

# CHANGE OF POSITION AND RESTITUTION FOR WRONGS: ‘NE’ER THE TWAIN SHALL MEET’?

PAUL A WALKER\*

*[Since its inception into Australian law less than two decades ago, change of position has become firmly established as the most important defence to a claim for restitution based on the concept of unjust enrichment. A lingering uncertainty, however, is the extent to which the defence can apply where restitution is claimed as a remedy for civil wrongs, such as conversion or breach of fiduciary duty. The author examines the nature and rationale of change of position and the policy behind restitutionary claims for conversion and breach of fiduciary duty, and argues that change of position should be applicable in these situations, provided the defendant has acted in good faith at all relevant times.]*

## CONTENTS

I	Introduction.....	236
II	Taxonomy and Essential Concepts .....	238
III	The Nature of Change of Position .....	241
	A Lord Goff’s Dictum.....	241
	1 The Nature of Wrongdoing.....	242
	2 The Wider Effect of Lord Goff’s Dictum .....	245
	B The Rationale of Change of Position .....	246
	1 Disenrichment.....	246
	2 Security of Receipts.....	247
	3 Inequitability.....	249
	C The Merits of a Broad Defence.....	251
IV	Change of Position and Strict Liability Wrongs .....	253
	A Change of Position and Remedial Compatibility.....	253
	B The Tort of Conversion .....	255
	1 The Rationale of Conversion.....	256
	2 Restitutionary Remedies for Conversion.....	258
	3 The Irrelevance of a Corresponding Loss .....	259
	4 Judicial Support for a Relaxation of Strict Liability.....	260
	5 Conclusions .....	261
	C Breach of Fiduciary Duty.....	261
	1 The Nature of Strict Liability in Equity.....	263
	2 Disgorgement of Profits .....	264
	3 Restitutionary Damages.....	266
	4 Conclusions .....	267
V	Conclusion .....	268

\* BA, LLB (Hons) (UWA). I am grateful to John Tarrant and Elise Bant for their suggestions and comments on an earlier draft of this article. I am also grateful for the support of the Hackett Foundation Alumni Honours Scholarship at The University of Western Australia, which funded much of the research that went towards the writing of this article.

## I INTRODUCTION

The law of unjust enrichment postulates that a person who is unjustly enriched at the expense of another must make restitution of that enrichment.<sup>1</sup> In the early 1990s, the highest courts in England and Australia recognised that a defendant was excused from making restitution where the defendant could establish a change of position defence.<sup>2</sup> Change of position appears to be a viable defence to any claim for restitution based on unjust enrichment,<sup>3</sup> but the relevance of the defence to other restitutionary claims remains undetermined.<sup>4</sup> This uncertainty is troublesome because Anglo-Australian law seems to have always awarded restitution for reasons other than the reversal of unjust enrichment, such as in response to certain civil wrongs.<sup>5</sup> The applicability of change of position to these restitutionary claims (‘restitution for wrongs’) is perhaps the greatest remaining ambiguity concerning the defence. This issue has never been comprehensively evaluated, and academic opinion is fleeting and divided on how to address it.<sup>6</sup> Its resolution, however, is potentially of great significance to our understanding of change of position and the defence’s relatively untapped potential to do practical justice between plaintiff and defendant in any number of situations.

This article does not intend to examine the precise elements of the change of position defence in any detail, preferring instead to focus on whether the defence can and should be extended to restitutionary claims based on wrongdoing. Nevertheless, a general understanding of the nature of the defence is worthwhile. In Australia, it appears that change of position is established when a defendant, acting in good faith,<sup>7</sup> irreversibly changes their position in reliance on the receipt

<sup>1</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61–2 (Lord Wright); *Degelman v Guaranty Trust Co of Canada* [1954] SCR 725, 728–9 (Rand J for Rinfret CJ, Taschereau and Rand JJ), 734 (Cartwright J for Estey, Locke, Cartwright and Fautex JJ); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256–7 (Deane J) (‘*Pavey & Matthews*’); *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, 559 (Lord Bridge), 559–60 (Lord Templeman), 572 (Lord Goff) (‘*Lipkin Gorman*’); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) (‘*David Securities*’). For a discussion of the possible meanings of restitution, see below Part II.

<sup>2</sup> *Lipkin Gorman* [1991] 2 AC 548; *David Securities* (1992) 175 CLR 353.

<sup>3</sup> See, eg, *Goss v Chilcott* [1996] AC 788, 798–9 (Lord Goff for Lords Goff, Jauncey, Steyn, Hoffmann and Cooke); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 716 (Lord Browne-Wilkinson).

<sup>4</sup> The only two cases to have commented upon the defence’s applicability beyond unjust enrichment are *Lipkin Gorman* [1991] 2 AC 548, 579–80 (Lord Goff for Lords Goff, Jauncey, Steyn, Hoffmann and Cooke), discussed in Part III, and *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 1094–5 (Lord Nicholls) (‘*Kuwait Airways*’), discussed in Part IV.

<sup>5</sup> See, eg, *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 (breach of fiduciary duty); *Seager v Copydex Ltd [No 1]* [1967] 2 All ER 415 (breach of confidence); *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd’s Rep 359 (trespass to land); *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (conversion).

<sup>6</sup> See, eg, Peter Birks, *Unjust Enrichment* (2<sup>nd</sup> ed, 2005); James Edelman and Elise Bant, *Unjust Enrichment in Australia* (2006); James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002). See also Andrew Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002) 524–7; Lord Goff and Gareth Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002) 765, 835–7.

<sup>7</sup> On the scope of good faith in this context, see *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] QB 985, 1003–4 (Clarke LJ); *Abou-Rahmah v Abacha* [2007] 1 Lloyd’s Rep

of a benefit.<sup>8</sup> There is some suggestion that the English defence is wider, in that there may not be a strict requirement that the change of position occur in reliance on the receipt.<sup>9</sup> For present purposes, this article proposes to deal only with the Australian version of the defence, drawing on English authority where appropriate. Issues as to the scope of the English conception of change of position and the bearing this may have on its extension beyond unjust enrichment in English law are likely to require specific consideration, which is not possible in this article. It may be, however, that if a case can be made as to why the narrower Australian conception of change of position should apply beyond unjust enrichment claims, any wider conception of the defence would also be suitably accommodated.

The nature of change of position is best explained by an example. Suppose A mistakenly pays B \$30 000 and B, having no reason to doubt their entitlement, spends \$25 000 of it on an overseas holiday. When A realises the mistake and brings an action in unjust enrichment, B may object, arguing that they changed their position by spending the money, that the change cannot now be reversed, that they believed in good faith that they had title to the money, and that they acted in reliance on its receipt. Due to the change in position, B must only restore the extant money. The defence is therefore tied to the defendant's gain and is intrinsically linked to restitution, the gain-based remedy.<sup>10</sup> This particular example arises in the context of unjust enrichment but, where analogous facts occur in the area of restitution for wrongs, change of position should also be applied to reduce the defendant's liability.

This article argues that there is an intrinsic link between change of position and restitution which transcends any taxonomical demarcation between wrongs and unjust enrichment. The mere fact that restitution is claimed as a remedy, regardless of whether this claim is based on unjust enrichment or wrongdoing, is sufficient to warrant the availability of a change of position defence where the elements of the defence can be satisfied. Change of position should, therefore, be applicable to claims of restitution for wrongs where the defendant has changed position bona fide in reliance on a benefit obtained by a wrong (that is, the defendant is an 'innocent wrongdoer'). It will also be shown that the defence has

115, 124–7 (Rix LJ); cf at 132–3 (Arden LJ), 134–5 (Pill LJ). See also Peter Birks, 'Change of Position: The Two Central Questions' (2004) 120 *Law Quarterly Review* 373, 375–6.

<sup>8</sup> See, eg. *David Securities* (1992) 175 CLR 353, 384–6 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318, 322–5 (Bell J); *Gertsch v Atsas* (1999) 10 BPR 18 431, 18 444 (Foster AJ); *K & S Corporation Ltd v Sportingbet Australia* (2003) 86 SASR 312, 348 (Besanko J). See also Edelman and Bant, above n 6, 323–35.

<sup>9</sup> See, eg. *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 827 (Robert Walker LJ); *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211, 228–9 (Thomas J); *Credit Suisse (Monaco) SA v Attar* [2004] EWHC 374 (Comm) (Unreported, Gross J, 10 March 2004) [98]; Ross Grantham and Charles Rickett, 'A Normative Account of Defences to Restitutionary Liability' (2008) 67 *Cambridge Law Journal* 92, 118–24; Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 512–17.

