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INSOLVENCY ALERT
PAYMENTS MADE BY MISTAKE AND THE DEFENCE OF CHANGE OF POSITION

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The High Court has confirmed that where it is claimed that a payment was made by mistake the defence of change of position will still apply where it would be inequitable to order the return of the payment because of a change in circumstances of the payee.

On 7 May 2014 the High Court handed down its decision in A*ustralian Financial Services and Leasing Pty Limited v Hills Industries Limited & Anor* [2014] HCA 14. In this case the Court was asked to consider the defence of change of position to a claim in restitution based upon a claim of mistake of payment.

In ultimately finding that the appeal be dismissed, the High Court emphasised that where restitutionary relief is sought by a party on the basis of money mistakenly paid, the outcome should be guided by the equitable notions of unconscionability and an assessment of who should bear the loss and why. The joint reasons further state that so long as the detriment to be suffered is substantial, a recipient need not show a 'quantifiable financial detriment.' In addition, the Court acknowledged that forbearance would be relevant to the question of detriment.

BACKGROUND

The Appellant, AFSL, a business financier, was approached by Total Concepts Projects group of companies (**TCP**) and agreed to purchase equipment from each of the Respondents, Hills Industries Limited (**Hills**) and Bosch Security Systems Pty Ltd (**Bosch**) (both manufacturers and suppliers of commercial equipment) and lease it back to TCP. AFSL entered such agreement on the basis of invoices produced by TCP for the equipment, which were later found to have been fraudulently prepared by TCP.

Hills and Bosch, both trade creditors of TCP, were led to believe by TCP that the funds being received from AFSL were in payment of outstanding debts owed to each of them. On receipt of the funds Hills and Bosch both credited TCP's accounts in the amount of the payments, Hills withdrew its threat of legal action and resumed trading with TCP while Bosch consented to the setting aside of default judgments supporting garnishee orders against TCP and its directors and also resumed trading with TCP.

At first instance, Einstein J found that while Bosch had made out its defence of change of position, Hills had not. Hills appealed to the Court of Appeal against AFSL, while AFSL appealed against Bosch.

On appeal to the NSW Court of Appeal, a three judge bench found that, contrary to Einstein J's view, both Hills and Bosch had acted on the receipt of the funds from AFSL to sufficient detriment that the defence of change of position was made out in both cases. AFSL appealed to the High Court.

The High Court dismissed the appeal brought by AFSL and upheld the decision of the Court of Appeal (*Hills Industries Ltd v Australian Financial and Leasing Pty Limited; Australian Financial Services and Leasing Pty Ltd v*

Bosch Security Systems Pty Ltd [2012] NSWCA 380). While the decision was unanimous, three separate judgments were written with the joint reasons written by their Honours Hayne, Crennan, Kiefel, Bell and Keane JJ. Separate judgments were delivered by the Chief Justice and Gaegeler J. The joint reasons will form the primary basis for discussion here.

THE RELEVANT ENQUIRY

As a starting point the Court referred to the basic principle of the doctrine of restitution – that a payment made on mistake of fact is sufficient to give rise to a prima facie entitlement to restitution of the mistakenly paid amount. The second step is then to consider whether, in the circumstances, it would be inequitable for the recipient to retain the benefit.

The Appellant put forth an alternative approach, submitting that the relevant enquiry should focus on the extent to which the recipients, here Hills and Bosch, have been 'disenriched' subsequent to the mistaken receipt. The Appellant further argued that it is necessary and appropriate to forensically assess the amounts of debts owed to each of the Respondents, or their respective recovery. Interestingly, the basis for Einstein J's finding that Hills had not made out the defence of change of position at first instance was that given the precarious financial position of TCP at the time of the mistaken payment, had the payment not been received and Hills had pursued the options for recovery open to it, it would not have been likely to recover a significant amount from TCP.

In dealing with the approach offered by the Appellant the Court made it clear that the principle of 'unjust enrichment' is not what governs the law of restitutionary relief in Australia, going so far as to say that it is inconsistent with the doctrine as it has developed in this country. The Court further provides that the law of restitution in Australia is instead governed by equitable principles and a consideration of who is to bear the loss and why, rather than adherence to a mathematical rule. This dismissal of the disenrichment argument is echoed by French CJ.

THE CHANGE OF POSITION DEFENCE

The Court determined that one such case where the grant of a remedy in restitution would lead to an inequitable outcome occurs where the recipient of the mistakenly provided funds has relied on the receipt to the extent that it would be at a detriment were it required to repay the amount mistakenly received.

In doing so, the Court makes reference to the relevance of the 'equitable notions of good conscience', that being a conscience 'properly informed and instructed'. The Court referred to the decision in *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd* (1910) 12 CLR 662 at 531 and noted that it has long been established in Australian law that recovery "depends largely on the question whether it is equitable for the plaintiff to demand or for the defendant to retain the money."

The Court then looked at the circumstances surrounding the Respondents' reliance and what was actually done on the receipt of the funds to the extent that it would amount to a detriment were they required to repay the monies. In doing so, the Court determined the issues as follows:

Was there a physical payment of the money required?

The Appellant sought to rely upon the decision in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1998) 164

CLR 662, in alleging the payments were mere receipts or book entries with no real value attached to them. The Court said that it was not accurate to characterise the payments to the Respondents as 'bare receipts' or 'mere book entries'. Their Honours went further to say that a recipient who honestly receives a payment in the discharge of a debt cannot be said to be in the same position as, for the purposes of the change of position defence, a recipient who receives a payment in advance for the future supply of goods.

Are the payments reversible?

The joint reasons provided a practical approach to this question and considered the effect of a reversal of the payment from the Appellant to each of the Respondents, even in the event that the discharge of the debt owed by TCP was reversible. It was said that the consequences for the Respondents, in particular the decision to continue trading with TCP and the loss of opportunity to pursue legal proceedings went beyond the mere fact of the receipt and these consequences were irreversible "as a practical matter of business". French CJ by contrast focused on the decision to forego options for recovery of the debts owed, stating that "the Respondents suffered an irreversible detriment when they decided, on the faith of the receipt of the payments made to them by the Appellant, not to pursue their legal remedies".

EFFECT OF DECISION

In declining to comprehensively state the scope of the change of position defence in more general terms the joint reasons provided that to do so would "mislead by distracting attention from the content of the principle to the manner of its expression." In effect, the Court has reinforced the notion that a grant of restitutionary relief will be considered in all circumstances and with regard to the practical effect of such relief, rather than by reference to any strict test or mathematical calculations of monetary loss.

Following the receipt from the Appellant, Hills discharged the debt owed to it by TCP, withdrew its threat of legal action and resumed trading with TCP while Bosch consented to the setting aside of default judgments supporting garnishee orders against TCP and its directors and also resumed trading with TCP. In dismissing the appeal the Court effectively found that these actions on the part of the Respondents which were made in reliance on the receipts were consequences sufficient to satisfy the requirements discussed above for a defence of change of position to be made out and reinforced the position that such matters are to be determined with regard to the notion of unconscionability. In particular, the issue of detriment is not to be read as 'a narrow or technical concept in connection with estoppel', but rather as 'part of a broad inquiry' into unconscionability in all the circumstances.

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