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Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd

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In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*,[1] the High Court has unanimously dismissed the appeal of a finance company that had made payments by mistake and sought to recover them. The court held that the recipients had changed their position to such an extent that any repayment would be inequitable. An interesting factual matrix provided the platform for a comprehensive analysis of the change of position defence, its application and exactly what the basis of restitutionary relief is in Australia.

Background

Richard Skarzynski was a director and shareholder in various companies in the Total Concepts Projects group (TCP). Mr Skarzysnki and his companies were supplied with equipment by Hills Industries Ltd (Hills) and Bosch Security Systems Pty Ltd (Bosch). As a result of these transactions, entities within TCP owed both Hills and Bosch a significant amount of money.

By mid-2009, business was not going well for Mr Skarzynski and TCP had fallen into arrears. In late August 2009, Hills had made a number of demands for the repayment of certain debts. Additionally, Bosch had initiated proceedings, obtained a number of default judgments and garnisheed the bank accounts (Crystalised Claims).

In order to turn things around, Mr Skarzynski arranged with Australian Financial Services and Leasing Pty Ltd (AFSL) for it to purchase certain equipment from Hills and Bosch to be leased back to TCP. Mr Skarzynski presented receipts for the equipment to AFSL and it transferred the money into the accounts of Hills and Bosch. Mr Skarzynski directed Hills and Bosh to apply the funds to his existing debts. AFSL did not make any enquiries with Hills or Bosch concerning the receipts or the delivery of the equipment. Unfortunately for AFSL, the receipts were fabricated and did not relate to any equipment.

On the basis of the payment, Hills and Bosch discharged TCP's debts. Additionally, Bosch consented to the setting aside of the default judgments and the discontinuance of proceedings commenced.

Throughout the remainder of 2009, Mr Skarzynski entered into further lease agreements with AFSL and continued to trade with Hills and Bosch. Mr Skarzynski's fraud went undetected until late March 2010, when AFSL discovered its mistake.

On 6 April 2010, AFSL made a demand upon each of Hills and Bosch for repayment of the money it had paid to them as a result of the fraud.

Hills and Bosch each resisted AFSL's claim on the basis of their change of position. In particular, they relied upon the discharge of their debts, that they had ceased pursuing their recovery, and that they had continued to trade with TCP.

As such, AFSL filed a statement of claim in the Supreme Court of New South Wales claiming repayment of the money transferred into the accounts of Hills and Bosch.

First instance

At first instance, Einstein J held that AFSL was prima facie entitled to restitution of the amount mistakenly paid.[2]

Justice Einstein rejected Hills's defence of change of position on the basis that, given TCP's debts, it was unlikely that Hills would have been able to recover a significant amount of the debt — and, as such, any loss of opportunity to pursue TCP for the debt was essentially worthless.

In these circumstances, it was said that no detriment was made out.

In contrast to the position of Hills, Einstein J accepted Bosch's defence of change of position, given that it was able to demonstrate a "real detriment by way of actual extinguishment of a legal claim to TCP's property".[3] In the opinion of Einstein J, the forgoing of the Crystallised Claims constituted a "real detriment".

Court of Appeal

The Court of Appeal found that both Hills and Bosch had established a change of position defence and were entitled to retain the money paid to them by AFSL.

The thrust of the decision lay in the judgment of Allsop P (with whom Bathurst CJ and Meagher JA agreed),[4] who found that the change of position defence had been established, given that both Hills and Bosch had lost a valuable opportunity to pursue claims against

TCP. The inability to demonstrate the extent of the detriment resulting from that loss of opportunity was not determinative.[5]

In the view of Allsop P, the approach taken by Einstein J, with its focus on "purely monetary and expenditure based considerations", went against the roots of equity, which tended against overly restricting the operation of the defence by requiring in all circumstances proof of sums lost on the faith of the receipt.[6]

The issues on appeal

AFSL's principal grounds of appeal were that:

- a change-of-position defence based on loss of an opportunity must ascribe a value to that lost opportunity because the defence only operates *pro tanto* to the extent of that proven value;
- the lost opportunity was worthless, as the debts owed to Hills and Bosch were unable to be paid; and
- since Hills and Bosch did not part with any money in treating TCP's debts as discharged, they gave nothing away of value.