<sup>10</sup> Birks, *Unjust Enrichment*, above n 6, 208.

an important role to play in tempering a strict liability approach to certain civil wrongs.<sup>11</sup>

Part II examines the theoretical framework underpinning this analysis of change of position and restitution for wrongs. It briefly sets out the taxonomy and nature of unjust enrichment and restitution. Part III analyses the character and potential scope of the defence in light of its rationale and theoretical basis. It is contended that not only is change of position readily applicable beyond unjust enrichment, but that the merits are broadly in favour of this move. Finally, Part IV applies change of position to the wrongs of conversion and breach of fiduciary duty and argues that strict liability to make restitution for these wrongs should be abandoned in favour of an approach tempered by change of position.

It is concluded that change of position addresses a universal concern in relation to restitutionary remedies, namely, how much gain a defendant should be required to give up. This issue cannot logically be confined to unjust enrichment. As a result, change of position should be extended to restitution for wrongs where the interests of practical justice require it, specifically where the defendant is an innocent wrongdoer.

## II TAXONOMY AND ESSENTIAL CONCEPTS

One cannot assess the scope of change of position without appreciating the theoretical framework of unjust enrichment and restitution. When this article refers to unjust enrichment, it denotes a concept which unifies a category of private law obligations running parallel to contract and tort.<sup>12</sup> Unjust enrichment encompasses a number of legally significant events for which only the remedy of restitution is available.<sup>13</sup> The unjust enrichment inquiry, which requires proof that a defendant was unjustly enriched at the plaintiff's expense, explains the operation of these legal events.<sup>14</sup> When this is proven, the defendant must make

<sup>11</sup> Specifically in regard to the tort of conversion and the equitable wrong of breach of fiduciary duty.

<sup>12</sup> See *Pavey & Matthews* (1987) 162 CLR 221; *Lipkin Gorman* [1991] 2 AC 548. The notion of a category of unjust enrichment is not, however, without its critics: see, eg, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 543–4 (Gummow J).

<sup>13</sup> *Pavey & Matthews* (1987) 162 CLR 221, 256–7 (Deane J); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 665 (Gummow, Hayne, Crennan and Kiefel JJ). See also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, chs 4–13; Edelman and Bant, above n 6, chs 8–13; Birks, *Unjust Enrichment*, above n 6, ch 2.

<sup>14</sup> See Robert Goff and Gareth Jones, *The Law of Restitution* (1<sup>st</sup> ed, 1966) 14; Peter Birks, *An Introduction to the Law of Restitution* (1<sup>st</sup> revised ed, 1989) 20–1. Some cases adopting this approach are: *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] AC 221, 227 (Lord Steyn), 238–9 (Lord Hutton), 234 (Lord Hoffmann); see also at 228 (Lord Griffiths), 237–8 (Lord Clyde); *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202, 206 (Millett LJ). Cf *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 661–3 (Gummow, Hayne, Crennan and Kiefel JJ).

restitution.<sup>15</sup> Unjust enrichment, however, is arguably not the only event that gives rise to a restitutionary response.<sup>16</sup>

Peter Birks's taxonomy of private law describes a range of legal events that can give rise to restitution.<sup>17</sup> This article is concerned with restitution as a remedial response to civil wrongs. What constitutes a wrong is not settled, but two common indicia are that the conduct constitutes a breach of duty and that damages are potentially available as an alternative remedy to restitution.<sup>18</sup> This article specifically considers two wrongs: conversion and breach of fiduciary duty.<sup>19</sup>

To reiterate: restitution is always a remedial response to unjust enrichment, and potentially also to other legal events. One fundamental truth is revealed by a comparison with compensation: compensation reverses the plaintiff's loss from an event,<sup>20</sup> whereas restitution undoes the defendant's gain.<sup>21</sup> There is disagreement, however, as to how narrowly this gain-based response should be defined. Restitution may be a giving up of something<sup>22</sup> or merely a giving back of something.<sup>23</sup> One can confine restitution to a giving back, namely, giving back transfers of value made at the plaintiff's expense.<sup>24</sup> So, for instance, if A mistakenly pays B \$400, assuming no defences apply, B must restore the \$400 to A

<sup>15</sup> See Goff and Jones, *The Law of Restitution* (1<sup>st</sup> ed, 1966), above n 14, 14–26; Birks, *An Introduction to the Law of Restitution* (1<sup>st</sup> revised ed, 1989), above n 14, 18.

<sup>16</sup> See Birks, *Unjust Enrichment*, above n 6, 21–8; Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 309, 312; Edelman and Bant, above n 6, 5.

<sup>17</sup> Birks's taxonomy consists of four broad categories of events — consent, wrongs, unjust enrichment and a fourth 'other' or 'miscellaneous' category: Peter Birks, 'Misnomer' in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 1; Peter Birks, 'Unjust Enrichment and Wrongful Enrichment' (2001) 79 *Texas Law Review* 1767, 1768–77; Birks, *Unjust Enrichment*, above n 6, 21–8. For a critique of Birks's taxonomy, see Steve Hedley, 'Rival Taxonomies within Obligations: Is There a Problem?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 77.

<sup>18</sup> Birks, *An Introduction to the Law of Restitution* (1<sup>st</sup> revised ed, 1989), above n 14, 313; Peter Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (1995) 31; Edelman, *Gain-Based Damages*, above n 6, ch 2. See also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 457–8.

<sup>19</sup> For a discussion of other wrongs, see Edelman, *Gain-Based Damages*, above n 6, 62, 209–11.

<sup>20</sup> See *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn); *A-G (UK) v Blake* [2001] 1 AC 268, 278–9, 282 (Lord Nicholls); *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 613 (Lord Scott).

<sup>21</sup> See Birks, *Unjust Enrichment*, above n 6, 3; *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 585–6 (Lord Hope). It is true that restitution will often necessarily result from a corresponding loss to or subtraction from another party, but in Anglo-Australian law this does not appear to be a strict requirement: see *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 74 (Mason CJ); *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, 400 (Morritt LJ). Compare this to the position in Canada, where corresponding loss seems essential: *Regional Municipality of Peel v Canada* [1992] 3 SCR 762, 788 (McLachlin J for La Forest, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ); *Air Canada v British Columbia* [1989] 1 SCR 1161, 1202–3 (La Forest J for Lamer, La Forest and L'Heureux-Dubé JJ).

<sup>22</sup> See Birks, *Unjust Enrichment*, above n 6, 281–2. See also Douglas Laycock, 'The Scope and Significance of Restitution' (1989) 67 *Texas Law Review* 1277, 1279–83.

<sup>23</sup> See Edelman and Bant, above n 6, 36, 45–8.

<sup>24</sup> This is the approach favoured by Edelman and Bant: see *ibid* 46–8; Edelman, *Gain-Based Damages*, above n 6, 65–80.

(that is, the transfer of value). In this example there is a corresponding detriment to A;<sup>25</sup> however, this does not seem essential.<sup>26</sup> Unjust enrichment only ever leads to restitution in this giving back sense, but other legal events arguably also result in restitution, both in this sense and others.

Some scholars contend that where there is no transfer of value, restitution does not follow.<sup>27</sup> So, an account of profits for breach of fiduciary duty is not restitutionary because there is no transfer of value from the plaintiff to the defendant; it is a giving up, but not a giving back. Although the defendant makes a gain, it accrues from the breach of duty, not from a transfer of value at the plaintiff's expense. The defendant's obligation to account is said to be based on deterrence rather than reversing transfers of value.<sup>28</sup> This remedy is often termed disgorgement.<sup>29</sup>

While this approach has merit,<sup>30</sup> many commentators appear to support a restitutionary view of disgorgement,<sup>31</sup> and there are judicial suggestions that the remedy has a restitutionary aspect.<sup>32</sup> This article, therefore, assumes that two restitutionary remedies exist: restitutionary damages, which reverse a transfer of value from the plaintiff to defendant, and disgorgement, which requires a defendant to surrender profits. This distinction is potentially important in determining the change of position's applicability in different circumstances.

Finally, although restitution may be both personal and proprietary,<sup>33</sup> this article proposes to consider change of position only in relation to personal restitutionary remedies. This is because, while change of position would appear just as relevant where proprietary remedies are concerned,<sup>34</sup> the defence's application is far more established in relation to rights in personam. Thus, it is preferable to confine argument, for the present, to the context where change of position is (to a degree) already tried and tested.

<sup>25</sup> That is, if A's wealth is viewed as an abstract fund, there has been a net reduction of \$400.

<sup>26</sup> See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 529 (Gleeson CJ, Gaudron and Hayne JJ); *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, 400 (Morritt LJ). See also *ABB Power Generation Ltd v Chapple* (2001) 25 WAR 158; *Andrew Shelton & Co Pty Ltd v Alpha Healthcare Ltd* (2002) 5 VR 577, 608 (Warren J).

<sup>27</sup> See, eg, Edelman and Bant, above n 6, 46–8.

