

MISTAKEN PAYMENTS - THE RIGHT OF RECOVERY AND THE DEFENCES

By
Kwai-Lian Liew*
Assistant Professor of Law
Bond University

Introduction

Suppose ABC Bank wrongly followed instructions of customer A. Instead of paying recipient Bank X where A had an account, ABC Bank paid Bank Y where A also happened to have an account. Can ABC Bank recover the payment from Bank Y? Consider another scenario: customer B had instructed ABC Bank to pay \$50,000 to recipient Z. By virtue of a computer error, Z was credited with \$500,000. Is ABC Bank able to seek restitution from Z?

In 1987, the High Court in *ANZ Group Ltd v Westpac Banking Corporation*¹ clarified two very important questions about the right of recovery for money paid under mistake of fact. It said that the plaintiffs did not have to show that they paid under a supposed liability to pay nor did they have to show that the mistake was one that had to be shared by the payee. Furthermore, the High Court recognised that the basis for recovery should no longer be regarded as lying in implied contracts but rather, on the basis of restitution or unjust enrichment. The joint judgment of Mason CJ, Wilson, Deane, Toohey and Gaudron JJ said:²

In other words, receipt of a payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.

In the *ANZ Banking Group* case, the High Court left open the questions whether the mistake of fact must be categorised as a fundamental mistake or whether it is sufficient that the mistake caused the payment. These questions were answered in *David Securities Pty Ltd v Commonwealth Bank of Australia*³ where the High Court answered the first question in the negative and the second in the affirmative. Furthermore, the court took the opportunity to abolish the archaic rule that denied recovery of money paid under a mistake of law. This paper seeks to examine the right of recovery of payments made under mistake of law with particular emphasis on the defences which may be

* LLB(Hons)(Adelaide)LLM(Hons)(Cambridge). I am grateful to Professor Andrew Burrows, Law Commissioner, London for his helpful comments on an earlier draft.

1 (1987) 164 CLR 662.

2 Ibid at 673.

3 (1992) 175 CLR 353; 109 ALR 57.

available to a recipient of such mistaken payments.

The Mistake of Law Rule

Until the decision of the High Court in *David Securities*,⁴ Australian courts had followed *Bilbie v Lumley*⁵ where Lord Ellenborough CJ refused recovery of money paid under a mistake of law on the ground that 'every man must be assumed to know the law otherwise there is no saying to what extent the excuse of ignorance might not be carried'.⁶ In *Bilbie*, the insured had withheld a material fact from the underwriter but this was later disclosed before a claim was made by the insured. This fact would have entitled the underwriter to rescind the insurance contract for non disclosure of material facts at the time of contract. Not realising the existence of this legal right, the underwriter settled an insurance claim with the insured and later brought an action of *indebitatus assumpsit* at common law to recover the money paid pursuant to the settlement.

Goff and Jones⁷ take the view that the decision reached by the court in *Bilbie v Lumley* was, on the facts of the case, one based on a sound rule of policy that a payment made in settlement of an honest claim ought to be irrecoverable. *Bilbie v Lumley* is therefore not a case to support the proposition that payments made in mistakes of law are irrecoverable;⁸ rather, the principle in that case is to preclude recovery of payments made in settlement of an honest claim.⁹ Any other payments made under a mistake of law should be recoverable if it would have been recoverable had the mistake been one of fact.

The fact and law distinction for the recovery of money paid under mistake is now of academic interest only since the High Court's seminal decision in *David Securities*. In that case, the plaintiffs, David Securities Pty Ltd ('David Securities') and other related companies, entered into a loan agreement with the defendant, the Commonwealth Bank of Australia ('the bank'). The loan agreement provided, inter alia, for interest to be paid to the bank by David Securities, the borrower, 'without deduction of any tax or duty or other imposts of any kind whatsoever' (clause 8(b)). It further purported to require the borrower, if obliged by law to deduct any such taxes, duties or imposts from any payment to be made by it to the bank, to pay such 'additional amounts' as may be necessary to ensure payment in full to the bank. It was held that the operation of this clause contravened s 261(1) of the *Income Tax Assessment Act 1936* (Cth) ('ITAA') and it was therefore void. Section 261 of the *ITAA* provides that:

4 See discussions of this case and the mistake of law rule generally in: Michael Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v Commonwealth Bank of Australia' (1993) 15 Syd LR 461; A Burrows, 'Restitution For Mistake in Australia' (1993) 13 *OJLS* 584; K-L Liew, 'Recovery of Moneys Paid Under a Mistake of Law: The Australian Approach' (1993) 6 *CBLJ* 157; Peter Birks, 'Modernising The Law of Restitution' (1993) 109 *LQR* 164.

5 (1802) 2 East 469 (102 ER 448).

6 (1802) 2 East 469 at 472 (102 ER 448 at 449-450).

7 *The Law of Restitution* (Sweet & Maxwell, 4th ed 1986, London) at p 118-119.

8 *Ibid* at 119.

9 The issue of payments made in settlement of an honest claim is discussed below.

A covenant or stipulation in a mortgage, which has or purports to have the purpose or effect of imposing on the mortgagor the obligation of paying income tax on the interest to be paid under the mortgage ... shall be absolutely void.

The court concluded that the loan agreement was collateral to the securities taken by the bank to secure the loan and thus fell within the definition of 'mortgage' (defined in clause 5 of the agreement) which includes 'any charge, lien or encumbrance to secure the repayment of money, and any collateral or supplementary agreement'.¹⁰ The effect of clause 8(b) imposed a financial burden on the plaintiff to pay 'additional amounts' without discount to the defendant. It was thus avoided by virtue of s 261(1) of the *ITAA*. The plaintiff thus sought recovery of the payments.

On appeal to the High Court, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ gave a joint judgment (hereafter referred to as 'the majority'), Brennan and Dawson JJ each gave a separate judgment. The majority stated that the general rule which precluded the recovery of money paid under a mistake of law did not form part of the law of Australia. Consequently, the present rule for recovery of mistaken payment is as follows:

... the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment.¹¹

Voluntary Payments and Mistake of Law

Although the High Court has abolished the distinction between mistake of fact and mistake of law, this distinction may still have a practical significance because the majority in that case made a deliberate effort to distinguish between payments made under a mistake of law and those made voluntarily in submission to an honest claim. Their Honours said that a payment made voluntarily in submission to an honest claim - where the payer is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment - would not be recoverable on the basis that the courts would uphold compromises freely entered into between the parties.

Cases involving voluntary payments made in submission to a claim will be more likely to arise in the context of mistake of law rather than mistake of fact. As Goff and Jones in *The Law of Restitution*¹² pointed out:

The essential difference between a restitutionary claim arising from a mistake of law rather than of fact is that the limiting principle, that benefits conferred

10 The discussion of what amounts to a 'collateral contract' is beyond the scope of this paper.

11 (1992) 175 CLR 353 at p 378. The matter was remitted to the primary judge to enable him to reconsider David Securities' application to call evidence on the issue of mistake.

12 Goff and Jones, *The Law of Restitution* (Sweet & Maxwell, 4th ed 1986, London) at p 144.

in submission to an honest claim are irrevocable, assumes considerable importance if the payer's mistake is one of law. But it is in rare cases that a plaintiff's claim is defeated because he has voluntarily assumed the risk of his own mistake of fact.

