Change of position defence

The defendant may claim the defence of change of position. Whether the defendant can successfully establish this defence depends of whether he can prove that his position is so changed that he will suffer an injustice if called upon to repay or repay in full (Lipkin Gorman v Karpnale) * In order to prove a change of position defence, first there must be an adverse change of position by the recipient in good faith and in reliance on the payment (New Zealand Banking Group v Westpac Banking Corporation) * The current position in Australia with regard to the availability of the defence is that the defendant must have (1) changed their position (2) irreversibly (3) in reliance on its receipt (4) in good faith (Australian Financial Services)(1) CHANGE THEIR POSITION / SUFFER DETRIMENT * The defendant must first be able to prove a change in the relative net assets of the defendant which shows that the defendant has acted to his detriment on the faith of the payments received from the plaintiff. In other words, the change must involve a net loss.

FACTUAL GAIN BUT NET LOSS * Even where a woman who had purchased new furniture and had got rid of her old furniture on reliance on her receipt, where the court accepted that she was factually enriched by her receipt since her net assets were worth more than what she had before, the change of position defence would nevertheless apply since if she was required to make restitution, she would be left with a net loss. * The mere fact that she continues to benefit from themoneydoes not defeat the defence of change of circumstances. The furniture acquisitions represent replacement of items the plaintiff had in her possession when she would not have replaced the items

except for the error. The expenditures were not to meet ordinary expenses or pay existing debts.

(RBC Dominion Securities v Hills Industries)IS SPENDING ON ORDINARY LIVING EXPENSES CHANGING YOUR POSITION? In general, expenditure on ordinary living expenses will not be regarded as a detriment or that the defendant changed his position because the defendant has to prove that he acted differently from how he would have ordinarily acted on the faith of the belief that the benefit conferred by the plaintiff was the defendant's to spend (Australian Financial Services & Leasing v Hills Industries) * However, a defendant is not precluded from relying on the defence of change of position merely because she has spent the money on ordinary living expenses, provided the expenditure is a substantial detriment stemming from her reliance on receipt of the payment. The defence can apply where the defendant does not simply spend the money on such expenses but applies for and is denied benefits to which she is entitled as a result of her receipt (TRA Global Pty Ltd v Kebakoska) In that case, the respondent had been made redundant by her employer who told her she was entitled to a redundancy payment equivalent to 12 weeks pay on severance and accordingly paid her the sum. She in fact had no such legal entitlement.

She subsequently applied for unemployment benefits from Centrelink but was denied them because she had declared receipt of the redundancy money. She was forced to used the bulk of the redundancy money to pay living expenses until she found work eight months later. When the appellant employer sought restitution of the payment on grounds of mistake, the court held that the plaintiff had a defence of change of position despite having

spent the money on ordinary living expenses since the expenditure is a substantial detriment stemming from her reliance on receipt of the payment and was denied benefits to which she was entitled as a result of her receipt.

DISCHARGING AN EXISTING DEBT * It is not a detriment to pay off a debt which will have to be paid of sooner or later (RBC Dominion Securities v Dawson) In that case Mr Dawson had a Visa debt which he liquidated in a manner he would not have otherwise done had it not been for the mistake on the part of the appellant to overpay him. However, since the Visa debt and those tofamilymembers was incurred prior to the mistake, it would have been paid in any event and cannot be said to be to Mr Dawson’s detriment because the payment would be a payment of a debt already owed. (2) IRREVERSIBLY * The second element is that actual, non-speculative and irreversible detriment (Australian Financial Services & Leasing v Hills Industries) The nature of the change must be such that it cannot now be undone such as money received which has been irretrievably paid away or incurring unconditional contractual obligation as a result of receipt. In Australian Financial Services, the plaintifffinancecompany was duped by a fraudster and two of his companies into advancing money to several legitimate businesses including that of the second defendant to whom the fraudster and his companies owed money so as to discharge their debts. The plaintiff was led to believe that the purpose of the money being advanced to the defendants was to finance the purchase of equipment they were supplying to the first company when the equipment never existed. Each of the defendants was accustomed to receiving payments for their equipment

from finance companies so they were not immediately suspicious of receiving money from the plaintiff.

