



Précis Paper

Restitution and the Defence of Change of Position

Andrew Bulley and Kevin Tang discuss unjust enrichment, restitution, and how a party can establish the defence of change of position.

Discussion Includes

- Claims in unjust enrichment
- Background facts
- The change of position defence
- Approaches by different jurisdictions
- Estoppel
- Valuing the loss of a chance
- Lessons for practitioners

Précis Paper

Restitution and the Defence of Change of Position

1. In this edition of BenchTV, Andrew Bulley (Barrister, 5 Wentworth Chambers, Sydney) and Kevin Tang (Barrister, 8 Wentworth Chambers, Sydney) discuss the High Court decision of *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA 14,

Background and Material Facts

2. Australian Financial Services and Leasing Pty Limited ("AFSL"), a financier, made payments to suppliers of goods, Hills and Bosch, who were trade creditors of a customer of the payer, TCP. AFSL was induced to make these payments by the fraud of the TCP, who provided AFSL with forged invoices. At TCP's request, Hills and Bosch applied the payments to the discharge of TCP's debts. When AFSL discovered the fraud and demanded repayment, Hills and Bosch resisted the claim on the basis that they had changed their position on the faith of the payments.
3. Between the receipt of the payments and AFSL's demand for repayment, more than six months elapsed, during which time Hills and Bosch treated the debts previously owed by TCP as repaid, ceased to pursue repayment of those debts from TCP and continued to trade with it. AFSL also continued to trade with TCP. TCP itself continued to trade with other businesses.
4. AFSL brought an action seeking to recover the monies paid to Hills and Bosch. Hills and Bosch relied upon the defence of change of position, arguing that they would suffer a detriment if required to repay the money. When the matter came before the High Court, the single issue for determination on appeal was the circumstances in which a change of position defence can be mounted, where a party otherwise has a good claim in unjust enrichment.

Unjust Enrichment and Restitution

5. A claim in unjust enrichment is brought where a party has received a benefit at the expense of another party and continues to retain that benefit in unjust circumstances as recognised by the law. An order for restitution is the remedy that flows from a finding of unjust enrichment, subject to the recipient of the benefit establishing a defence such as the change in position defence.

The Change of Position Defence

6. In this case, AFSL had a prima facie right to an order for restitution in circumstances where it had paid money to Hills and Bosch pursuant to a mistake of fact. The change of position defence relieves a party of an obligation to make restitution where it can point to a relevant change of position which would make it inequitable for that party to otherwise make restitution.

7. The High Court's decision was delivered in three judgments. French CJ described the defence in the following terms (at [27]):

Whether or not the defence is available depends upon whether it would be inequitable for the recipient to refuse to repay the money. That is a judgment which the recipient, properly advised, must be able to make within a reasonable time and at a reasonable cost.

8. The plurality judgment of Hayne, Crennan, Kiefel, Bell and Keane JJ stated (at [77]):

One category of case in which it would be inequitable to require a recipient to repay is where the recipient has so far altered its position in relation to the receipt that it would be a detriment to it if it were now required to repay.

9. Gaegler J discussed unjust enrichment and the defence at [106], stating:

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

10. There was a body of academic thought in the UK that suggested that the relevant touchstone for making out the defence of change of position was the concept of "disenrichment". Disenrichment touches upon the extent to which a party has been disenriched by reason of circumstances after receipt of payment. For example, if a party receives \$100,000 as a mistake payment and makes a \$10,000 donation to charity as a result, the party that received the \$100,000 has been disenriched by \$10,000 by reason of the fact that they have changed their position.

11. All of the judges in *AFSL*, however, held that the concept of disenrichment does not apply in Australia. The plurality stated at [78]:

Disenrichment operates as a mathematical rule whereas the enquiry undertaken in relation to restitutionary relief in Australia is directed to who should properly bear the loss and why. That enquiry is conducted by reference to equitable principles.

12. Thus, the Court will look broadly at the circumstances in which it would be inequitable for a recipient of money to be required to pay that money back to the payer.

13. The judgments also indicated that the doctrine of estoppel is the foundation for a change in position defence. The High Court found that the payments gave rise to an estoppel upon which both Hills and Bosch could rely. The plurality stated at [84]:

The equitable doctrine which protects expectations, with which the notion of "detriment" is associated, is not concerned with loss caused by a wrong or a breach of promise. [...] The equitable doctrine concerning detriment is concerned with the consequences that would enure to the disadvantage of a person who has been induced to change his or her position if the state of affairs so brought about were to be altered by the reversal of the assumption on which the change of position occurred.

14. *AFSL* also argued that it is necessary and appropriate to assess, forensically, the value of TCP's debts to Hills and Bosch, or their prospects of recovery, in order to measure the extent to which they remained enriched by *AFSL*'s mistaken payments. However the High Court rejected this argument, and made clear that it was not necessary for the recipient to be able to prove with any great certainty the extent to which they had been enriched. Instead, there must be substantial grounds that a recipient can point to in order to successfully make out the defence. In this case, Hills and Bosch had forgone the chance to pursue TCP. Moreover, they had had considered the indebtedness of TCP to have been discharged and had continued to trade with TCP.

15. Ultimately, practitioners need to carefully consider the circumstances that have taken place after the recipient received monies to determine the way in which the recipient has changed position. Moreover, anyone seeking to bring a claim in restitution should be aware that although there might be a strong case for unjust enrichment, the outcome is ultimately very difficult to predict.

BIOGRAPHY

Andrew Bulley

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Andrew commenced his professional career as a Solicitor and then Senior Associate with Ebsworth & Ebsworth in Sydney. Since coming to the Bar in 1997 he appeared in a variety of jurisdictions in a wide range of matters. His practice now involves commercial and equity matters and in more recent times he has also appeared in appellant matters in the New South Wales Court of Appeal and the Supreme Court. Since 2009 he has been an Advocacy Instructor in the Bar Readers Course run by the NSW Bar Association. Andrew has been a Director of Counsel's Chambers Limited since 2007.

Kevin Tang

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Kevin commenced his professional career as a Solicitor in the large firms in Sydney practising in commercial litigation. Prior to coming to the Bar, he was a Judge's Associate to the Hon PA Bergin and Pembroke J in the Equity Division of the NSW Supreme Court. Since coming to the Bar in 2013, he has appeared regularly in commercial and equity matters, and takes a particular interest in real property, corporations, wills and trusts. He has also acted in charitable trust matters and takes an interest in ecclesiastical law. Outside of those areas he has appeared in appellate courts and in other jurisdictions and has tutored in contract law at the University of Sydney Law School.

BIBLIOGRAPHY

Focus Case

Australian Financial Services and Leasing Pty Limited v Hills Industries Limited [2014] HCA 14

Benchmark Link

https://benchmarkinc.com.au/benchmark/construction/benchmark_08-05-2014_construction.pdf

Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2014/14.html>