<sup>28</sup> Edelman, *Gain-Based Damages*, above n 6, 83.

<sup>29</sup> See generally *ibid* ch 3; Lionel D Smith, 'The Province of the Law of Restitution' (1992) 71 *Canadian Bar Review* 672, 695–6. Note, however, that Smith uses disgorgement as a single term to refer to all gain-based damages for wrongdoing: at 696–9.

<sup>30</sup> One benefit of this approach is the clarity of structure it injects into this area of law.

<sup>31</sup> See, eg, Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 461–2, 466–8; Birks, *Unjust Enrichment*, above n 6, 12–13, 167–8, 281–3; Keith Mason and J W Carter, *Restitution Law in Australia* (1<sup>st</sup> ed, 1995) 606–7. See also *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 585–6 (Lord Hope).

<sup>32</sup> See, eg, *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 618 (McIntyre and Sopinka JJ), 669–71 (La Forest J); *A-G (UK) v Observer Ltd* [1990] 1 AC 109, 286 (Lord Goff). Cf *Green v Bestobell Industries Pty Ltd [No 2]* [1984] WAR 32, 38 (Brinsden J).

<sup>33</sup> *Chase Manhattan NA v Israel-British Bank (London) Ltd* [1981] Ch 105, 119–20 (Goulding J). Cf *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 715 (Lord Browne-Wilkinson). See also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 60–75.

<sup>34</sup> See Edelman and Bant, above n 6, 323.

## III THE NATURE OF CHANGE OF POSITION

This Part considers the nature of change of position and addresses the issue of whether it can and should be extended beyond the context of unjust enrichment. It does not appear, from the case law, that change of position has ever been argued as a defence to a restitutionary claim for a wrong; accordingly, the matter must be examined at an abstract level, by considering whether Lord Goff's dictum in *Lipkin Gorman (a firm) v Karpnale Ltd* ('*Lipkin Gorman*')<sup>35</sup> expressly barred wrongdoers from the defence, and whether the rationale of change of position would support its extension to wrongs. This article argues that not only do these considerations support extending change of position to the category of wrongs, but also the equities are broadly in favour of allowing innocent wrongdoers to invoke the defence.<sup>36</sup> The overall conclusion of Part III is that change of position is not limited to the context within which it was conceived, but may potentially extend to *any* restitutionary claim, such as those based on wrongs.

A *Lord Goff's Dictum*

Although the central argument of this article has never been judicially considered, one famous dictum potentially prevents change of position from applying to 'wrongdoers'. In *Lipkin Gorman*, Lord Goff said:

It is, of course, plain that the defence [of change of position] is not open to one who has changed his position in bad faith ... and *it is commonly accepted that the defence should not be open to a wrongdoer*.<sup>37</sup>

Depending on how 'wrongdoer' is interpreted, this passage could prevent the extension of change of position to restitution for wrongs. It is argued that Lord Goff only intended to disqualify wrongdoers who had some actual or constructive notice of wrongful conduct. Furthermore, it is submitted that Lord Goff and the House of Lords did not intend to definitively lay down the law in *Lipkin Gorman*, such that even a restrictive interpretation of 'wrongdoer' would not bar further consideration of the issue.

<sup>35</sup> [1991] 2 AC 548. Lord Goff was a highly influential jurist in the area of restitution. He co-authored the first definitive legal text on the law of restitution in 1966 with Gareth Jones: Goff and Jones, *The Law of Restitution* (1<sup>st</sup> ed, 1966), above n 14. The effect of its publication on legal scholarship has been profound. Edelman and Bant describe it, along with Peter Birks's *An Introduction to the Law of Restitution* (1<sup>st</sup> ed, 1985), as 'the bedrock upon which the modern law of unjust enrichment developed': *ibid* 2. In his time on the House of Lords, Lord Goff was involved in a number of key cases that entrenched and developed the concept of unjust enrichment in English law: see, eg, *Lipkin Gorman* [1991] 2 AC 548; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. It is perhaps no surprise, then, that his views on the change of position defence have been regarded almost as 'gospel': see below n 71 and accompanying text.

<sup>36</sup> It will be recalled that this term is used to describe a defendant who can satisfy the elements of the change of position defence, with particular emphasis on the defendant's bona fides.

<sup>37</sup> [1991] 2 AC 548, 580 (emphasis added).

### 1 *The Nature of Wrongdoing*

Some have argued that the term ‘wrongdoer’ imports a fault-based approach to change of position,<sup>38</sup> whereby a defendant who is somehow blameworthy in relation to a change of position should have the availability of the defence reduced accordingly.<sup>39</sup> This approach, however, has been largely rejected by academics<sup>40</sup> and the courts.<sup>41</sup> It was also recently suggested that a defendant who changes position illegally is a ‘wrongdoer’ and thus cannot invoke the defence.<sup>42</sup> But this result does not specifically affect restitution for wrongs, since civil wrongs are not considered illegal as such.<sup>43</sup>

It is possible that a ‘wrongdoer’ is simply someone who acts through want of probity.<sup>44</sup> This view, however, can also be rejected fairly summarily, as the notion of bad faith already encompasses a defendant who acts in this way. Lord Goff’s example of bad faith, where the defendant pays money away with knowledge of the plaintiff’s entitlement,<sup>45</sup> is an act done through want of probity. Significantly, his Lordship referred to both bad faith and wrongdoing as separate grounds of disqualification from the defence; this suggests that there must be some discernable or explicable distinction between them.

Jessica Palmer and Andrew Tettenborn both argue that a ‘wrongdoer’ is someone who has notice of wrongful conduct (an ‘intentional wrongdoer’).<sup>46</sup> In practice, this is a largely identical concept to bad faith, in that an intentional or deliberate wrongdoer would appear to be somebody who commits a legal or equitable wrong with some impairment of their conscience. Tettenborn gives the example of an agent who takes a bribe and, to avoid repayment, argues they have

<sup>38</sup> See, eg, Andrew Burrows, *The Law of Restitution* (1<sup>st</sup> ed, 1993) 431. Burrows does not repeat this view in the second edition of his work.

<sup>39</sup> See Paul Key, ‘Change of Position’ (1995) 58 *Modern Law Review* 505, 515; Elise Bant and Peter Creighton, ‘The Australian Change of Position Defence’ (2002) 30 *University of Western Australia Law Review* 208, 226.

<sup>40</sup> See Peter Birks, ‘Change of Position and Surviving Enrichment’ in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (1997) 36, 41; Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 522–3; Edelman and Bant, above n 6, 336–7; Ross Grantham and Charles Rickett, ‘Change of Position and Balancing the Equities’ (1999) 7 *Restitution Law Review* 158, 162–3. *Contra* Elise Bant and Peter Creighton, ‘Mistake of Fact and Change of Position: Sound Advice from the Privy Council? (*Dextra Bank & Trust Co Ltd v Bank of Jamaica*)’ (2002) 2 *Oxford University Commonwealth Law Journal* 271, 277–80.

<sup>41</sup> *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, 205–7 (Lords Bingham and Goff for Lords Bingham, Goff, Hobhouse, Sir Martin Nourse and Sir Patrick Russell) (*‘Dextra’*); *Port of Brisbane Corporation v ANZ Securities Ltd [No 2]* [2003] 2 Qd R 661, 675 (McPherson JA).

<sup>42</sup> *Barros Mattos Junior v MacDaniels Ltd* [2005] 1 WLR 247, 253–4 (Laddie J). In reaching this conclusion, Laddie J drew support from Lord Goff’s ‘wrongdoer’ limitation in *Lipkin Gorman*: at 253.

<sup>43</sup> The concept of ‘illegality’ by its very nature is hard to define, though it is clear from both *Tinsley v Milligan* [1994] 1 AC 340 and *Nelson v Nelson* (1995) 184 CLR 538 that it relates to claims which would run seriously counter to public policy.

<sup>44</sup> See Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3<sup>rd</sup> ed, 2002) 278.

<sup>45</sup> *Lipkin Gorman* [1991] 2 AC 548, 580. Cf *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211. See also Edelman and Bant, above n 6, 329–30; Bant and Creighton, ‘The Australian Change of Position Defence’, above n 39, 217–19.