One of the cases which involved 'voluntary submissions' is *South Australian Cold Stores Ltd v Electricity Trust of South Australia*.¹³ In that case, the plaintiff paid electricity charges to the defendant at an increased rate and later successfully challenged the validity of the Minister's order in increasing the charges. The plaintiff's claim to recover these excessive charges paid to the defendant was, however, not successful. This was so despite the fact that the plaintiff had objected to the increase prior to making the payments. The court, in denying recovery, said that the plaintiff had paid the increase on the supposition that the demand was lawfully made. The case also fell outside the rule allowing for recovery of payment made under a mistake of fact. There was no mistake of law either because the plaintiff company was prepared to make the payments without investigating the lawfulness of the demand. It had assumed that the Trust was entitled to charge the higher rates and thus it had voluntarily submitted to the claim of the Trust.

The High Court in *David Securities* defined 'voluntary' payment as follows:¹⁴

The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes a particular law or contractual provisions requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required, he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment.

Where payments have been made under such 'voluntary' circumstances, the court said, they were made in satisfaction of an honest claim. This definition of voluntary payments is perhaps stated too broadly. It may remove any advantage that may be gained from the abolition of the mistake of law rule. It is also unfortunate that reference was made to the phrase 'submission to an honest claim'. The definition of 'voluntary payment' ought to be wide enough to include cases of voluntary payments where no legal 'claim' has been made and payments which might be sought to be recovered could have been paid in circumstances which did not involve a threat of litigation.¹⁵ It is better to talk of distinguishing between payments made voluntarily or by election (and therefore irrecoverable) and those made under a mistake of law (recoverable).¹⁶

13 (1957) 98 CLR 65.

14 Above n 1 at 373-4.

15 Instances of such cases are payments made pursuant to a demand from a public authority without an immediate threat to litigation. Note the case of *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] AC 70 where the House of Lords decided that a public authority comes under a restitutionary obligation to return a levy demanded without parliamentary authority. This obligation rests entirely on the *ultra vires* character of the demand rather than whether Woolwich was mistaken as to the legality of the payment.

16 Support for this can be found in: Burrows A, 'Restitution for Mistake in Australia' [1993] 13 *OJLS* 584 at 586.

On the question of voluntariness, where a party to a contract makes a claim on the other party and threatens to bring legal proceedings unless the latter pays a certain sum of money, the payer may elect to pay in order to settle the claim. Such payments are regarded properly as voluntary payments. An example here is the claim by an insured against an insurance company pursuant to an insurance policy. The insurance company may doubt the validity of the claim by the insured in which case it has the option to investigate the claim further but if it chooses to pay so as to avoid litigation, the payment must be regarded as voluntary. If, however, the insurance company pays without thinking about the validity of the claim, the payment cannot be said to have been paid voluntarily in submission to the claim. A payment made under a mistake of law is not necessarily voluntary simply because there is absence of duress, inducement or compulsion.¹⁷ If one is ignorant of the possibility of the claim being invalid, or simply fails to consider its validity, it is hard to say that these payments were made in satisfaction of an honest claim. One cannot submit to any claim unless one is aware of one's legal rights. More is required to show that a payer has paid in *submission* to a claim.¹⁸ This point is particularly apposite in the context of *ultra vires* payments to a governmental authority. Although *David Securities* was concerned with payments made pursuant to a contract between private individuals and not with payments made pursuant to an *ultra vires* demand by a governmental authority, the principle enunciated in that case, in the writer's view, is wide enough to cover the *ultra vires* payment cases.¹⁹ These payments are clearly made under a mistake of law - if the payer had known that the demand did not have to be complied with because it was beyond the power of the relevant authority to make such a demand, then the payer would not have made the payment. Recovery of such payments should thus be allowed.

A distinction should therefore be drawn between a case where a party pays money to another pursuant to, for instance, a contractual provision under some doubts as to the validity of the provision but nevertheless agrees to pay because it wishes to close the transaction, and the situation where the payer may not have thought about the validity of the provision at all but pays because he or she has assumed the validity of the provision. This would not be unusual in commercial transactions particularly in cases where parties to a contract have negotiated on terms which are later found to be invalid or illegal. Dawson J in *David Securities*²⁰ took the view that the correct approach is to ask whether the plaintiffs had turned their minds to the question of their legal obligation to pay at the time of payment. If they paid merely because the contract had provided

17 [1992] 109 ALR 57 at 96, per Dawson J.

18 Support for this can be found in the judgment of the majority in *David Securities* where their honours said that the concept of 'mistake of law' includes cases of sheer ignorance as well as cases of positive but incorrect belief, see: (1992) 175 CLR 353 at 374.

19 *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] 1 AC 70 where the court held that payments made pursuant to an *ultra vires* demand could be recovered based on the constitutional principle that there should be no taxation without parliament. The question of voluntariness is not relevant as the payment is *prima facie* recoverable, subject to defences, simply because the demand was *ultra vires*. For an analysis of the *Woolwich* case, see: Beatson, 'Restitution of Taxes, Levies And Other Imports: Defining The Extent of the *Woolwich* Principle' (1993) 109 LQR 401.

20 (1992) 175 CLR 353.

for such payments²¹ and not because of a mistaken belief in the enforceability of the provision, then no recovery should be allowed. These payments were made voluntarily and not because of any mistake of law. On this point, Dawson J said that:²²

A payment made in those circumstances is made voluntarily and even if it turns out that there was no legal obligation to make that payment, it does not seem to me that it can be said that the payment was made under a mistake of law. Indeed, it cannot necessarily be said that, even if the payer had turned his mind to the question of law, he would not have made the payment. Some contractual obligations are commonly performed in the knowledge that they are not binding and not every question of law can be answered so clearly or definitely as to warrant the resistance of an honest claim for payment.

There is merit in this approach because it places the onus on the plaintiffs to show that they had indeed made the payments under a mistake; that is, they must show that but for the mistaken belief in the validity of the relevant provision in the contract, they would not have paid. This of course is a question of fact.

Assumptions of Risk and Negligence

At the end of the day, the real question, it is submitted, is whether the payer, knowing the possibility of mistake, nevertheless elected to assume a risk of mistake and paid. If that is the case, even if there was a mistake, the payer had elected to assume the risk of a mistake and recovery should therefore not be allowed. The approach taken by Dawson J is not without difficulties. It may result in denying a restitutionary claim to a payer who did not even address his or her mind to the possibility that there might have been no legal obligation to pay; or to one who would not have paid had he or she known that there was no legal obligation to pay.

Where the payment is paid as a result of a compromise, no doubt recovery should be denied if subsequently it transpires that there is no legal substance to the claim. This result could be explained on the policy ground that *bona fide* compromises should be upheld, or, alternatively, the payment was not caused by any mistake. The payment was paid with the intention of settling the claim.²³ The payer has a right to contest the claim but if he or she *elects* not to adopt that option, then he or she cannot seek to recover any payments made in settling the claim even though, if he or she had contested the claim, the law would have been in his or her favour. These were not *mistaken* payments.²⁴

21 Parties who have negotiated a contract at arms' length must be taken to have agreed to the terms of the contract. They would not have agreed to be bound by the terms of the contract if there was no *quid pro quo*.

22 (1992) 175 CLR 353 at 403.

23 *New York Life Insurance Co v Chittenden* 112 NW 96 (1907); see Goff and Jones at 106.

24 See Latham CJ in *Werrin v The Commonwealth* (1938) 59 CLR 150 at p 159 where he said:

The principle appears to me to be quite clear that if a person, instead of contesting a claim, elects to pay money in order to discharge it, he cannot thereafter, because he finds out that he might have successfully contested the claim, recover the money which he so paid merely on the ground that he made a mistake of law.

