The change of position defence

Tom O'Brien reports on *Australian Financial Services Ltd v Hills Industries Ltd* [2014] HCA 14.

For most, the High Court's decision in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*[1] provides welcome clarification of the rationale, scope and application of the defence of change of position in restitution claims. For some unjust enrichment enthusiasts, particularly those across the globe, the decision may cause some consternation.

Facts

A fraudster procured payments by Australian Financial Services and Leasing Pty Ltd (AFSL) to two companies, Hills Industries Ltd (Hills) and Bosch Security Systems Pty Ltd (Bosch). AFSL were defrauded into believing they were purchasing equipment from Hills and Bosch. Hills and Bosch were defrauded into believing that AFSL's payments were being made to discharge the fraudster's outstanding debts.

After receipt of the money, both Hills and Bosch:

- treated the fraudster's debts as discharged;
- recommenced trading with the fraudster; and
- refrained from taking steps they otherwise would have taken to enforce the debts. In particular, Bosch consented to the setting aside of default judgments and discontinued proceedings in respect of the fraudster.

After six months, AFSL discovered the fraud and demanded repayment from Hills and Bosch on the basis that the payments had been made by mistake. The demand was rejected by Hills and Bosch, so AFSL instituted proceedings for recovery of the payments. By that time the fraudster was insolvent.

Issue

The issue before the High Court was whether ASFL's claim for recovery of the monies paid by mistake should be refused because Hills and Bosch had changed their position upon receipt of that money. AFSL submitted that any change of position must be valued, and that the defence should only operate to the extent of that value. For example, if $10 is mistakenly paid, and the recipient in reliance on that payment gives $2 to charity, the remaining $8 should still be recoverable, as opposed to the recipient's partial change of position acting as a complete bar to recovery.[2]

High Court decision

The High Court unanimously dismissed the appeal, holding that the defence of change of position provided a complete defence to AFSL's restitutionary claims. Three judgments were delivered: French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ; and Gageler J.

Three points of importance are highlighted for the purpose of this short note.

First, the High Court indicated that the ultimate question in determining whether the defence is available is whether recovery of the money would be inequitable[3] or unconscionable.[4] One circumstance in which recovery will be inequitable or unconscionable is where the recipient has changed their position by relying on the receipt of the money in good faith by taking certain actions or by omitting to act, such that they will suffer substantial detriment if they are required to return the money received. For this purpose, the plurality noted the relevance of the 'equitable doctrine concerning detriment' in connection with estoppel.[5] Gageler J almost[6] went a step further, to find that the defence of change of position was merely a particular application of the doctrine of estoppel. According to his Honour, this step would avoid uncertainty in defining the scope of the defence and difficulties reconciling it with estoppel.[7]

Second, for the purposes of the defence, detriment is not a narrow or technical concept,[8] so that it need not consist of expenditure of money or other quantifiable financial detriment.[9] Gageler J stated:[10]

> Material disadvantage must be substantial, but need not be quantifiable in the same way as an award of damage. Material disadvantage can lie in the loss of a legal remedy, or of a 'fair chance' of obtaining a commercial or other benefit which 'might have [been] obtained by ordinary diligence" (Footnotes removed).

As the enforcement opportunities forgone by Hills and Bosch were substantial, they were sufficient to ground the defence, despite not being easily quantifiable. [11] It was held that it was not appropriate for the court to attempt to quantify such detriment in the same way as an award of damages. Where such detriment could not be easily quantified, the change of position provided a complete answer to the restitutionary claim. [12] However, according to French CJ and Gageler J, where detriment could be easily quantified, the defence may operate pro tanto, so that a payer may recover the money paid, less the monetary detriment incurred by the recipient.[13]

Third, the High Court reaffirmed that in Australia, restitutionary claims and defences are rooted in equity, not unjust enrichment and the corresponding concept of 'disenrichment'. The plurality stated (at [78]):

> The principle of disenrichment, like that of unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia.

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This aspect of the decision was bemoaned by Professor Graham Virgo of Cambridge University, who queried the continuing significance of unjust enrichment in Australian law. In more strident terms, Professor Virgo questioned whether the equitable basis for restitution had any content, likening Australia's use of 'the old language of conscience' to: [14]

> nothing more than Hans Christian Andersen's Emperor, albeit one who thinks he is wearing old clothes, but is actually wearing nothing at all.

As to the continuing significance of unjust enrichment in Australia, in *Lampson (Australia) Pty Ltd v Fortescue Metals Group (No 3)* [2014] WASC 162, Edelman J considered the impact of the High Court's decision in Hills Industries. In a feat of judicial efficiency, no doubt taking advantage of the time difference between Canberra and Perth, Edelman J delivered that judgment on the same day that Hills Industries was handed down (7 May 2014). On the continuing role of unjust enrichment in Australia, his Honour explained that:

> [p]rovided that unjust enrichment is not applied as a direct source of liability, in Australia the taxonomic category of unjust enrichment has served a useful function and might continue to do so. Like the category of 'torts' the category of unjust enrichment assists in understanding even though it is not a direct source of liability. The category directs attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or within bills in equity.

This is consistent with recent statements of the High Court on the role of unjust enrichment.[15] The role of unjust enrichment in Australia continues to be distinct from that in the United Kingdom. Hills Industries is merely confirmatory in that respect.

As to the content of the inquiry into whether retention of money will be inequitable or unconscionable, the plurality emphasised:[16]

> This is not to suggest that a subjective evaluation of the justice of the case is either necessary or appropriate. The issues of conscience which fall to be resolved assume a conscience 'properly formed and instructed'[17] by established equitable principles and doctrines.

To adopt and adapt Professor Virgo's analogy, Australia's law of restitution is wearing old clothing, which has been, and will continue to be, altered and patched 'on a case-by-case basis' so enabling it 'to meet changing circumstances and demands'.[18]

Endnotes

1. [2014] HCA 14; (2014) 307 ALR 513; 88 ALJR 552.
2. See the example given by French CJ at [28].
3. French CJ at [23].
4. Hayne, Crennan, Kiefel, Bell and Keane JJ at [69].
5. at [84].
6. His Honour found it unnecessary to finally decide the question: [156].
7. at [155].
8. [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ)
9. [24] (French CJ); [88] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
10. at [150].
11. [30] (French CJ); [83] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [150] (Gageler J).
12. [31] (French CJ); [96] (French CJ; Hayne, Crennan, Kiefel, Bell and Keane JJ); [158] (Gageler J).
13. [17] and [28] (French CJ); [153] - [154] (Gageler J).
14. Graham Virgo, 'Conscience or Unjust Enrichment?: The Emperor's Old Clothes: *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*' on Opinions on High (19 May 2014) <http://blogs.unimelb.edu.au/opinionsonhigh/2014/05/virgo-hills-industries/>
15. For example: *Roxborough v Rothmans of Paul Mall Australia Ltd* (2001) 208 CLR 516 at [74] (Gummow J); *Bofinger v Kingsway Group* (2009) 239 CLR 269 at [88] – [89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ).
16. [76] (French CJ, Crennan and Kiefel JJ).
17. *Citing ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [45].
18. *Commonwealth v Verwayen* (1990) 170 CLR 394 at 443 (Deane J), cited with approval by the plurality in Hills Industries at [98].