<sup>46</sup> See Jessica Palmer, ‘Chasing a Will-o’-the-Wisp? Making Sense of Bad Faith and Wrongdoers in Change of Position’ [2005] *Restitution Law Review* 53, 76–80; Tettenborn, above n 44, 278.

spent the money.<sup>47</sup> In Tettenborn's opinion, Lord Goff meant to exclude only these characters from change of position because, as a matter of policy, it is hard to see why innocent wrongdoers should be denied the defence.<sup>48</sup>

Palmer's reasoning is analogous: she considers that disqualification from change of position is legitimate only where the antecedent conduct negates legal causation.<sup>49</sup> According to Palmer, both bad faith and intentional wrongdoing negate legal causation because, if a defendant knew that title to a received benefit was defective, then that benefit was not relied on in effecting a change of position.<sup>50</sup> The same cannot be said of an innocent wrongdoer, who thus should be allowed to invoke the defence. These are both sound reasons to view a 'wrongdoer' as someone with notice of wrongful conduct. Nevertheless, more elaboration is required. Palmer and Tettenborn effectively argue for conflation of the 'wrongdoer' and bad faith exclusions,<sup>51</sup> but Lord Goff clearly thought there was some difference between the two. For this interpretation to be legitimate, a synonymy of wrongdoing and bad faith must be explicable and not simply rest on notions of policy and fairness.

The necessary legitimacy can be found by looking to the historical context of Lord Goff's comment and considering the meaning of 'wrongdoer' with reference to what little was known of change of position when *Lipkin Gorman* was handed down. At that time, the *Restatement of the Law of Restitution* proclaimed that change of position was not available for tortious conduct.<sup>52</sup> While some have suggested Lord Goff intended 'wrongdoer' to bear a similar meaning,<sup>53</sup> it is puzzling that, if so, his Lordship did not use clearer language. The preferable view is that Lord Goff drew upon the old 'payment over' defence in articulating the 'wrongdoer' limitation.<sup>54</sup> His Lordship did explicitly refer to the payment over defence as a species of change of position,<sup>55</sup> and it would be logical for Lord Goff to have conceived of a restriction on the scope of the new change of position defence by reference to the limits which the common law placed on the earliest manifestation of the change of position ideal. The issue then becomes whether an innocent wrongdoer would be barred from invoking the old payment over defence; if not, it is difficult to justify excluding them from the new change of position defence.

<sup>47</sup> Tettenborn, above n 44, 278. A defendant with knowledge of their own defective title to a benefit may hold that benefit on constructive or resulting trust, and clearly no change of position defence would be available to them: see *Westpac Banking Corporation v Ollis* [2007] NSWSC 956 (Unreported, Einstein J, 31 August 2007) [34]–[40].

<sup>48</sup> Tettenborn, above n 44, 278.

<sup>49</sup> Palmer, above n 46, 78.

<sup>50</sup> *Ibid.*

<sup>51</sup> Palmer herself explicitly recommends this approach: *ibid* 76–7.

<sup>52</sup> *Restatement of the Law of Restitution* § 142(2) (1937).

<sup>53</sup> Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 525; Graham Virgo, *The Principles of the Law of Restitution* (2<sup>nd</sup> ed, 2006) 705–6; Edelman, *Gain-Based Damages*, above n 6, 96.

<sup>54</sup> See *Miller v Aris* (1800) 3 Esp 231; 170 ER 598; *Townson v Wilson* (1808) 1 Camp 396; 170 ER 997; *Ex parte Edwards; Re Chapman* (1884) 13 QBD 747. See also Mason and Carter, above n 31, 848–9.

<sup>55</sup> *Lipkin Gorman* [1991] 2 AC 548, 578.

Historically, the payment over defence prevented an agent who received money and paid it over to the principal from being personally liable for restitution.<sup>56</sup> Significantly, it was denied to wrongdoers,<sup>57</sup> in that an agent who knew of facts constituting a wrong when paying money over could not invoke the defence.<sup>58</sup> Courts never directly considered whether this included an innocent wrongdoer, but it seems an agent's knowledge that title to the money was defective was critical and not the bare legal classification of the agent's conduct as wrongful or otherwise.

In *D Owen & Co v Cronk*,<sup>59</sup> an agent with no knowledge of the fact that the party who paid money to him had obtained it by committing a wrong was permitted to invoke the payment over defence. The Court clearly considered 'notice of the wrong' the crucial factor.<sup>60</sup> An innocent wrongdoer, that is, somebody who does not know that their own conduct was wrongful, has no more notice of the wrong than anybody else.

Further support for this view can be found in the judgment of the High Court of Australia in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*, where the Court said:

If money is paid to an agent on behalf of a principal and the agent receives it in his capacity as such and, *without notice* of any mistake or irregularity in the payment, applies the money for the purpose for which it was paid to him, he has applied it in accordance with the mandate of the payer who must look to the principal for recovery ...<sup>61</sup>

It seems, then, that an agent who was an innocent wrongdoer would have a good defence of payment over, since that agent would not have notice of any defective title to the money that was received. If the 'wrongdoer' limitation in *Lipkin Gorman* is interpreted in this light then change of position should be available to an innocent wrongdoer as well.

Elise Bant, in a recent article, has suggested a contrary view.<sup>62</sup> Bant considers that issues of notice in relation to the payment over defence are really separate from notions of wrongdoing and that the case law has adopted misleading terminology.<sup>63</sup> Bant suggests that wrongdoing in the payment over context really encompasses agents who act illegally or legally wrongfully (whether bona fide or

<sup>56</sup> See, eg, *Smith v Sleep* (1844) 12 M & W 585; 152 ER 1332; *Oates v Hudson* (1851) 6 Ex 346; 155 ER 576; *D Owen & Co v Cronk* [1895] 1 QB 265.

<sup>57</sup> See *Smith v Sleep* (1844) 12 M & W 585, 588; 152 ER 1332, 1333 (Parke B); *Sharland v Mildon* (1846) 5 Hare 469, 474; 67 ER 997, 999 (Wigram V-C); *Ex parte Edwards*; *Re Chapman* (1884) 13 QBD 747, 751–2 (Cotton LJ).

<sup>58</sup> See, eg, *Ex parte Edwards*; *Re Chapman* (1884) 13 QBD 747; *Miller v Aris* (1800) 3 Esp 231; 170 ER 598; *Townson v Wilson* (1808) 1 Camp 396; 170 ER 997; *Snowdon v Davis* (1808) 1 Taunt 359; 127 ER 872; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 681–2 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

<sup>59</sup> [1895] 1 QB 265.

<sup>60</sup> *Ibid* 274 (Lopes LJ); see also at 273–4 (Lord Esher MR), 275 (Rigby LJ).

<sup>61</sup> (1988) 164 CLR 662, 682 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ) (emphasis added).

<sup>62</sup> Elise Bant, 'Payment Over and Change of Position: Lessons from Agency Law' [2007] *Lloyd's Maritime and Commercial Law Quarterly* 225, 240–5.

<sup>63</sup> *Ibid* 242–4.

not),<sup>64</sup> and that the exclusion of such persons from the defence is justified on policy grounds (namely, to ensure that the rationale behind the law's prohibition of the conduct is not 'stultified').<sup>65</sup> Assuming the payment over defence informs the meaning of 'wrongdoer' in Lord Goff's dictum, Bant's view suggests that change of position would be incapable of applying to restitution for wrongs.

This approach, however, is legitimate only if the change of position defence will always undermine the policy behind those legal wrongs to which it could have an application. Such a broad exclusion should be made only after detailed consideration of the rationale behind each relevant legal wrong has been attempted. The issue is, therefore, unique to each particular wrong and is better dealt with in that context rather than by trying to account for it within the meaning of 'wrongdoer'. At any rate, Part IV of this article considers this issue in detail in relation to conversion and breach of fiduciary duty, where it will be shown that change of position is actually readily compatible with the policy behind these wrongs. Therefore an interpretation of 'wrongdoer' which would deny the defence of change of position to all legal wrongs on policy grounds cannot be accepted.

For present purposes, then, the most satisfactory view is that a defendant who innocently commits a legal wrong and then changes position is not a 'wrongdoer' within the meaning of the term as used by Lord Goff in *Lipkin Gorman*. Admittedly, this means bad faith and wrongdoing will be synonymous in practice, but this is defensible due to the historical classification of acts done with notice of defective title as 'wrongful'. The structure of Lord Goff's judgment is accordingly respected.

## 2 *The Wider Effect of Lord Goff's Dictum*

Notwithstanding which interpretation of 'wrongdoer' is ultimately accepted, there is in any event some doubt as to whether Lord Goff even supported the limitation. Lord Goff describes it in his judgment as 'commonly accepted',<sup>66</sup> but does not indicate his concurrence or disagreement with it: a 'commonly accepted' view is not necessarily a correct one. Indeed, given that Lord Goff clearly expressed his support for the bad faith limitation by stating its application was 'of course, plain',<sup>67</sup> the absence of express concurrence with the 'wrongdoer' limitation may indicate that his Lordship had no concluded view on the subject. This possibility appears even more likely taking into account Lord Goff's suggestion that such matters could 'be considered in depth in cases where they arise for consideration'.<sup>68</sup> As a result there would appear to be some doubt as to whether Lord Goff was even advocating the restriction he was enunciating.