In Goff and Jones' discussion of submission to an honest claim, reference was made to some United States authorities which based their decision on the notion of 'assumption of risk'.²⁵ If the plaintiff paid in circumstances where it had assumed a risk that payments may not have been legally enforceable, then the payment was a voluntary one and was not vitiated by any mistake. Goff and Jones observe that this notion of 'assumption of risk' has been rejected by some jurisdictions in the United States and that much depends on the circumstances in which the payment was made. In the writer's view, this 'assumption of risk' argument is one which ought to be explored further both academically and judicially in Australia. If a financial institution makes a payment without checking whether the payee is legally entitled to payment, it could be said that it had assumed a risk that the payment was an unnecessary payment.²⁶ The factors which ought to be taken into account include: whether the payer was aware of facts or circumstances which would put the payer on enquiry and whether the payer has waived the right to further investigations of the facts; whether the payee has threatened to bring legal proceedings against the payer in respect of the money claimed²⁷ and whether there was an element of doubt in the mind of the payer at the time of payment.²⁸ If the payer had doubts as to the validity of the demand for payment but nevertheless paid, it can be said that he or she had waived the right to further investigation or had accepted the risk of mistake. The difficulty here, as noted by Burrows,²⁹ is in assessing the degree of doubt in the mind of the payer. To what extent must the doubt be such as to deny any claim of a mistaken payment? It has been suggested that the best approach is to apply the balance of probabilities test:

If the payer pays believing that the facts are *probably* not what they in truth are (ie he is 51% mistaken) he can recover for mistake: otherwise his doubts preclude restitution for mistake either on the grounds that he was not mistaken or that he took the risk of his mistake.³⁰

The writer agrees that this balance of probabilities test is appropriate as a general test on the state of mind of the payer at the time of payment, that is, it ought to be used in determining whether the payer thought (mistakenly) he was under a legal obligation to pay or whether he had doubts as to the validity of the claim but nevertheless chose to pay in which case recovery ought to be denied. Although this test could be criticised on the basis that it is difficult to assess a person's state of mind, this difficulty is not limited to cases of mistaken payment. In the context of a misrepresentation of fact, Lord Justice Bowen had said that a person's state of mind is 'as much a fact as the state of his

25 See Goff and Jones, *The Law of Restitution* (Sweet and Maxwell, 3rd ed, 1986) beginning at p 105. See also: *New York Life Insurance Co v Chittenden* 134 Iowa 613, 112 N W 96 (1907).

26 See *Cam Sons Pty Ltd v Ramsay* (1960) 104 CLR 247; M Bryan, 'Mistaken Payments and The Law of Unjust Enrichment: David Securities Pty Ltd v Commonwealth Bank of Australia', above n 4.

27 Goff and Jones, above n 10 at p 107.

28 See *Maskell v Horner* [1915] 3 KB 106; A Burrows, *The Law of Restitution* (Butterworths, 1993) at 102.

29 A Burrows, *The Law of Restitution* (Butterworths, 1993) at 102.

30 *Ibid.*

digestion.³¹ It may be difficult to prove but it is a question of fact which can be ascertained objectively.

As far as the distinction between payments made under a mistake of law and those which the payer had voluntarily paid or elected to pay, the following proposition is suggested: a payment is not vitiated by a mistake of law if the payment is made in circumstances where the payer doubts the validity of the demand but chooses to assume a risk of mistake. In such cases, even if there was a mistake, the mistake was not the cause of the payment. Where the payer has not directed his or her mind to the validity of the demand but has nevertheless paid on the assumption of validity, then the payment ought to be recoverable. The concept of mistake of law includes cases of ignorance of the law.³²

There is one further issue which needs to be considered in this context - the issue of negligence of the payer. Can it be said that a payer who has negligently paid the payee without investigating the true facts or legality of the demand is estopped from relying on mistake as a ground for recovery? There was an early dictum by Bayley J in *Milnes v Duncan*³³ that an omission by the payer to avail himself of the means of knowledge of the real facts could preclude him from recovery. In that case, the relevant bill of exchange was drawn in Ireland. The stamp duties payable on bills drawn in Ireland was less than that payable in England. By various indorsements, the bill was endorsed to the defendant in England who neglected to present the bill until one month after it was due. The acceptor of the bill had, in the meantime, become bankrupt. The defendant sought payment from the indorser of the bill (the plaintiff) who argued that the former could not seek payment when it was his own delay to seek payment from the acceptor that caused his loss. The defendant threatened to sue the plaintiff, alleging that the bill was void on the ground that it was insufficiently stamped. The plaintiff inspected the bill and found that the bill was in fact insufficiently stamped - not knowing that the bill was in fact drawn in Ireland. There was nothing on the face of the bill to show that it was drawn in Ireland. The plaintiff paid the defendant and later sought to recover the amount. The court allowed the plaintiff to recover because it was paid under a mistake or rather, ignorance, of the facts. Bayley J said:

If it had appeared on the face of the bill to have been drawn in Ireland, there would perhaps have been laches on his part in making the payment, under an idea that the bill was drawn in England and had improper stamp, when he might by due inquiry of the prior indorser have learnt that the bill was drawn in Ireland and was a valid bill. But neither the date nor the indorsements were calculated to raise in the mind of any person who saw the bill any suspicion that it was drawn in England.³⁴

It is implicit in Bayley J's dictum that if there was a reason which ought to raise suspicion in the mind of the payer prior to payment, the payer ought to

31 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

32 See above n 18.

33 (1827) 6 B & C 671 at 677; 108 ER 598 at 600.

34 108 ER 598 at 601.

have investigated further. He concluded that the payer had no adequate means of knowing that the bill was not a void bill on the facts and therefore was entitled to recovery.

In *Kelly v Solari*,³⁵ Parke B criticised the dictum of Bayley J in *Milnes v Duncan* and said that if money 'is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact.'³⁶ In the same passage, however, Parke B said that if money is intentionally paid without reference to the truth or falsehood of the fact, and the payer waives all inquiry into the legitimacy of the payment, then the payee is entitled to retain it. A distinction seems to be drawn between mere negligence and complete recklessness. This seems to be the position taken by the Appellate Division of the Supreme Court of South Africa in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another*³⁷ where the court said that recovery for money paid under mistake may be denied where the conduct of the payer was found to have been inexcusably slack. The court refrained from defining the circumstances in which error of law could be said to be inexcusable since much would depend on the relation between the parties; the conduct of the defendant; the plaintiff's state of mind and the culpability of his or her ignorance in making the payment. Professor Jones has commented that most jurisdictions which grant relief for payments made under mistake of law have limited the right to recovery in cases where, for example, the payer had assumed a risk of mistake.³⁸ He took the view, correctly in the writer's view, that excusability of error is an inherently uncertain concept. For example, what steps must the payer have taken before one can excuse his mistake? When is his or her mistake non-excusable? What seems clear, however, is that only a high degree of negligence - more than mere negligence on the part of the payer should preclude him or her from recovery. In cases of complete recklessness, it is arguable that a payer who was reckless in making the payment and *chose* not to investigate cases of suspicion, did not make the payment by mistake. The issue is not one of negligence but one of assumption of risk of error.

The triumph of the causative test

The majority in *David Securities* said that it would be logical to treat cases involving mistake of law in the same way as those involving mistake of fact. Consequently, payments made would be recoverable if they would not have been made had the plaintiff payer known of the true legal position, that is, but for the mistake regarding the validity of the claim no payments would have been made.³⁹ Their Honours accepted the position that there is a *prima facie* right of restitution where a mistake of fact or law caused the payer to make the

35 (1841) 9 M & W 54.