The plaintiff then claiming unjust enrichment against the defendants on the ground that it had made payments under the mistaken belief that the invoices made by the fraudster to the plaintiff, purporting to be from each of the defendants, were genuine and that it would obtain title to the equipment named in the invoices. * In this case, the court held for the defence of change of position to succeed that there must be evidence of an irreversible detriment. The second defendant having foregone default judgments already obtained against one of the fraudster's companies was in reliance on receipt of the money from the plaintiff was such evidence. * In TRA Global Pty Ltd v Kebakoska, the detriment to the plaintiff such that she was denied benefits to which she was entitled to stemming from her reliance on receipt of the payment was irreversible. In RBC v Dawson, the fact that the purchased new furniture and had got rid of her old furniture on reliance on her receipt would have caused her in the circumstances a loss that is unjust for her to bear and which is not easily reversible. * Thus it seems that the defendant must show at the very least, significant hurdles to getting the money back. (3) In reliance on the receipt/on the faith of receipt * This third element shows that there must be a causal correlation between the detriment suffered and the receipt of the payment. A BUT-FOR TEST IN UK * The mere fact that the recipient may have suffered some misfortune is not a defence unless the misfortune is linked at least on a but-for test with the mistaken receipt (Scottish equitable) There a variety of conscious decisions which may be made by the recipient in reliance on the overpayment.

A CAUSAL CONNECTION IS SUFFICIENT IN AUSTRALIA – ONE CAUSE * In Co-Buchong v Citigroup Pty Ltd, it was held that for the purposes of a change of position defence, a payment is made ‘ on the faith of the receipt’ if it is causally linked to the receipt. This requires that the payment would not have been made unless the receipt has been recognised as valid. There is no further requirement that the information upon which the payer was acting be such that, if it were true, the payer would have been entitled to pay the money away in the way that id did. * In this case, Citibank had received instructions purporting to be from the plaintiff to transfer 500, 000 from his account to a second account in his name at the NAB.

Citibank examined the instruction and determined that it was genuine and paid. NAB then received similar instructions to pay the money away to various overseas bank accounts. Here the instructions were all forgeries perpetrated by an unknown third party. Citibank claimed restitution of its payment to NAB on grounds of mistake. The issue was whether NAB was entitled to a defence of change of position and whether those payments had to various overseas bank accounts had been made ‘ on the faith of its receipt’ of the money from Citibank. It was held that NAB did make those payments on the faith of its receipt and all that was required was a causal link between the payment and the receipt. The fact that a third party fraudster had instructed the bank to make out the payments should not necessarily negate the causal connection between the receipt and its payment so as to defeat the defence (rejecting State Bank v Swiss Bank Corporation) * In such a case, the bank’s good faith receipt may still be a cause of a change of position even if it was not the only cause and this

should be enough. * This follows the reasoning in the NSWCA case of Perpetual Trustees Australia Ltd v Heperu. Perpetual had paid away sums to Mrs Cincotta funds represented by the units credited on the faith of the receipt of payments by the respondent who had been induced by fraud to do so.

The respondents submitted that Perpetual had not proven that the payments of funds out of the account were made on the faith of the receipt because it paid out the funds represented by the account on the faith of what it was told to do by Mr Cincotta in the original forgery of Mrs Cincotta's signature at the opening of account and in telephone redemptions. * This was construed to be far too narrow an analysis of what is meant by " on the faith of the receipt". Payments on the faith of the receipt meant that they would not have been made unless the receipts had been recognised as valid. Just because there was the element of dishonesty of Mr Cincotta which also was the occasion for the withdrawal of funds, this did not negate the causal connection between the receipt and the payments. The change of position remain causally linked to the receipt. Thus while the test seems to involve a causation element, this is not a but for test but rather that the payments of the money were caused or linked to the receipt of payments from the plaintiff. ANTICIPATORY EXPENDITURE – DOES IT COUNT? * Can a defendant be said to rely on the faith the receipt when there is anticipatory expenditure on the part of the defendant? * Can reliance be understood as something other than an essentially causal concept where the effect of the defendant's expenditure follows the cause which is the defendant's receipt of the enrichment? Or does it mean that the defendant can be said to have acted

on the faith of the receipt where it had a reasonable expectation of receipt? * In the case of Dextra Bank, Dextra Bank drew a cheque on its bankers, Royal Bank of Canada in favour of the Bank of Jamaica.