Finally, one must bear in mind that the House of Lords was not attempting to lay down the precise ambit of change of position in *Lipkin Gorman*; many dicta

<sup>64</sup> Ibid 238–45.

<sup>65</sup> Ibid 240.

<sup>66</sup> *Lipkin Gorman* [1991] 2 AC 548, 580.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid. See also Virgo, *The Principles of the Law of Restitution*, above n 53, 705.

in the judgments bear this out.<sup>69</sup> Indeed, Lord Goff explicitly noted that matters such as the ‘wrongdoer’ limitation were not at issue and he was concerned to leave it for later courts to decide.<sup>70</sup> There is a tendency to view Lord Goff’s ‘wrongdoer’ limitation as barring the way towards an extension of change of position to restitution for wrongs.<sup>71</sup> Nevertheless, to consider even a restrictive interpretation of ‘wrongdoer’ as unassailable is to explicitly counter the very clear concerns of the House of Lords in *Lipkin Gorman*. That is, a definitive position on the scope of change of position should not be taken up until it can be dealt with fully and in an appropriate context.

Therefore, as Lord Goff’s dictum does not prevent the extension of change of position to restitution for wrongs, we must consider other arguments as to whether the defence is capable of so applying.

### B *The Rationale of Change of Position*

A key concern in the development of any legal doctrine is the identification of its rationale. As Graham Virgo notes, if the rationale of change of position is not understood then its scope will be hard to determine.<sup>72</sup> For this reason, it is important to identify the policy behind change of position and consider whether it would support the expansion of the defence beyond unjust enrichment.

Three possible rationales of change of position will be considered: disenrichment, security of receipts, and inequity. It will be shown that the inequity rationale is preferable and supports a broad-reaching view of the defence.

#### 1 *Disenrichment*

Disenrichment has traditionally been the most widely supported rationale for change of position among academics.<sup>73</sup> It is explained thus: a defendant who receives a benefit attributable to the plaintiff is enriched and must make restitution. If the defendant then changes position in reliance on the benefit, for example, by going on an overseas holiday, the defendant has thereby lost the enrichment and is therefore disenriched. Disenrichment considers that a change of position reduces the defendant’s net wealth, such that the defendant is no longer enriched to the full extent of the initial benefit received.<sup>74</sup> James Edelman and Elise Bant recently dissected the disenrichment rationale, regarding it as

<sup>69</sup> See, eg, *Lipkin Gorman* [1991] 2 AC 548, 558 (Lord Bridge), 568 (Lord Ackner), 580 (Lord Goff).

<sup>70</sup> *Ibid* 580.

<sup>71</sup> See, eg, Palmer, above n 46; Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (2000) 353–5; Tettenborn, above n 44, 278.

<sup>72</sup> Graham Virgo, ‘Change of Position: The Importance of Being Principled’ [2005] *Restitution Law Review* 34, 34. See also Edelman and Bant, above n 6, 319.

<sup>73</sup> See, eg, Birks, *Unjust Enrichment*, above n 6, 208–19; Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 512; Palmer, above n 46, 55–8; Grantham and Rickett, *Enrichment and Restitution in New Zealand*, above n 71, 334; Richard Nolan, ‘Change of Position’ in Peter Birks (ed), *Laundering and Tracing* (1995) 135, 136.

<sup>74</sup> In the example, supposing the defendant had received \$20 000 and the holiday cost \$15 000, the defendant is ultimately enriched only to the value of \$5000; the remaining \$15 000 is regarded as a disenrichment.

fundamentally inconsistent with both the nature of unjust enrichment and the proven operation of change of position.<sup>75</sup> Their well-argued and convincing analysis must be regarded as highly persuasive, and it now seems difficult to sustain disenrichment as the rationale of change of position.<sup>76</sup> Nevertheless, for completeness it is worth considering whether disenrichment would support the extension of change of position to wrongs.

Disenrichment is likely to support this move only if the quadrationist view of the law is accepted. Quadrationists consider that restitution is always underpinned by the unjust enrichment principle;<sup>77</sup> ergo, restitution for wrongs requires proof that the defendant was enriched. If so, a defendant should be able to argue disenrichment in order to refute the principle, as with 'true' unjust enrichment claims. From a quadrationist standpoint then, the application of change of position to restitution for wrongs is logical if disenrichment underpins the defence. However, on a multi-causalist view, which considers restitution as a possible response to a number of distinct legal events, enrichment is not relevant to wrongdoing and the issue is simply whether the plaintiff can establish the cause of action constituting the wrong.<sup>78</sup> Disenrichment in such a scenario cannot have much relevance.

Thus if change of position were in fact premised on disenrichment, the defence would have no necessary application to wrongdoing. To reiterate though, in light of Edelman and Bant's analysis, disenrichment is unlikely to underpin the defence in any case.

## 2 Security of Receipts

The notion of security of receipts has often been said to support the existence of change of position;<sup>79</sup> some even consider it the defence's actual rationale.<sup>80</sup> Views differ as to the scope of the concept. Birks described it as a 'general interest in our being free to dispose of wealth which appears to be at our disposition.'<sup>81</sup> Edelman and Bant, however, view it as a justification peculiar to unjust

<sup>75</sup> Edelman and Bant, above n 6, 320–1. See also Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability', above n 9, 120.

<sup>76</sup> It is noteworthy that at least a few of the supporters of disenrichment have been open to the possibility of non-disenriching changes of position existing: see, eg, Birks, *Unjust Enrichment*, above n 6, 258–61; Nolan, above n 73, 136, 143, 172.

<sup>77</sup> See, eg, Andrew Burrows, 'Quadrating Restitution and Unjust Enrichment: A Matter of Principle?' [2000] *Restitution Law Review* 257; Andrew Tettenborn, 'Misnomer — A Response to Professor Birks' in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 31; Mason and Carter, above n 31, 56–7.

<sup>78</sup> See, eg, Birks, 'Misnomer', above n 17, 14; Edelman, *Gain-Based Damages*, above n 6, 41; James J Edelman, 'Unjust Enrichment, Restitution, and Wrongs' (2001) 79 *Texas Law Review* 1869.

<sup>79</sup> Birks, *Unjust Enrichment*, above n 6, 209; Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 527; Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002), above n 6, 821.

<sup>80</sup> See, eg, Edelman and Bant, above n 6, 322.

<sup>81</sup> Birks, *Unjust Enrichment*, above n 6, 209. Birks does not seem to view security of receipts as the primary rationale of change of position, but rather a concern of the law which serves to bolster the case for recognising the defence. Goff and Jones also appear to view security of receipts in this way: see Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002), above n 6, 821.

enrichment.<sup>82</sup> In their opinion, the liberalisation of the grounds of mistake, the key cause of action in unjust enrichment, has mandated a change of position defence to protect the security of the defendant's receipt since otherwise there would be too much restitution in a 'floodgates of litigation' sense.<sup>83</sup>

The ambit of the concept is highly significant. If security of receipts is a general concern then it is just as applicable to restitution for wrongs as unjust enrichment. Suppose, for example, A innocently breaches their fiduciary duty and makes a profit, a portion of which they then give to charity. Insofar as A is concerned, when they made the gift the money was theirs and they could dispose of it as they wished; the basis of their legal liability cannot affect that fact. On the other hand, if security of receipts is unique to unjust enrichment, then A's ability to deal with what they consider their money is not protected if their liability arises from a wrong as opposed to unjust enrichment. The former approach is more legitimate. While it is true that in Australia the relaxation of the grounds of mistake occurred concurrently with the recognition of change of position,<sup>84</sup> in England the defence was introduced seven years prior to this occurring.<sup>85</sup> Thus there is no essential connection between change of position and the liberalisation of liability in unjust enrichment,<sup>86</sup> although there is clearly a justifiable one.

At any rate, security of receipts is problematic as a universal rationale. For one, it cannot explain the extension of the defence to a change of position that occurs prior to the defendant's actual receipt of a benefit. Although the Privy Council in *Dextra* accepted that a prior change of position can occur in reliance on a subsequent receipt,<sup>87</sup> it did not directly answer the plaintiff's submission that a defendant has no interest in the security of a receipt when nothing has been received at the time the change of position occurs. True, a defendant must always eventually receive the benefit (otherwise no claim in unjust enrichment could arise) and so, in that sense, the defendant's security of receipt is protected;<sup>88</sup> but this is merely a 'happy accident' and cannot prevent a security of receipts rationale appearing somewhat artificial in this kind of situation. Furthermore, it is hard to ignore the Privy Council's clear reluctance to view security of receipts

<sup>82</sup> Edelman and Bant, above n 6, 322.

<sup>83</sup> Ibid. Burrows is clearly aware of this view of security of receipts, though he does not express his agreement or otherwise with it: see Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 527.