36 Ibid at 59. *Kelly v Solari* has been applied in subsequent cases including *R E Jones Ltd v Waring & Gillow Ltd* [1926] AC 670.

37 1992 (4) SA 202.

38 Gareth Jones, 'Payments of Money Under Mistake of Law: A Comparative View' [1993] 52 *CLJ* 225 at 227.

39 See *Barclays Bank v Simms* [1980] QB 677.

payment. They concentrated on the fact of unjust enrichment and rejected the argument that such a mistake, of itself, was insufficient.

(a) *Supposed Liability*

It is not necessary to show the plaintiff had supposed that he or she was legally liable to make the payment before recovery is allowed. Having decided that the fact and law distinction is unsatisfactory, it would be ludicrous to reintroduce via the back door the requirement that the mistake must be one as to legal liability. This argument is made stronger by the fact that the recent judicial trend is simply to ask whether the mistake caused the payment. If so, then restitution is *prima facie* available.⁴⁰

(b) *Fundamentality*

The requirement as to fundamentality adds little to the requirement that the mistake caused the payment. The real question is whether the mistake caused the payment. This was the approach taken by *Barclays Bank Limited v W J Simms and Sons*⁴¹ and approved by the majority in *David Securities*.⁴² Goff and Jones⁴³ have also argued that it is unnecessary for the mistake to be fundamental. This approach is surely correct because in seeking restitution for mistaken payments, we are not seeking to undermine expectations created by a contract but, rather, to prevent unjust enrichment. To require the mistake to be fundamental would only serve to focus the attention on the nature of the mistake rather than on the fact of enrichment.

Birks⁴⁴ has suggested, however, that this requirement of fundamentality is a worthwhile precaution against a potential flood of claims and for the protection against insecurity of receipts. The writer does not agree with this view because not only is the concept of 'fundamentality' vague and lacking in specificity as a working criterion for the kind of mistakes that would ground a right of recovery, its non-requirement does not necessarily mean that there would be a floodgate of claims based on mistake of law. Fundamentality of the mistake has not been a requirement for the recovery of payments made under mistake of fact and yet there does not seem to be any concern for floodgate claims and insecurity of receipts, so why should payments made under a mistake of law be given a different treatment? If the plaintiff can successfully show that he or she would not have made the payments but for the mistake, that is, the mistake caused the payment, then the defendant should *prima facie* be required to return the payments to the plaintiff on the ground that it would be unjust for the defendant to be enriched at the expense of the

40 See, for example, *Barclays Bank Ltd v Simms* [1980] QB 677, per Goff J (as he then was); *Bank of New South Wales v Murphett* [1983] VR 489; *Royal Bank of Canada v LVG Auctions Ltd* (1985) 12 DLR (4th) 768 and, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

41 [1980] QB 677.

42 (1992) 175 CLR 353 at 378 and at 395, per Brennan J.

43 *The Law of Restitution* (3rd ed, 1986, Sweet and Maxwell) at 89.

44 Birks, *Introduction To The Law of Restitution*, Clarendon Press, Oxford, 1985 at p 159; see also the views of Beatson, *The Use and Abuse of Unjust Enrichment*, Clarendon Press, Oxford, 1991 at p 150.

plaintiff's mistake. The test for mistake is therefore a simple one of causation. The plaintiff bears the burden of proving that the mistake caused the payment.

The unjust factor

Dawson J P in his article 'Restitution Without Enrichment'⁴⁵ said that the general idea of unjust enrichment 'has the peculiar facility of inducing sober citizens to jump right off the dock'. The ideal of preventing unjust enrichment has a strong appeal to justice but it also has the 'delusive appearance of simplicity'. Those who are sceptical to the principle of unjust enrichment might say that the principle is vague and allows 'palm tree' justice. However, one must bear in mind that, in order to establish a successful claim in restitution, the plaintiff must prove not only an enrichment (which is easy in the case of money) but also an unjust factor on which the right to restitution is based, that is, the benefit must have been conferred by mistake, under compulsion, duress, undue influence or out of necessity and other legal grounds before a right of recovery can be established.⁴⁶

It has been argued that the plaintiff must prove, in addition to the mistake, some other unjust or unconscionable factor which would compel the defendant to make restitution. This argument was advanced by the defendant in *David Securities* but the court said that it is not legitimate to determine whether an enrichment is unjust by reference to what is fair and just. To adopt this approach, they said, would have 'important consequences in relation to the elements of the action which the plaintiff must plead and prove. It also appears to proceed from the view that in Australian law unjust enrichment is a definitive legal principle according to its own and not just a concept'.⁴⁷ In order to obtain restitution, they said, what is important is to focus on vitiating factors such as mistake, duress or illegality. With respect, this approach is sound because a requirement of a superadded unjust factor based on a subjective judicial determination of what is fair and just is to deny the force of the obligation imposed by the legal concept of unjust enrichment. In the case of mistake, the fact that the payments were made under a mistake is sufficient to give rise to the unjust factor and thus gives rise to a *prima facie* obligation to make restitution.⁴⁸ The mistake vitiates any intention on the part of the payer to give the money to the payee and it is that mistake which gives rise to a *prima facie* right to restitution.

Defences

A plaintiff is entitled to a *prima facie* right to restitution once a mistake

45 (1981) 61 BULR 563

46 Goff and Jones have listed a number of situations where the enrichment is not unjust: *The Law of Restitution* (3rd ed, Sweet and Maxwell, 1986) at 29.

47 (1992) 175 CLR 353 at 378. By rejecting the argument of the defendant, the majority seems to be rejecting the claim that the unjust enrichment principle gives rise to a cause of action in unjust enrichment.

48 See *Australia New Zealand Banking Corporation Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

has been established. This *prima facie* rule is of course subject to available defences. The defences barring recovery for payments made under a mistake of fact are set out in the judgment of Goff J in *Barclays Bank v Simms*⁴⁹ but, for the purposes of this paper, the writer will focus only on the defences of 'bona fide purchase' and 'change of position'.

(a) *Bona Fide Purchase*

Clearly if a defendant has given consideration for the benefits, then it would *not* be unjust for the defendant to retain the benefits obtained. It could of course be argued⁵⁰ that if one had known that payments made pursuant to contractual provisions would be void, one would have negotiated different terms to ensure that one would receive an equivalent net benefit. The argument is that the plaintiffs have received the benefit of the agreement and to allow recovery would mean a windfall to the plaintiffs. The problem with this argument, however, is that not only is it retrospective and premised upon having the benefit of hindsight, it also ignores the fact that the plaintiff's agreement to pay was given under a mistake. Where payment is made pursuant to a contractual term that is subsequently held to be invalid, it is necessary to look at the terms of the agreement closely in order to discover what the payer expects to receive by way of consideration for the payment. If a payer agrees to pay money pursuant to a term of a contract on the assumption that it was a valid term, that payment is vitiated by mistake. The defendant in *David Securities* argued that as a matter of formation of a contract, the plaintiff had accepted the defendant's offer concerning the payment of the withholding tax. The High court, with respect, correctly concluded that it was not concerned with an objective assessment of what a hypothetical, experienced commercial person believed he or she was contracting for; rather, it must ask what the payer, in all the circumstances, thought he or she was receiving as consideration.

What does 'consideration' in this context mean? The majority in *David Securities* referred to decisions such as *Rowland v Divall*⁵¹ and *Rover International v SP Cannon Film Ltd*⁵² and said that in the context of total failure of consideration, the failure is judged from the perspective of the payer in that he must not have received any part of the performance bargained for. The court was of the view that in order to succeed, the bank must prove that the plaintiff was not entitled to restitution of the payments which it sought to recover; otherwise, the plaintiff would gain a windfall in the process.