The origins of the change of position defence

The change of position defence is a defence to a claim for restitution where moneys have been paid as a result of a mistake.

Justice Gummow, writing extra-judicially,[7] traced the genesis of the "change of position" term to an article titled "Recovery of money paid under mistake of fact",[8] written by Professor W A Keener and published in the first volume of the *Harvard Law Review*.

In the article, Keener asked: "How far is a change of position which prevents the defendant being put *in statu quo* an answer to an action brought to recover money paid under mistake?"

The High Court had previously considered the change of position defence on two occasions,[9] but neither decision dealt directly with the issues in this appeal.

The High Court's decision

AFSL's appeal was unanimously dismissed.

While a unanimous decision, both French CJ and Gageler J delivered their own separate judgments.

We turn our focus first to the joint reasons for judgment.

Joint reasons for judgment

Was the retention of moneys by Hills and Bosch unconscionable?

In order to assess the applicability of the defence, the relevant enquiry was not the precise value of the lost opportunity but whether it would be unconscionable for the respondents to retain the money they had been paid.

This directed attention to an assessment of each of the payer's and the payee's conscience — a conscience "properly formed and instructed"[10] — to evaluate what would be unjust:

> The question here is whether it would be inequitable in all the circumstances to require Hills and Bosch to make restitution. The answer to that question is not at large, but neither is it simply a measure of the monetary extent to which the recipient remains enriched by the receipt at the time of demand for repayment.[11]

The approach argued by AFSL — that the focus should be on the extent to which Hills and Bosch have been "disenriched" subsequent to the receipt — did not apply in the circumstances of this case, because the concept of unjust enrichment was not the basis for restitutionary relief in Australian law.

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.[12]

The equitable doctrine of detriment

To establish that it would be inequitable to repay the money, it must be shown that the recipient has acted to his or her detriment in reliance. In *David Securities Pty Ltd v Commonwealth Bank of Australia*,[13] this was identified as the central element of the change of position defence "that the defendant has acted to his or her detriment on the faith of the receipt".[14]

The High Court noted that consideration of detriment should not be focused squarely on monetary expenditure and referred to the observations of Deane J in *Commonwealth v Verwayen*[15] that "[e]quity has never adopted the approach that relief should be framed on the basis that the only relevant detriment … is that which is compensable by an award of monetary damages".[16]

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.[17]

As such, it was not necessary for Hills and Bosch to ascribe a value to their loss of opportunity. It was enough that they had foregone the right to pursue TCP. Their inability to quantify the detriment did not affect their ability to rely on their change of position as a complete defence.

Had Hills and Bosch given away "nothing" of value?

In the court's view, it was inaccurate to characterise the payments to Hills and Bosch as "mere book entries".

The receipts had consequences for Hills and Bosch beyond the simple fact of the receipt, and these consequences were irreversible as a practical matter of business.[18]

The judgment of French CJ

The Chief Justice agreed with the majority, but elected to provide his own separate judgment which outlined the history of the change of position defence and his view as to whether it operated *pro tanto*, as contended by the appellants.

In his view, as a general proposition, the change of position defence should be applied in a way that is faithful to its origins in *Moses v Macferlan*[19] — that amounts should not be repaid if it would be inequitable to do so.

Further, the variety of ways in which recipients might change position to their detriment goes against the confinement of the defence to a quantitative analysis.[20]

In his view, the question whether the defence should operate *pro tanto* may depend upon the extent to which the detriment is quantifiable, but in cases of lost opportunity, quantifying the amount of the detriment "must be capable of practical application".[21]

In this instance, any attempt to quantify the value suffered would involve the consideration of more than one factor with varying degrees of probability.[22] Leaving the court to determine as best it can the extent of the value of the lost opportunity was unacceptable.

As such, the change of position in this case was a complete defence.