<sup>84</sup> Mistake, the most common claim in unjust enrichment, was typically actionable only if the mistake was one of fact and not simply a mistake of law: see, eg, *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448. This restriction was abolished in Australia by *David Securities* (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>85</sup> *Lipkin Gorman* [1991] 2 AC 548 established the defence of change of position, but it was not until *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 that liability in mistake was widened to include mistakes of law.

<sup>86</sup> Birks seems to support this view, since he describes the liberalisation of the cause of action in mistake as '[a] consequential benefit, now that the defence is securely in place': Birks, *Unjust Enrichment*, above n 6, 209.

<sup>87</sup> *Dextra* [2002] 1 All ER (Comm) 193, 204–5 (Lords Bingham and Goff for Lords Bingham, Goff, Hobhouse, Sir Martin Nourse and Sir Patrick Russell).

<sup>88</sup> Ibid 205.

as a concept which can limit the scope of change of position. As the Privy Council commented: ‘it does not, in their Lordships’ opinion, assist to rationalise the defence ... as concerned to protect security of receipts and then to derive from that rationalisation a limitation on the defence.’<sup>89</sup>

In the view of the Privy Council, the true rationale of the defence is inequity, which now falls for consideration.

### 3 Inequity

Inequity recognises the injustice of requiring full restitution from a defendant whose position has irreversibly changed.<sup>90</sup> The idea that notions of fairness underpin change of position is pervasive in the case law,<sup>91</sup> and was foreshadowed in *Moses v Macferlan*, where Lord Mansfield said ‘[the defendant] may defend himself by every thing which shews that the plaintiff, *ex aequo et bono*, is not intitled to the whole of his demand, or to any part of it.’<sup>92</sup> Over two hundred years later, in *Lipkin Gorman*, Lord Goff described change of position as ‘available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution’.<sup>93</sup> Subsequently, in *Dextra*, the Privy Council asserted inequity as the central rationale of the defence:

The defence *should be regarded as founded on a principle of justice* designed to protect the defendant from a claim to restitution in respect of a benefit received ... *in circumstances in which it would be inequitable* to pursue that claim, or to pursue it in full.<sup>94</sup>

Despite such strong indicia, academic writing has tended to dismiss inequity as a sustainable rationale. The main argument is that notions of unfairness are too uncertain to properly inform the scope of change of position and would inhibit its principled development.<sup>95</sup>

<sup>89</sup> Ibid. Similar sentiments were echoed in *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 (Unreported, Mummery, Sedley LJ and Munby J, 21 November 2003) [62]–[63] (Munby J).

<sup>90</sup> See Virgo, ‘Change of Position’, above n 72, 35.

<sup>91</sup> See *David Securities* (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] QB 985, 999–1000 (Clarke LJ); *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 (Unreported, Mummery, Sedley LJ and Munby J, 21 November 2003) [40] (Mummery LJ), [53] (Munby J); *Dextra* [2002] 1 All ER (Comm) 193, 204–5 (Lords Bingham and Goff for Lords Bingham, Goff, Hobhouse, Sir Martin Nourse and Sir Patrick Russell); *Gertsch v Atsas* (1999) 10 BPR 18 431, 18 449 (Foster AJ).

<sup>92</sup> (1760) 2 Burr 1005, 1010; 97 ER 676, 679. See also *Dominion Bank v Union Bank of Canada* (1908) 40 SCR 366, 381–2 (Duff J).

<sup>93</sup> *Lipkin Gorman* [1991] 2 AC 548, 580.

<sup>94</sup> *Dextra* [2002] 1 All ER (Comm) 193, 205 (Lords Bingham and Goff for Lords Bingham, Goff, Hobhouse, Sir Martin Nourse and Sir Patrick Russell) (emphasis added).

<sup>95</sup> See, eg. Grantham and Rickett, ‘A Normative Account of Defences to Restitutionary Liability’, above n 9, 121–2; Birks, *Unjust Enrichment*, above n 6, 260–1; Andrew Burrows ‘Clouding the Issues on Change of Position’ (2004) 63 *Cambridge Law Journal* 276, 278–9; Edelman and Bant, above n 6, 319; Nolan, above n 73, 173. See also *Baylis v Bishop of London* [1913] 1 Ch 127, 140 (Hamilton LJ).

However, a rationale sourced in inequity need not necessarily have this effect. While vague notions of fairness clearly cannot themselves constitute the criterion for satisfying the defence,<sup>96</sup> inequity is a legitimate point of reference for the incremental extension of the defence beyond its existing limits. This is, effectively, the development of legal principle by reference to notions of practical justice. It is noteworthy, for instance, that although in *Lipkin Gorman* Lord Goff supported a defence underpinned by inequity, his Lordship also stressed that ‘where recovery is denied, it is denied on the basis of legal principle.’<sup>97</sup> As it happens, the initial development of the defence appears to have proceeded by direct reference to notions of fairness.<sup>98</sup> To establish the defence, a defendant must prove an irreversible change of position in good faith.<sup>99</sup> For these particular elements to be explicable, there must be something about them which, depending on whether or not they are present, either creates or dispels a need for the defence to operate. They must relate to the injustice of requiring the defendant to make restitution.<sup>100</sup> Where a defendant acts in bad faith, or does not make an irreversible change of position, the equities lie in favour of restitution; however, when all elements are satisfied, the injustice to the defendant in requiring restitution outweighs the plaintiff’s prima facie right to it,<sup>101</sup> at least to the extent that the defendant’s position is changed.

Further expansion of the defence could operate with inequity in mind; indeed, it seems this has already been occurring. *Dextra* recognised that change of position could occur prior to the actual receipt of a benefit. The Privy Council refused to restrict the defence by reference to security of receipts and noted that, in determining whether to extend the ambit of change of position, ‘what is in issue is the justice or injustice of enforcing a restitutionary claim in respect of a benefit conferred.’<sup>102</sup> What followed was essentially a weighing of competing considerations which prompted the conclusion that the equities supported extending the defence to anticipatory changes of position.<sup>103</sup> The Privy Council had to consider, for example, whether anticipatory change of position would amount to undesirable enforcement of expectation interests beyond that currently provided by contract and estoppel.<sup>104</sup> They were satisfied that there was no risk

<sup>96</sup> See *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 832 (Simon Brown LJ).

<sup>97</sup> *Lipkin Gorman* [1991] 2 AC 548, 578. See also *Philip Collins Ltd v Davis* [2000] 3 All ER 808, 827 (Jonathan Parker J); Nolan, above n 73, 173.

<sup>98</sup> The US *Restatement of the Law of Restitution* § 142(1) (1937) makes reference to inequity as underpinning change of position in similar terms to Lord Goff in *Lipkin Gorman*. The Supreme Court of Canada, when it recognised the defence in 1975, made reference to the same: *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1976] 2 SCR 147, 162–3 (Martland J for Laskin CJ, Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ).

<sup>99</sup> See, eg, Edelman and Bant, above n 6, 323–34; Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 510–29.

<sup>100</sup> See Graham Virgo, ‘What Is the Law of Restitution About?’ in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 305, 321.

<sup>101</sup> *Lipkin Gorman* [1991] 2 AC 548, 579 (Lord Goff).

<sup>102</sup> *Dextra* [2002] 1 All ER (Comm) 193, 204 (Lords Bingham and Goff for Lords Bingham, Goff, Hobhouse, Sir Martin Nourse and Sir Patrick Russell).

<sup>103</sup> *Ibid* 204–5.

<sup>104</sup> *Ibid*.

of this occurring, hence the inequity of requiring full restitution in the context justified an extension of change of position to the new situation.<sup>105</sup> There is nothing novel about this approach, which uses issues of inequity to inform the principled development of the law<sup>106</sup> — equitable doctrines have their origin in such concerns.<sup>107</sup> However, the use of inequity as a touchstone for the extension of an established defence is far removed from a general approach that would merely ask whether it is fair to require restitution in any given case.<sup>108</sup> This important distinction needs to be appreciated.

At any rate, if we apply inequity to restitution for wrongs, it is arguably unjust to require an innocent wrongdoer to make restitution. There may be many reasons why this is so, but fundamentally a person who commits a legal wrong without bad faith acts honestly and this is a legitimate reason to limit their liability if they have changed their position.<sup>109</sup> This proposition cannot be fully assessed until we consider the specific wrongs to which change of position could apply. Nevertheless, at a basic level, inequity clearly supports expansion of change of position to innocent wrongdoers.

### C The Merits of a Broad Defence

Hitherto, I have merely contended that, at a theoretical level, change of position is applicable to wrongs. We must now consider why this is justified. The following discussion considers the merits of a broad defence and demonstrates that they support extending change of position to innocent wrongdoers.