It is necessary, however, to distinguish between the concept of total

49 [1980] QB 677 at 695.

50 On the facts of *David Securities*, the defendant argued that it had agreed to lend money to the appellants at the rate named in the loan agreement because of the plaintiff's agreement to pay the 'additional amounts' pursuant to clause 8(b) of the agreement. If it had known that these additional payments would be void, then it would have negotiated a different interest rate with the defendant to ensure that it would receive an equivalent net amount. The consideration for a lower interest rate was the plaintiff's agreement to pay the additional amount.

51 [1923] 2 KB 500.

52 [1989] 1 WLR 912.

failure of consideration as an unjust factor and therefore a ground for restitution and the provision of consideration by the defendant as a defence to a prima facie right to restitution on the ground of mistake. Surely in the latter case, the concept of total failure of consideration is irrelevant. The onus is on the defendant to show that it had provided consideration for the benefit conferred by the plaintiff. 'Consideration' here includes mutual consideration or promises sufficient to make a bargain binding. In the former case, the onus is on the plaintiff to establish that it is entitled to restitution for the benefits it had conferred on the defendant because the defendant had not provided any part of the bargain promised by it to the plaintiff.

The majority in *David Securities* has, with respect, confused these two concepts of 'consideration'. In cases of mistaken payments, the payer is entitled to a *prima facie* right of restitution as soon as the payment has been made because the payer would not have made the payments but for the mistake. The payee is unjustly enriched at the time of payment. However, in the case where payments are made for consideration that has totally failed, the payer is *not* entitled to recovery at the time of payment. He can only recover in a situation where he or she can prove that he or she has not received any part of the performance bargained for under the contract pursuant to which payments were made. The writer is therefore of the view that payments made under a mistake and payments made for a consideration that has totally failed are distinct grounds upon which recovery of payments are available.⁵³

Butler P,⁵⁴ however, has argued that acceptance of the principle of failure of consideration as the basis for the recovery of mistaken payments would 'unify and simplify the underlying basis of the action for recovery of money wrongly withheld.'⁵⁵ One of the examples he used is the case of *J & S Holdings v NRMA Insurance*⁵⁶ where the Full Court of the Federal Court held that the plaintiff payer who had paid excess interest under a loan agreement could not recover that payment because the money was paid under a mistake of law. Both parties to the said agreement were in ignorance of the existence of a relevant statute which rendered void a provision in the agreement providing for an interest rate higher than a certain rate. Butler has said that:

the intention of the payer and payee in making and receiving the payments could be considered to be to discharge the legal indebtedness arising under the loan agreement. In relation to the excess interest paid there was a failure of consideration for which there could be recovery.⁵⁷

To base the recovery of mistaken payments on the ground of failure of consideration makes artificial rather than simplifies the basis of their recovery.

53 Brennan J in *David Securities* was clearly of the view that it is 'a fallacy to conflate the two categories and to find a total failure of consideration to be an element common to both': (1992) 175 CLR 353 at 390.

54 Butler P, 'Mistaken Payments, Change of Position and Restitution' in P D Finn (ed) *Essays on Restitution* (1990) at 96.

55 Ibid at p 122.

56 (1982) 41 ALR 539.

57 Above n 54.

But for the relevant statutory provision disallowing the excess interest payments, the interest payments made *were* supported by the consideration of loan. Both parties had mutually agreed on the terms of the contract. The payments were made in performance of the loan agreement. It is incorrect to say that the excess interest paid was unsupported by consideration. The lender had agreed to grant the loan upon the agreement by the borrower to pay interest at the stipulated interest rate. However, to the extent that the interest payable under the agreement exceeded that payable under a certain rate as provided by the statute, the excess payments were made under a mistake of law. The borrower had mistakenly believed that the stipulated interest was legally enforceable by the defendant payee. Thus, *at the time of payment*, the payee was unjustly enriched. If the law is such that recovery for payments made under a mistake of law is irrecoverable, then the plaintiff payer would be unsuccessful in his claim for recovery. The argument that recovery should have been allowed on the ground of failure of consideration is unconvincing.

Would the argument be stronger on facts similar to *Pavey & Matthews v Paul*?⁵⁸ In summary, that case involved an oral agreement between the plaintiff builder and the defendant land owner. The builder had agreed to carry out certain building work for the defendant owner of land at a reasonable price. After the building work had been carried out, the defendant refused to pay the plaintiff. As the agreement between the parties was entirely oral, the contract could not be enforced by virtue of s 45 of the *Building Licensing Act 1971* (NSW). Butler has argued that the law imposes a duty on the land owner to pay the builder a reasonable value for the benefit conferred. Although the oral contract may not be enforceable 'the court will not be precluded from enforcing the obligation to pay the value of the benefit rendered for failure of consideration.'⁵⁹ The function of the agreement was to show that the services rendered were not intended to be gratuitously rendered. One important point could be made on this analysis: if the court could enforce the obligation to pay a reasonable value for the services rendered would that amount to enforcing the oral contract? If so, would that not be subverting the intention of the relevant statute? On the facts of *Pavey*, the court rightly, in the writer's view, granted restitution to the plaintiff on the ground that the land owner had requested and freely accepted the services rendered and, more importantly, it recognised that an order of restitution would not have been against the intention of the relevant statute. Mason and Wilson JJ in that case said the purpose of s 45 of the Act includes:

the protection of the building owner against a claim by a builder on a written contract that fails to describe the building work sufficiently, even in a case where the builder has fully executed the contract on his part. But it would be going a very long way indeed to assert that the statutory protection extends to a case where the building owner requests and accepts the building work and declines to pay for it on the ground that the contract fails to comply with the statutory requirements.⁶⁰

58 (1987) 162 CLR 221.

59 Above n 54 at p 123.

60 (1987) 162 CLR 221 at p 229.

The decision in *Pavey* can therefore be explained on the basis of an acceptance of a bargained-for benefit and not necessarily on the basis of a total failure of consideration.⁶¹

It seems that a 'common sense' approach is to be adopted in pleading the defence of *bona fide* purchase. In *Lipkin Gorman v Karpnale Ltd*,⁶² Lord Goff considered whether the supply of chips to Cass in that case constituted the provision of consideration.⁶³ His Lordship gave an example of chips being used in a shop on the same basis as chips used in the casino. He said that when the shop gave customers chips in exchange for cash, the transaction was to be analysed as a gratuitous deposit and the shop gave no consideration for the money proffered by the customer. This approach, Lord Goff said, is preferable to a technical approach which would see consideration by the shop in the form of a promise to repay the sum received subject to a purchase of goods by the customer from the store. This has significance for banks and other financial institutions because it means that when customers deposit money in their bank accounts (and this money was mistakenly paid to the customer in the first place), the fact of deposit does not mean that the bank has given any consideration for the money. The bank would have to return the money (even if another account of the customer is overdrawn) unless it can plead the defence of change of position.

(b) Change of Position

Another possible defence to a claim for restitution is that the defendant payee has received the money in good faith and has changed its position in reliance of the receipt of the benefit conferred. The majority in *David Securities*, while envisaging the change of position defence, noted that this defence has not yet been accepted in Australia.⁶⁴ The House of Lords has already accepted this defence in *Lipkin Gorman v Karpnale Ltd*⁶⁵ although their Lordships had declined to define the scope of the defence. They simply said that restitution would be denied if circumstances had so changed that it would be inequitable to require the defendant to make full restitution.