Dextra drew its cheque intending to lend the sum specified to the Bank of Jamaica against the security of a promissory note executed by the Bank of Jamaica. The Bank of Jamaica intended to buy the specified sum of US dollars in exchange for the equivalent in Jamaican dollars which it paid to individuals understood to be nominated by Dextra. Dextra sued BOJ for restitution of the moneys paid. BOJ claimed that it had the defence of change of position. However Dextra argued that BOJ was relying on actions performed by BOJ before it received the benefit from Dextra and this amounted to anticipatory reliance which could not amount to a change of position. The issue was thus whether anticipatory reliance on the plaintiff’s payment can amount to expenditure on the faith of the benefit of the payment and thus whether an effective change of position defence can be made out. * It was held that it is no less inequitable to require a defendant to make restitution in full when he has bona fide changes his position in the expectation of receiving a benefit which he in fact receives, than it is when he has done so after having received the benefit.

The court thus held that there should be no effect on the availability of the change of position defence whether the payment is made when the benefit is received or on a reasonable expectation that it is to be received. Anticipatory expenditure can be recognised as payments made on the faith of the benefit of the receipt. This was also recognised in South Tyneside v Svenska Internation where the court held that it does not follow that the defence of

change of position can never succeed where the alleged change occurs before the receipt of money, as seen from the facts of Lipkin Gorman where the defence succeeded despite the winning being paid out before getting other gambling bets in. * In Commerzbank, the court held that the relevant question in whether the change of position defence would succeed was whether his decision to change his position was caused or contributed to by the receipt of the payment. The crucial point the courts have emphasised is the causal relationship between the detriment and the receipt and not the strict when the detriment and the receipt or occurred. 4) In good faith * The defence is not open to a recipient who had changed his position in bad faith as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution (Lipkin Gorman) * What is crucial to the good faith element is whether the payee had actual knowledge of all the facts constituting the wrongdoing or else had knowledge of such facts as would reasonably raise a suspicion of wrongdoing so that the payee was put on enquiry (Mercedes-Benz v National Mutual Royal Savings Bank Ltd) * Does a person act in good faith unless he acts dishonestly? (Niru) * NO. A person can act in bad faith where the recipient knows that the payer had paid the money to him as result of a mistake of fact or mistake of law and it will in generally be unconscionable or inequitable to refuse restitution. Just because he is not guilty of dishonesty does not make him innocent. Will knowledge of the mistake bar the defence? * Waitaki- mere knowledge of the fact that the money is not due probably doesn’t bar the defence if d acts reasonably: d knew that the money was not its money to keep and in fact put the money on deposit, ready to repay. D was allowed the defence (albeit partially) when the money was lost through the collapse of the company with whom the sum

had been deposited, even though it knew about the mistake when it put the money on deposit. * Lipkin Gorman: In cases where the payee had grounds for believing that the payment may have been made by mistake but cannot be sure, good faith may well dictate that an enquiry be made of the payer.

The nature and extent of the enquiry called will of course depend on the circumstances of the case but I do not think that a person who has good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making enquiries of the person from whom he received it. * English courts to date appear generally more relaxed about defendant fault, although they have tended to be thinking about fault with regard to the initial receipt of the money (“ should defendant have known about the error”?), as opposed to fault with regard to what is then done with it. * Whether fault is relevant to good faith? * In both Dextra and Niru, the CA aid that the defendant will only be denied the defence if he was in bad faith when paying away the money * The way the CA in Niru defines bad faith actually comes quite close to a negligence standard – acting in a “ commercially unacceptable way” or with “ sharp practice falling short of outright dishonesty”. If negligence in not realising the mistake is insufficient to bar the defence, then it seems unlikely that negligence in a decision about how to dispose of the money will be. Also, it would seem strange if a good faith payment to charity could give rise to the defence, but a good faith (but negligent) investment couldn’t? * A different approach is taken in NZ . In Waitaki, fault is relevant. The facts are that the defendant received 50, 000. He takes the money and puts it into an investment with the finance company which eventually goes under.