As suggested earlier, it is fundamentally just to extend change of position to wrongs. Consider the following two situations. Suppose, for example, A buys a valuable antique from B for \$6000, who in fact (without A's knowledge) has stolen it from C. A then sells the antique for \$15 000 and spends that money on a holiday which they would not otherwise have taken. C subsequently claims the \$15 000 in conversion against A.<sup>110</sup> Alternatively, suppose that A is mistakenly paid \$15 000 by C. A also uses the money on a holiday and C later claims \$15 000 in unjust enrichment. In both examples, A has changed their position and is equally innocent of any bad faith. To allow change of position in only the second situation ignores the identical level of moral culpability with which A acted in both situations. It renders A a 'victim of history'<sup>111</sup> rather than determin-

<sup>105</sup> Ibid.

<sup>106</sup> As Justice Gummow has written extra-curially, 'law without support in values is ineffective because it is static rather than dynamic': see Justice W M C Gummow, 'Equity: Too Successful?' (2003) 77 *Australian Law Journal* 30, 43.

<sup>107</sup> See *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J).

<sup>108</sup> See, eg, Burrows, 'Clouding the Issues on Change of Position', above n 95, 280.

<sup>109</sup> There is general academic concurrence with this sentiment: see, eg, Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002), above n 6, 765; Virgo, *The Principles of the Law of Restitution*, above n 53, 708; Tettenborn, above n 44, 278.

<sup>110</sup> The tort of conversion is discussed more fully in Part IV(B).

<sup>111</sup> See Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002), above n 6, 836. See also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 525.

ing their liability by reference to their own conduct.<sup>112</sup> The fear that the law would otherwise operate too harshly has engendered strong academic support for extension of change of position to innocent wrongdoers.<sup>113</sup> This notion of practical justice must be considered a highly persuasive reason for extending change of position to wrongs.

The practical justice argument, however, will only be pertinent if there are no equally persuasive reasons to deny change of position to wrongdoers. Most issues are peculiar to the particular legal wrongs and are dealt with in Part IV. In relation to restitution for wrongs broadly, though, one argument for denying change of position is that ‘nobody should be able to profit from his own wrong’.<sup>114</sup>

This maxim is often used to justify an account of profits award,<sup>115</sup> but Ross Grantham and Charles Rickett argue that it warrants denying change of position to the entire category of wrongs.<sup>116</sup> In *Halifax Building Society v Thomas*,<sup>117</sup> however, the Court of Appeal of England and Wales held that this axiom cannot be regarded as definitive<sup>118</sup> and doubted that there must always be restitution of a benefit acquired from a wrong.<sup>119</sup> A bona fide change of position is arguably one circumstance where this observation is merited.<sup>120</sup> The defence, as currently understood, does not precondition itself on the defendant deriving no overall benefit in the circumstances,<sup>121</sup> it simply relaxes the obligation to make restitution where it would be inequitable to do otherwise. In that regard, whether a benefit was obtained by unjust enrichment or by a legal wrong should make no

<sup>112</sup> Charles Harpum criticises the potential for outcomes like this as irrational: Charles Harpum, ‘Knowing Receipt: The Need for a New Landmark — Some Reflections’ in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (1998) 247, 250.

<sup>113</sup> See Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002), above n 6, 836. See also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 525; Virgo, *The Principles of the Law of Restitution*, above n 53, 708; Nolan, above n 73, 153–4.

<sup>114</sup> The maxim often appears in its Latin form: *commodum ex iniuria sua nemo habere debet*.

<sup>115</sup> See, eg, *A-G (UK) v Observer Ltd* [1990] 1 AC 109, 262 (Lord Keith).

<sup>116</sup> Grantham and Rickett, *Enrichment and Restitution in New Zealand*, above n 71, 354. See also Palmer, above n 46, 77.

<sup>117</sup> [1996] Ch 217. In this case, the plaintiff sought a constructive trust of surplus from the sale of a property which the defendant mortgaged to the plaintiff as a result of the defendant’s fraudulent misrepresentations. The Court of Appeal could find no basis on which the plaintiff could justify its claim for a constructive trust: at 229 (Peter Gibson LJ); see also at 229 (Simon Brown LJ), 229–30 (Glidewell LJ).

<sup>118</sup> *Ibid* 229 (Glidewell LJ).

<sup>119</sup> *Ibid* 227 (Peter Gibson LJ). See also Birks, *An Introduction to the Law of Restitution* (1<sup>st</sup> revised ed, 1989), above n 14, 24. This case has been criticised by some authors: see, eg, Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 476.

<sup>120</sup> The claim of adverse possession, which permits a trespasser who can prove over a decade’s continuous occupation of land (the precise period is set by statute) to obtain title to that land, would also appear to support the rejection of this maxim as a universal principle: see, eg, *Buckinghamshire County Council v Moran* [1990] Ch 623.

<sup>121</sup> It is clear that there are instances in which change of position has been invoked despite an indication that the defendant still retains the benefit of the enrichment in some form: see, eg, *Gertsch v Atsas* (1999) 10 BPR 18 431; *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4<sup>th</sup>) 230 (‘Dawson’). Indeed, in *Dawson* there was clear acceptance that the defendant was ultimately benefited, despite a successful defence of change of position: at 239 (Cameron JA).

difference. If the defendant can establish change of position, the law would operate illogically if it distinguished between actions in unjust enrichment and those sourced in wrongs on the basis of a general maxim of limited utility. As Lord Goff once remarked: '[t]he statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case.'<sup>122</sup>

#### IV CHANGE OF POSITION AND STRICT LIABILITY WRONGS

In Part III it was demonstrated that change of position is capable of applying beyond unjust enrichment to restitution for wrongs in circumstances where the defendant is an innocent wrongdoer. Three considerations support this view: Lord Goff did not restrict the defence to claims in unjust enrichment, the rationale of the defence supports a wide-ranging scope, and it is clearly practically just to extend change of position to bona fide wrongdoers. Such an extension of change of position to wrongs is, of course, only acceptable if it is shown to be compatible with the nature and operation of the particular wrongs to which it could be extended.

Accordingly, this Part first analyses the remedies of disgorgement and restitutionary damages in the law of wrongs generally and considers the extent to which they are capable of accommodating a change of position defence. The focus then turns to two specific legal wrongs: the tort of conversion and the equitable claim of breach of fiduciary duty. These wrongs have traditionally advanced specific policy concerns<sup>123</sup> by rendering defendants strictly liable to the persons wronged by their actions. It is submitted that an unwavering insistence on strict liability, however, is neither necessary nor desirable where restitution is involved because restitution focuses on a defendant's gain and is unconcerned with the plaintiff's loss. Where the remedial focus is simply the measure of gain to be given up, to demand full restitution where a defendant has otherwise changed position would place the defendant at a net disadvantage, but the reverse would not do the same for the plaintiff. Change of position in this situation simply reduces the plaintiff's ultimate gain from the defendant's wrongful act. For this reason, strict liability tempered with change of position would do more practical justice between the parties. Therefore, bearing in mind that the defence is based on notions of inequity, the extension of change of position to these wrongs is clearly warranted where the defendant is an innocent wrongdoer.

##### *A Change of Position and Remedial Compatibility*

Part II described two remedies which effect restitution for wrongs: restitutionary damages and disgorgement. Before we deal with the operation of the specific

<sup>122</sup> *A-G (UK) v Observer Ltd* [1990] 1 AC 109, 286. Lord Nicholls echoed this sentiment in *A-G (UK) v Blake* [2001] 1 AC 268, 278.

<sup>123</sup> Namely, the protection of personal property and the need to ensure that fiduciaries act with undivided loyalty.

wrongs themselves, we must consider the general compatibility of these remedies with change of position.

Edelman argues that change of position is inappropriate in relation to restitutionary damages.<sup>124</sup> In his view, the law must always reverse wrongful transfers of value, for '[t]o do otherwise would be to legitimate the wrong'.<sup>125</sup> The implication is that change of position, by limiting the reversal of a wrongful transfer of value to extant gain only, would have that effect. This is disputed.

First, it is doubtful that a wrong is necessarily legitimated merely because change of position is invoked.<sup>126</sup> To permit the defence could just as easily mean that the merits warrant consideration of the 'bigger picture' in order to avoid the hardship to innocent defendants which an all-or-nothing approach would inevitably facilitate. It is rather like saying that the law legitimates a defendant's unjust enrichment when change of position is established; rather, the law acknowledges that it is undesirable to strictly enforce the plaintiff's rights in such circumstances. Indeed, this is no doubt what Lord Goff meant in *Lipkin Gorman* when he said:

Where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.<sup>127</sup>

There is no reason why restitution for a wrongful transfer of value cannot give way to these concerns simply because the source of the transfer is based on a civil wrong and not unjust enrichment. It is unlikely a concern to reverse wrongful transfers of value can be considered entirely inflexible. Edelman argues elsewhere that restitution in unjust enrichment and restitutionary damages in the law of wrongs are distinct; however, he also admits that the two remedies are identical in operation and effect.<sup>128</sup> In unjust enrichment, change of position overrides the law's prima facie concern to reverse a transfer of value; that is, the law recognises that an absolute requirement to undo transfers of value is not desirable. Given that restitutionary damages operates in the same way, it would be illogical to deny change of position any applicability merely because the antecedent conduct was legally wrongful. The source of the law's desire to reverse the transfer can only be significant insofar as the change of position defence would be repugnant to the rationale behind the particular wrong. As far as the remedy itself is concerned, however, the mere fact that it comes from a wrong rather than unjust enrichment cannot be material. It is more legitimate to construe the defence, at a basic level, as displacing the law's primary concern to undo *any* transfer of value, wrongful or otherwise. Accordingly, it is submitted

<sup>124</sup> See Edelman, *Gain-Based Damages*, above n 6, 96.