61 While money is considered to be incontrovertibly beneficial, services are not necessarily of value to the recipient. Where, however, the recipient has requested or freely accepted them, knowing that they were not being rendered gratuitously, having had an opportunity to reject them, they will be regarded as a benefit - she or he must make restitution for their reasonable value. See, for instance: Goff and Jones, *The Law of Restitution* (3rd ed, Sweet and Maxwell, 1986) at 8; *Way v Latilla* [1937] 3 All ER 759. Birks, *Introduction To The Law of Restitution*, p 265, also 104, 114-6, has shown that free acceptance enables a person seeking restitution to prove both that there has been 'an enrichment' and further, that it was an 'unjust' one. It is an 'enrichment' because the recipient cannot rely on arguments saying that it was of no value to her. By accepting them in circumstances where she knew they were to be paid for, and having failed to avail herself of the opportunity to reject, the recipient has shown that the services were of value to her. Further, by having failed to reject them, and having had the benefit of the services without having paid for them, the enrichment is 'unjust'.

62 [1991] 2 AC 548.

63 The notable point is that s 18 of the *Gaming Act* 1945 rendered void contracts gaming and wagering contracts.

64 Although the High Court had made strong indications of its acceptance in *Australia New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 602 and Mason CJ in the recent case of *Commissioner of State Revenue v Royal Insurance Australia Limited* (1994) 264 CLR 1 seems to have, in his judgment, assumed the availability of this defence.

65 [1991] 2 AC 548.

One central uncertainty that remains, given the acceptance of the defence, is the basis upon which the defence lies. Is it reliance-based, enrichment-based or hardship-based?

In New Zealand, s 94B of the *Judicature Act* 1908 provides that relief should be denied in whole or in part

if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

The effectiveness of this provision has been criticised by Sutton on the basis that it is vague and creates confusion 'so great that the court is left merely making *ex gratia* payments with other people's money'.⁶⁶ The case of *Thomas v Houston Corbett & Co*⁶⁷ illustrates the arbitrariness of the defence. Although the provision seems to allow the payee a defence on a reliance basis, the court in *Thomas* focused more on the issue of apportioning loss between the parties, having regard to all the facts and the relative equities of both the payer and the payee.

The New Zealand provision and its application in *Thomas* has prompted criticism from the Law Reform Commission of British Columbia and the New South Wales Law Reform Commission⁶⁸ but the Law Reform Committee of South Australia⁶⁹ has recommended in 1984 the adoption of the provision subject to a requirement that the alteration of position should flow from the mistaken payment.

In *Lipkin Gorman*, the House of Lords said that restitution would be denied if circumstances had so changed that it would be inequitable to require the defendant to make full restitution:

... the defence is available to a person whose position has so changed that it would be inequitable in all circumstances to require him to make restitution, or alternatively to make restitution in full.⁷⁰

Reference to 'inequity' seems to suggest that the defence is hardship-based; that is, the defence would be available to the payee if it would be inequitable to require payment in the circumstances. Lord Goff gave the

66 RJ Sutton, 'Mistake of Law - Lifting the Lid of Pandora's Box' in J F Northey ed, *The A G Davis Essays in Law* 218 at 223-5.

67 [1969] NZLR 151.

68 Law Reform Commission of British Columbia Report on the Recovery of Unauthorised Disbursements of Public Funds (1980); New South Wales Law Reform Commission, Restitution of Benefits Conferred Under Mistake Of Law, Report LRC 53. Note that the Western Australian legislation of the *Property Law Act* 1969, s 125 (1) is very similar to the New Zealand provision except that regard is not to be had to the position of the payer and those who acquire rights or interests through him or her.

69 Law Reform Committee of South Australia, Report Relating to the Irrecoverability of Benefits Obtained by Reason of Mistake of Law (SALRC 84) 24-27.

70 [1991] 2 AC 548 at p 579.

example where money paid under a mistake of fact is given to charity by the payee. In such circumstances, it would be unjust to require the payee to make restitution to the extent that he has so changed his position. Similarly, if a thief steals money and gives to a third party who gives the money to charity, the third party has a good defence to the money had and received.

The House of Lords' approach follows that of the United States, as set out in paragraph 142(1) of *Restatement of the Law of Restitution*. This provision focuses on whether or not it would be unjust to compel the payee to repay the money in the circumstances. The paragraph provides as follows:

The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

This definition of the defence applies in situations where, for example, money is paid by a bank under mistake to a payee and the money is stolen from the payee soon upon receipt. It would be inequitable to compel the payee to repay the money to the payer when the payee has not even had the benefit of the payment. The courts in the United States will weigh the equities between the parties and will deny a plaintiff a right to recovery on 'patent equitable considerations'.⁷¹ Whilst the denial of recovery based on 'equitable' or 'just' grounds may sound attractive, it does not assist the court nor the parties involved in ascertaining whether in a given a set of facts, recovery will be denied. Is recovery to be denied because it would be more unjust to compel restitution than it is to allow the recipient to be enriched due to the payer's mistake? If that is so, when does that situation arise? Which of the many conceptions of justice is being invoked?⁷²

The majority in *David Securities* said that if payments made under mistake of law are *prima facie* recoverable, in the same way as payments made under mistake of fact, a defence of change of position is necessary to ensure that enrichment of the recipient is prevented only where it would be unjust.⁷³ This does not mean that one is required to shift the primary focus on the concept of unjust enrichment from the moment of enrichment. It means that 'the defence of change of position is relevant to the enrichment of the recipient precisely because its central element is that the recipient has acted to his or her detriment *on the faith of the receipt*'.⁷⁴ They were therefore of the view that a defence of change of position is necessary to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be unjust.⁷⁵ Consequently, a *prima facie* right to restitution will be denied if its order would cause a greater injustice to the defendant, who has acted to his or her detriment on the faith of the receipt, than the injustice being suffered by the

71 *Bank of New York v Simmons & Co* (1921) 190 NYS 602.

72 See Birks, *Restitution - The Future* (The Federation Press, 1992) at pp 127-128.

73 (1992) 175 CLR 353 at 385.

74 *Ibid.*

75 *Ibid.*

plaintiff who has conferred the benefits under unjust factors such as mistake. The purpose of the defence is therefore to balance the relative equities between the parties.

A *prima facie* entitlement to restitution cannot be denied merely because of subjective notions of unfairness to the payee. As Lord Goff indicated in *Lipkin Gorman* a court 'cannot carte blanche reject (the payer's) claim simply because it thinks it unfair or unjust to grant recovery'.⁷⁶ The court must consider all the circumstances and weigh the equities between the parties in deciding whether the receipt by the defendant would indeed result in an unjust enrichment.⁷⁷

It would be unfortunate if the defence's main focus is solely based on the hardships of the parties. It is clear that the defence should not be allowed simply because the recipient has spent the money. An example is where the recipient, who loves gambling and gambles regularly, puts his own money in a fixed bank account after he has received the money from the payer. He then gambled, unsuccessfully, the entire payment from the payer. It might be argued that it would be harsh to require him to make restitution from his own savings because he would lose interests which he could have earned from the fixed account. In such cases, the defence of change of position should not be allowed. The question that must be asked is whether the recipient would have spent the money on gambling but for the receipt from the payer. The expenditure must flow as a result of the payment. The recipient in this example would very likely have spent his own money on gambling even if he had not received the payment from the payer. It is suggested that the following elements must be shown before the defence is successfully established:

1. The recipient is no longer 'enriched' at the time of demand of repayment because the recipient has acted to his or her detriment on the faith of the receipt; or because the enrichment has been taken away from him or her in circumstances beyond his or her control;⁷⁸
2. The recipient's change of position is as a result of the enrichment; and
3. It would be more unjust, in the circumstances, to require the recipient to make restitution than the fact of unjust enrichment in the first place.