The bank then realises they paid him the money under mistake and sue him. * The defendant had relied on the receipt because the bank had forced him to take it. However he had never thought it was valid. The court held that the defendant had partly been at fault in the ultimate loss of the enrichment because he had chosen an insecure investment. Where defendant failed to obtain sufficient security for a risky investment, he had defence reduced by 10%. This introduces the uncertainties of the " contributory negligence" model of COP, which requires a relative balancing of the fault of p and d in proportioning the amount repayable. The approach was expressly rejected in Dextra as being " hopelessly unstable".

DEFENDANT WHO ILLEGALLY CHANGES HIS POSITION AS A WRONGDOER * Recently suggested that a defendant who changes position illegally is a ' wrongdoer' cannot invoke the defence (Barros Mattos) * The recent case of Barros Mattos now indicates this is highly likely to be the case. In reaching this conclusion, Laddie J drew support from Lord Goff's ' wrongdoer' limitation in Lipkin Gorman: this indicates that defendant can be disqualified from the defence either because of his knowledge of the claimant's rights before changing his position, or because the change of position itself is " wrongful". * Should this affect civil wrongs? This result does not specifically affect restitution for wrongs, since civil wrongs are not considered illegal as such.

Despite the concept of ' illegality' by its very nature being hard to define, it is clear from both Tinsley v Milligan [1994] 1 AC 340 and Nelson v Nelson (1995) 184 CLR 538 that it relates to claims which would run seriously counter to public policy. In Lipkin, Goff suggested that COP should not be

open to wrongdoers, but it is not clear that he was referring to those guilty of an innocent breach of duty. DEFENDANT WHO INDUCES THE MISTAKEN PAYMENT IN THE FIRST PLACE * Deliberate: No defence- Goff in Lipkin Gorman- defendant will be in bad faith and bad faith precludes reference to the defence. Note that it is assumed in Niru that dishonesty is sufficient to amount to bad faith, even if it is not always necessary.

It is clear from Niru that dishonesty amounts to bad faith, even if defendant can sometimes be in bad faith even where there is no actual dishonesty. * Negligent: No clear authority on this. Defence probably still available, but not if it amounts to " bad faith" as defined recently in Niru. There, defendant was denied defence on the basis that it had documents in its hands which were forgeries, which it ought to have realised might be forgeries and into which it had failed to make reasonable inquiries. This amounted tofailureto act in a " commercially acceptable" way, tantamount to bad faith and denying the defendant access to the defence, even though defendant was not dishonest in the sense of appreciating the risk of fraud.

It is arguable that in the light of Niru, plaintiff would be in a strong position to argue that the defence should be denied to defendant here on the grounds that defendant's inducement was not " commercially acceptable" behaviour. * Innocent: Defence probably still applicable, since, if inducement was " innocent" in the sense of being non-negligent, it might be commercially acceptable behaviour, as per Niru. DOES THE DEFENCE ACT AS A COMPLETE DEFENCE? * No it can apply pro tanto. (Australian Financial Services & Leasing Pty Ltd v Hills Industries) * Meaning you give back to the extent of what you still have. * How does this compare with estoppel? * Estoppel by

representation remains available as a total defence to restitutionary claims even in circumstances in which the defence of change of position is available.

Properly understood, it does not undermine the defence of change of position as they are based on different elements. In estoppel, one had to prove representation and detrimental reliance. Whether one can plead estoppel however depends on how equitable it is for to make such a claim to the overpayment received. In TRA Global, the court held that equity may intervene to prevent the latter’s unconscientious assertion in certain circumstances. It may be inequitable to assert a full defence of estoppel when you are overpaid 1000 and remain in possession of 500 which was mistakenly paid to you. * Under a defence of change of position, your entitlement will be 500. |