipt of the plaintiff's cheque, payable to the defendant, the defendant's agent paid out an equivalent sum in Jamaican dollars to third parties associated with the fraudsters. The defendant then reimbursed its agent for this outlay, prior to receiving the funds paid by the plaintiff.

The Privy Council rejected both of the plaintiff's claims to recover the payment. The claim in conversion failed because the defendant had acquired title to the plaintiff's cheque. The claim for money paid under a mistake of fact failed on the ground that the plaintiff had acted on a misprediction as to a future transaction, rather than a mistake of fact. The Privy Council further held that, had the payment been made under a mistake of fact, the defendant could have maintained a defence of change of position.

This conclusion required their Lordships to accept that the defence could extend to a change made in reliance on an anticipated receipt, which the defendant did subsequently receive. They did so on the ground that it was as unjust to enforce a restitutionary claim against a defendant who had changed its position in anticipatory reliance as it was against a defendant who had changed its position after receipt. As we have suggested, it is inequitable in both cases to require the defendant to restore the value of a benefit it no longer has. Significantly for Australia, the Privy Council was prepared to describe both cases as a change of position in reliance on, or on the faith of, the plaintiff's payment. This characterisation of anticipatory reliance would, if accepted here, fit within the High Court's description of the defence.

The Privy Council rejected any suggestion that allowing the defence in a case of anticipatory reliance would amount to enforcing a claim to the funds by the defendant. As we have pointed out, allowing the defence in such a case cannot be said to protect the defendant's expectation of receiving a payment, for that expectation has already been fulfilled by the plaintiff. Further, the Privy Council rejected the argument that, since the defence operated to protect security of receipt, it could not apply where the defendant acted prior to receipt. Their Lordships appeared to regard 'protecting security of receipt' as too narrow a rationalisation of the defence. In any event, they concluded that allowing the defence in a case of anticipatory reliance could still be said to protect the security of the defendant's actual receipt. While the thrust of their reasoning casts doubt on the decision in *South Tyneside*

Borough Council v Svenska International,[102] the Privy Council was content merely to distinguish that case as decided on its exceptional facts and to note that it had been subject to criticism by, among others, *Goff & Jones.*[103]

On the question of fault, the Privy Council concluded that the relative fault of the parties should not affect the availability of the defence. Rather, the requirement of good faith on the part of the defendant should be sufficient to exclude an unmeritorious defendant. This conclusion was based on two arguments. First, it would be very strange if the fault of both parties should be relevant to the defence, when the fault of the plaintiff was not relevant to the cause of action to recover money paid by mistake. Secondly, the experience of the New Zealand courts in applying fault has shown how unstable the defence may become if fault is regarded as relevant.

While we understand the desire to ensure that the defence does not become judicially unmanageable, we consider that the arguments in favour of a limited role for fault still deserve consideration. As we have sought to demonstrate in this article, it is possible to explain the apparent oddity whereby fault is not relevant to the cause of action but may be relevant to the defence. Fault only becomes relevant once it is established that there is no surviving enrichment, thereby raising the question as to which party should bear the loss. Further, we consider that some of the difficulties encountered by the New Zealand courts can be avoided by confining the issue of fault more narrowly, so that fault is only relevant if it contributed to the original receipt, and operates only to deprive a defendant of a defence otherwise available to it. While it may be tempting to rely on the good faith requirement to exclude unmeritorious defendants, decisions such as *Mercedes-Benz (NSW) Pty Ltd v National Mutual Royal Savings Bank Ltd* [104] and *Jeffrey v Fitzroy Collingwood Rental Housing Association Ltd* [105] suggest that this approach may produce a distorted concept of good faith, which only serves to conceal the real issue.

102. Supra n 40.
103. R Goff & G Jones *The Law of Restitution* 5th edn (London: Sweet & Maxwell, 1998) 823-824.
104. Supra n 78.
105. Supra n 16.