76 [1991] 2 AC 548 at p 578.

77 In the United States and Canada where the defence has been firmly accepted, the courts have denied restitution where the defendant has been at fault, for example, where the defendant has changed his or her position after the mistake was discovered: *E R Squibb & Sons v Chemical Foundations* (1937) 93 F 2d 475. In *Lipkin Gorman*, the House of Lords said that mere expenditures by the defendant does not on its own constitute a change of position: [1991] 2 AC 548. If the defendant payee had acted in bad faith or knew that the payment was paid under mistake by the payer, then the defence of change of position will be denied: see further Goff and Jones, above n 10 at 125.

78 This formulation is intended to cover cases where money has been mistakenly paid to the payee from whom a thief steals it.

This approach focuses on the question of enrichment, that is, is the recipient in fact enriched? A recipient whose money from the mistaken payment is stolen by a thief is, although enriched at the time of payment, clearly not enriched in the real sense in that he or she did not in fact enjoy the fruits of the enrichment. The question of enrichment is one of fact.

The change of position must flow as a result of the enrichment. Even if a recipient is in fact enriched and has changed position because of the enrichment, one must ask whether that change of position is as a result of the enrichment. A person who had planned a holiday and who had been saved expenses because of the unjust enrichment cannot claim to have changed his or her position. The expenses were already expected and it was not money which would not have been spent but for the enrichment. An example where the change of position is as a result of the enrichment is the situation where the recipient gives the money received, whether in whole or in part, to charities. Another example would be where, on the faith of the receipt, the recipient uses the money to renovate the kitchen in the house which he or she would not otherwise have done. What if the receipt resulted in the recipient buying a more expensive car or house than he or she could otherwise afford? Clearly, if money had been given to charities and the gift is on the faith of the receipt, it would be unjust to require repayment. If the money had gone towards buying a more expensive commodity than the recipient could otherwise afford, should the defence be available? In *Lipkin Gorman*, the House of Lords gave a similar example where money had been spent to buy a car which the recipient would not have bought but for the receipt. The recipient is said to have changed his or her position on the faith of the receipt and has only been unjustly enriched to the extent of the second-hand value of the car at the time when restitution was sought.⁷⁹ If the recipient buys a more expensive car than what he or she would otherwise have bought, for example, instead of spending \$20,000 on a car, the recipient spends \$40,000, what is the extent of his or her enrichment? Presumably, the same principle above will apply. The extent of the unjust enrichment will be the proportion of the second-hand value of the car at the time restitution is sought that is equal to the proportion of the contributions at the time of purchase. If the second-hand value is, say, \$30,000, then the extent of the unjust enrichment is $20,000/40,000 \times 30,000$ which is \$15,000.

Finally, the court should take into account all the circumstances and decide whether, as a matter of fact, it would be more unjust to require restitution. For instance, to require restitution would be more unjust than the fact of unjust enrichment in a case where a recipient has received money in good faith and has spent it, in reliance of the receipt, on a new kitchen and the only way restitution could be achieved would be to require the recipient to sell that house. On the other hand, it may not be unjust to require this of a recipient who is in a similar situation but who was already planning to sell the house anyway. In the latter case, it is not particularly unjust to require the recipient of the enrichment to restore to the payer the equivalent sum paid by mistake.

79 [1992] 2 AC 548, at 560.

This final requirement might be criticised on the ground that 'unjust' is a vague word and therefore there is danger of 'palm-tree' justice. This criticism can be met by the point that the notion of 'unconscionability' is an equally vague and emotive concept and yet the courts have not shied away from its application in other areas of the law.⁸⁰ The concept of what is 'unjust', in the context of the change of position defence, is not as unruly as one might first imagine. It is to be assessed in the circumstances of the case, taking into account whether the recipient has in fact been enriched, whether he or she has spent the money in whole or in part in reliance of the receipt and whether it would be unjust, overall, to require restitution. Lord Goff in *Lipkin Gorman* indicated quite clearly that, in recognising the defence, he wished to allow it to develop on a case by case basis. It is understandable that the court should wish to refrain from a definition of the defence at such an early stage. Given the fact that it is now possible to recover money paid under a mistake of law as well as mistake of fact, it is becoming important for the mistaken payer to know the circumstances in which his or her *prima facie* right to restitution will be denied. The suggested test discussed above has the merit of producing some certainty but at the same time allowing the court to look at the availability of the defence on a case by case basis.

The House of Lords in *Lipkin Gorman* said the defendant will not be successful in establishing the defence of change of position if he or she has acted in bad faith. If, at the time of receipt, the recipient knew or ought to have known that he or she was not entitled to the payment, then the receipt would not have been in good faith. The House went on to say that the mere fact that the defendant has spent the money does not itself render it inequitable that he or she should be called upon to pay.⁸¹ In *David Securities*, the majority were clearly of the view that a defendant cannot rely on the change of position defence 'where he or she has simply spent the money received on ordinary living expenditures'⁸² but no indication was given as to what would amount to 'ordinary living expenses'. It has been suggested that no distinction should be made between ordinary expenses and extraordinary expenses - all that is required is that the defendant would not have spent the money but for the receipt.⁸³ Whilst the writer agrees that the focus should be on the circumstances in which the money was expended rather than on the nature of the expenses, the reference to such 'ordinary living expenses' is nevertheless useful to show that the expenditure of the money must be caused by the mistaken payments. If the defendant usually spends \$100 per week on groceries but spends \$200 on one occasion because he or she has been mistakenly paid money by the payer, the questions ought to be whether he or she incurred the expenses in consequence

80 Unconscionability underlies many of the vitiating factors (eg mistake, duress, undue influence) to an apparently valid contract. It is also an important factor in estoppel cases: see *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

81 This is based on the statements expressed by Lord Simonds in *Ministry of Health v Simpson* [1955] AC 251 where it was decided that money wrongfully given to charities from legacies cannot be traced against such charities when they have spent the money on alterations to buildings.

82 (1992) 175 CLR 353 at 386.

83 Burrows, *The Law of Restitution* (Butterworths, 1993) at 428; Bryan, 'Mistaken Payments and The Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*', (1993) 15 *Syd LR* 461 at 487.

of the payment and whether it would be unjust to require the defendant to repay the money in the circumstances.

(c) Change of Position and Estoppel

From the position of the recipient, what is the advantage of a defence of change of position given the developed doctrine of estoppel in Australia? In *Walton Stores (Interstate) Ltd v Maher*,⁸⁴ Brennan J said that an estoppel arises when:

A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to.⁸⁵

In the case of estoppel as a defence to restitutionary claims based on mistake, the fact of payment made under a mistake is not disputed nor the fact that the payee is in receipt of a benefit, it simply denies recovery in the circumstances of the case on the basis that the plaintiff is estopped from denying that the defendant is entitled to the payment. As far as the recipient is concerned, there is no advantage in pleading the defence of change of position. The defence of estoppel is clearly a more attractive defence to the defendant because, unlike the defence of change of position, the estoppel defence does not operate *pro tanto*.⁸⁶ If the defendant successfully establishes the defence, he or she is not required to make any repayments to the plaintiff.