The judgment of Gageler J

In his reasoning, Gageler J explored the similarities between the defence of change of position and the doctrine of estoppels, noting that the central element identified in *David Securities* (acting to one's detriment on the faith of a receipt) is an essential step in the application of that doctrine.[23]

In his view, treating the defence of a change of position as a particular application of it would avoid both the uncertainty of defining a separate content for the change of position defence and the complication of attempting then to determine whether, and if so how, circumstances giving rise to the defence might separately give rise to an estoppel.[24]

With respect to the application of the defence to the circumstances of the case, Gageler J noted, as did French CJ, that where the detriment from a change of position can be quantified, the entitlement of the defendant to retain the payment is reduced *pro tanto*. However, in this case, the respondents were unable to demonstrate what would or may have happened if they had not so acted on the faith of the payment.[25]

Ceasing to take proposed steps of enforcement, essentially losing a commercial opportunity, was enough to entitle the respondents to the entire payment, unless the value of the opportunity forgone was able to be quantified as some other lesser amount.[26]

What does this mean?

Faced with a change-of-position defence, it would be unwise to conduct an examination of your case with a measure of enrichment by the mistaken payment. AFSL encountered great difficulty in trying to convince the court that unjust enrichment had direct application in this instance.

The High Court rejected the approach of the English courts that have adopted "disenrichment" as the informing criterion. This gives due weight to the fact that some changes of position are difficult or impossible to value, though they should still, in fairness, be taken into account. Attention should be directed not to a mathematical assessment of each party's position, but towards the recipient's conduct and whether it would be unconscionable to require repayment.[27]

Ultimately, while questions remain, by providing clarity around the concept of "change of position" and, more broadly, restitution, commercial litigants are served by the increase in certainty in what is a very uncertain area of the law.

At a more commercial level, companies are not on notice to ascertain the circumstances under which payments are made and debts are satisfied. The court placed a degree of importance on the fact that the transactions had occurred in a commercial context.

This indicates acceptance of the fact that it was not the responsibility of Hills and Bosch to investigate the circumstances upon which they had received the money from AFSL. Indeed, none of the parties had adverse findings made against their conduct.

This judgment shifts the risks of fraud onto the parties that are in the best position to identify and avoid that conduct (in this case, AFSL). In this sense, the judgment is welcome news to "receiving" parties, who often have little or no way of informing themselves as to the source of payments.

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Footnotes

1. *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 307 ALR 512; 88 ALJR 552; [2014] HCA 14; BC201403243.
2. *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2011] NSWSC 267; BC201102190 at [76] per Einstein J.
3. Above, n 2, at [157] per Einstein J.
4. *Hills Industries Ltd v Australian Financial Services & Leasing Pty Ltd; Australian Financial Services & Leasing Pty Ltd v Bosch Security Systems Pty Ltd* (2012) 295 ALR 147; [2012] NSWCA 380; BC201209426 at [1]–[3] per Bathurst CJ and at [216] Meagher JA.
5. Above, n 4, at [165] per Allsop P.
6. Above, n 4, at [153]–[155] per Allsop P.
7. Justice Gummow "Moses v Macferlan: 250 years on" (2010) 84 *Australian Law Journal* 756.
8. W A Keener "Recovery of money paid under mistake of fact" (1887) 1 *Harvard Law Review* 211 pp 221–2.
9. *Australia & New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662; 78 ALR 157; 62 ALJR 292; BC8802661 and *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; 109 ALR 57; 66 ALJR 768; BC9202662.
10. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 227; 185 ALR 1; [2001] HCA 63; BC200107043 at [45].
11. Above, n 1, at [69].
12. Above, n 1, at [78].
13. Above, n 9.
14. Above, n 9, at 385.
15. *Commonwealth v Verwayen (Verwayen's/Voyager case)* (1990) 170 CLR 394 at 448; 95 ALR 321; 64 ALJR 540; BC9002931.
16. Above, n 1, at [84].
17. Above, n 1, at [84].
18. Above, n 1, at [95].
19. *Moses v Macferlan* [1558] All ER Rep 581; (1760) 2 Burr 1005; 97 ER 676.
20. Above, n 1, at [22]–[23].
21. Above, n 1, at [28].
22. Above, n 1, at [30].
23. Above, n 1, at [155].
24. Above, n 1, at [155].
25. Above, n 1, at [161].
26. Above, n 1, at [166].
27. Above, n 1, at [88].