In order to plead a successful defence of estoppel, however, the payee must satisfy three basic requirements. The first is that the person seeking recovery has made a representation of fact to the payee which was intended to be acted upon.⁸⁷ The second requirement is that the payee relied on that representation and, thirdly, that the payee has, as a result of the reliance, changed his or her position in such a way that it would be inequitable to require him or her to return the money.

The difficulty with estoppel is that the mere payment of money by mistake is not sufficient to amount to a representation which will estop the payer from asserting his or her right to receive the payment. The payer must have represented, whether expressly or by conduct that the defendant is entitled to treat the money as his or her own.⁸⁸ It has been suggested that this is no longer

84 (1988) 164 CLR 387.

85 *Ibid* at p 413.

86 *Avon County Council v Howlett* [1983] 1 WLR 605.

87 Note that even if there is no representation of fact, the plaintiff may nevertheless be estopped if he or she has been guilty of a breach of a duty to give accurate information which he or she owed to the defendant: see, for example, *R E Jones Ltd v Waring & Gillow Ltd* [1926] AC 670, per Lord Sumner at 693; *Weld-Blundell v Synott* [1940] 2 KB 107, at 114 per Asquith J.

88 *Transvaal & Delagoa Bay Investment Co v Atkinson* [1944] 1 All ER 579, per Atkinson J at p 585.

See also: *R E Jones Ltd v Waring & Gillow Ltd* [1926] AC 670.

a tenable requirement given the development of the estoppel doctrine in Australia.⁸⁹ Whilst it is true that a representation need not be verbal and that a representation by conduct would suffice, there is still a requirement of a representation made in order to establish a case of estoppel. The defendant cannot argue that the plaintiff is estopped from denying something when the plaintiff has done nothing to justify that claim. Even if one adopts a wide doctrine of estoppel as that taken by Brennan J in *Waltons Stores (Interstate) v Maher*⁹⁰ where his honour omitted any references to representations,⁹¹ his honour still required that the plaintiff, by his conduct, induced the defendant to adopt a certain assumption or expectation. Where a payment is made under mistake, whether it be one of fact or of law, whether the fact of payment carries an inherent representation that the recipient is entitled to the payment depends on whether the payer is under a duty of accuracy. It is submitted that banks are not under any duty of accuracy to the payee just as they do not owe a duty of care to the holder of a cheque. The mere payment by the bank therefore does not carry an inherent representation of entitlement. The requirement of a representation is even harder to satisfy where the plaintiff is not the payer of the money. So, in cases where the plaintiff is a next-of-kin who is claiming money paid by mistake by the executor to a legatee (who was not entitled to receive the money), the payment by the executor will usually involve no representation by the plaintiff and thus no estoppel will arise against the plaintiff.⁹²

The first requirement of a representation, whether by word or conduct, therefore limits the availability of estoppel as a defence to innocent recipients of money paid under mistake.

As noted earlier, the defence of estoppel is a better defence for the defendant simply because it cannot operate *pro tanto* so that if, for example, the defendant has innocently changed his or her position by disposing of *part* of the money, a defence of estoppel would provide him or her with a defence to the whole claim. It has been suggested that developed doctrine of estoppel in Australia now allows the defence to operate *pro tanto*.⁹³ The whole basis of this *pro tanto* rule is that estoppel is a rule of evidence which precludes the plaintiff from denying certain facts inconsistent with his or her conduct. If the defence can be established, it operates as a defence to the whole claim by the plaintiff. Although the High Court in *David Securities* seemed to assume the correctness of the *Avon County Council*'s case, Mason J in *Commonwealth v Verwayen*⁹⁴ had said that the defence of estoppel by conduct has expanded from an evidentiary function to a substantive doctrine. There is therefore little justification for

89 See: Bryan, 'Mistaken Payments and The Law of Unjust Enrichment: David Securities Pty Ltd v Commonwealth Bank of Australia' (1993) 15 *Syd L R* 461 at 487.

90 (1988) 164 CLR 387.

91 See: Bryan, above n 89 at 489.

92 See, for example, *Re Diplock* [1948] Ch 465. That was a case involving tracing and the charities in that case were innocent recipients of money paid under a mistake, the court therefore allowed them to retain the money paid on the ground that they had changed their position because of the payment.

93 See Bryan, 'Mistaken Payments and The Law of Unjust Enrichment: David Securities Pty Ltd v Commonwealth Bank of Australia' (1993) 15 *Syd LR* 461 at 488 who suggests that the two defences should merge and form a single defence of injurious reliance.

94 (1990) 170 CLR 394 at 412.

insisting that the defence of estoppel should not operate *pro tanto*. If the defendant is able to return what remains of the mistaken payments, it does not seem appropriate that he or she should be able to retain the remainder on a successful defence of estoppel. The defendant in such circumstances would still have gained an unjust enrichment.

The defence of change of position offers a more appropriate protection to an innocent recipient of the payments who has received the money in good faith and who has changed his or her position in consequence of the mistaken payments. It is also more of an equitable defence as far as the payer is concerned because it is a *pro tanto* defence; the defendant is still required to repay the payer the money that has not been spent. As between the payer and the payee, it is a question of fact, as between the injustices of the plaintiff and the defendant, who should bear the loss. If the defendant has changed his or her position by disposing only part of the payments and is in a position to return what remains, then it would not be unjust to require him or her to return the remaining money to the mistaken payer. It may be that the defence of estoppel should not be available as a defence to restitutionary claims altogether.

Conclusion

The High Court has, via *Pavey and Matthews v Paul*⁹⁵ and *David Securities*⁹⁶, removed any doubt that in Australia the principle of unjust enrichment is a principle which explains why a right to restitution is required in some cases and a *prima facie* right to recover mistaken payments irrespective of whether the mistake was one of fact or of law is an example of the application of this principle. The High Court in *David Securities* has made a distinction between mistaken payments and voluntary payments. There is a danger that the wide definition of the word 'voluntary' may overshadow the advantage of removing the fact and law distinction. This can be avoided if a number of factors are taken into account in deciding whether the payment was made either by mistake or voluntarily:

- (i) whether the payer, on the balance of probabilities, had doubts about the validity of the payment so that it precludes him or her from relying on mistake;
- (ii) whether the payer had waived his or her right to further investigation and had chosen to assume a risk of mistake;
- (iii) if the payer was ignorant or did not direct his or her mind to the validity of the claim or demand, the payment was likely to have been made under mistake. Negligence of the payer should not be a bar to the *prima facie* right of recovery although the extent of negligence may be taken into account in deciding whether the payer had assumed a risk of mistake.

Given the *prima facie* right to recovery for payments made under mistake, it is crucial to protect a *bonafide* payee who had received the payment in good faith and who has subsequently changed his or her position. In Australia, the High Court in *David Securities* has said that the defence of change of position would operate to ensure that the plaintiff can only succeed in cases where the defendant's enrichment is clearly *unjust*. It is submitted that whilst it is desirable to balance the equities between the payer and the payee, the court's focus should be whether the payee has in fact been enriched and whether the change of position was as a result of the enrichment. It would be inequitable to the payer to deny recovery simply because it would be unjust to the payee. The question of whether it would be unjust to compel restitution must be examined in the context of the payee's enrichment and the causal link between the payment and the change of position. The issue of 'unjustness' is relevant as the final consideration in determining whether it would be more unjust to require restitution than the fact of unjust enrichment in the first place.

Finally, the defence of estoppel which is a better defence for the payee whilst it is still considered a *pro tanto* defence, ought not to be available as a defence to restitutionary claims. Given that restitutionary claims for payments made under mistake are based on the principle of unjust enrichment, the defences to such claims ought to focus on the enrichment and the extent of the change of position as a result of that enrichment.