<sup>125</sup> *Ibid* 81. See also *Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson [No 2]* [1914] SC (HL) 18, 32 (Lord Shaw).

<sup>126</sup> Similarly, it has been noted that the maxim 'nobody should profit from their own wrong' cannot be regarded as a universal principle: see above nn 114–19.

<sup>127</sup> *Lipkin Gorman* [1991] 2 AC 548, 579.

<sup>128</sup> That is, both restitution and restitutionary damages reverse transfers of value: see Edelman, *Gain-Based Damages*, above n 6, 93.

that change of position is prima facie applicable to claims of restitutionary damages in the law of wrongs.

Edelman has also argued that the deterrent rationale upon which disgorgement is based justifies its imposition for non-fiduciary wrongs only where the defendant acted in bad faith.<sup>129</sup> If this general denial of disgorgement to innocent wrongdoers is correct, change of position need intervene only in cases seeking disgorgement for breach of fiduciary duty; its scope in the law of wrongs would be very limited. This all-or-nothing approach would, however, leave innocent wrongdoers with a windfall gain from any non-fiduciary wrongs. It may be preferable to recognise a general liability to disgorge all profits from wrongdoing, but reduce the quantum of recovery to reflect any change of position defence. It is consequently submitted that change of position is applicable to disgorgement for both fiduciary and non-fiduciary wrongs.

### B *The Tort of Conversion*

This article now considers the first of two strict liability wrongs: the tort of conversion. Conversion is essentially a dealing with goods which deprives another person of their use or possession.<sup>130</sup> The essential requirement is an intention to exercise dominion over another's goods,<sup>131</sup> which is usually proven by conduct that is inconsistent with that person's continuing rights over the chattels.<sup>132</sup> So a thief who steals goods is guilty of conversion,<sup>133</sup> as is the person who buys the stolen goods,<sup>134</sup> because both acts are adverse to the true owner's rights over the property.

A gain-based response may be awarded as a remedy for conversion. In 1941, the House of Lords acknowledged this fact in rejecting the 'waiver of tort' fiction.<sup>135</sup> Lord Nicholls has also supported this view of the law on several

<sup>129</sup> See *ibid* 83–6.

<sup>130</sup> See, eg, *Banks v Ferrari* [2000] NSWSC 874 (Unreported, Dowd J, 7 August 2000) [57]; *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 229 (Dixon J). See also Anthony M Dugdale and Michael A Jones (eds), *Clerk & Lindsell on Torts* (19<sup>th</sup> ed, 2006) 1008; W V H Rogers (ed), *Winfield and Jolowicz on Tort* (17<sup>th</sup> ed, 2006) 752–3.

<sup>131</sup> See, eg, *Fouldes v Willoughby* (1841) 8 M & W 540, 547; 151 ER 1153, 1156 (Lord Abinger CB).

<sup>132</sup> See *M'Combie v Davies* (1805) 7 East 5, 6; 103 ER 3, 4 (Lord Ellenborough CJ); *Hollins v Fowler* (1875) LR 7 HL 757, 766 (Blackburn J), 782 (Brett J); *Lancashire and Yorkshire Railway Co v MacNicoll* (1918) 88 LJ KB 601, 605 (Aikin J); *Oakley v Lyster* [1931] 1 KB 148, 153 (Scrutton LJ), 156 (Slesser LJ); *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178, 201–2 (Lord Porter); *Douglas Valley Finance Co Ltd v S Hughes (Hirers) Ltd* [1969] 1 QB 738, 751–2 (McNair J).

<sup>133</sup> *Grainger v Hill* (1838) 4 Bing NC 212; 132 ER 769.

<sup>134</sup> *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573, 577–8 (Diplock LJ).

<sup>135</sup> *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 17–18 (Viscount Simon LC), 29 (Lord Atkin), 34 (Lord Romer). Cf *Lamine v Dorrell* (1701) 2 Ld Raym 1216; 92 ER 303; *Chesworth v Farrar* [1967] 1 QB 407. The fiction that was rejected was the idea that a plaintiff suing for conversion could either claim compensation for the plaintiff's loss of the goods or 'waive the tort' and claim the defendant's gain or profit from the conversion. The assumption was that the defendant's gain from the conversion could not be recovered in a tort action, but only through 'waiving' the tort and suing in *assumpsit*. The House of Lords recognised that the tort was never actually waived in this situation; instead, the plaintiff relied on the tort and sued

occasions.<sup>136</sup> Both restitutionary damages and disgorgement appear to exist in the law of conversion.<sup>137</sup> Restitutionary damages may occur, for example, where the defendant has had the use of converted goods and must pay a reasonable sum to reflect that benefit.<sup>138</sup> Suppose J steals K's car and gives it to L, saying that L can 'borrow' the car indefinitely. L uses it for five months before K demands the car back. If L returns the car immediately, L has still had the benefit of using it. K may seek to reverse this transfer of value from K to L and claim the benefit L has received.

Restitution might also be based on disgorgement.<sup>139</sup> Suppose, for example, X steals Y's car (with a market value of \$600) and sells it to Z, whereupon Z sells it on for \$1400. Y's loss on a normal measure of damages would be only \$600,<sup>140</sup> but Z's net gain is \$800.<sup>141</sup> Y may wish to make Z disgorge these profits.<sup>142</sup>

Since conversion simply requires an intention to exercise dominion over goods, the wrong can be committed in good faith and so change of position is potentially relevant. A defendant may, for example, receive goods bona fide and, in reliance on that receipt, change position.<sup>143</sup> In the second example above, Z's net gain is \$800. Suppose Z, without notice of Y's rights, treats himself to a night out and spends \$200 on food, transportation and accommodation. If Y later claims Z's entire gain, Z may argue that they spent \$200 of it in good faith. A good faith conversion is possible; the real issue is whether change of position is compatible with the policy of the tort.

### 1 *The Rationale of Conversion*

If the rationale of conversion is irreconcilable with the operation of change of position, the defence may be inappropriate in this context. Conversion aims to

for the resulting gain as an action in tort. This is a classic recognition of restitution for wrongs: see also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 462–3.

<sup>136</sup> *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, 523–4 (Lord Nicholls for Lords Keith, Lloyd, Nicholls, Steyn and Hardie Boys J); *A-G (UK) v Blake* [2001] 1 AC 268, 280 (Lord Nicholls). See also *Kuwait Airways* [2002] 2 AC 883, 1094–5 (Lord Nicholls).

<sup>137</sup> See Edelman, *Gain-Based Damages*, above n 6, 139–41.

<sup>138</sup> *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 585–6 (Lord Hope), 606 (Lord Nicholls); *Kuwait Airways* [2002] 2 AC 883, 1094 (Lord Nicholls); *A-G (UK) v Blake* [2001] 1 AC 268, 278–9 (Lord Nicholls). See also *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184; *Kuwait Airways Corporation v Iraqi Airways Co* [2004] EWHC 2603 (Comm) (Unreported, Cresswell J, 12 November 2004) [234].

<sup>139</sup> There is disagreement as to whether disgorgement is a separate remedy or whether restitutionary damages subsumes it by allowing a plaintiff to claim any profit as a transfer of value traced into the ultimate sale value of the goods: see Edelman, *Gain-Based Damages*, above n 6, 140–1. This article adopts the disgorgement approach for structural convenience.

<sup>140</sup> In *Kuwait Airways* [2002] 2 AC 883, 1090, 1094, Lord Nicholls confirmed that compensation for loss is the primary method of relief for conversion. Similar sentiments were expressed by the High Court of Australia in *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191 (Taylor and Owen JJ), 192 (Menzies J). It must be acknowledged, however, that often the proceeds of conversion will be used to measure the plaintiff's loss from the conversion. This is known as the 'full value' rule.

<sup>141</sup> That is, when the amount C initially paid for the car is subtracted (\$1400 - \$600 = \$800).

<sup>142</sup> It was accepted in Part II that disgorgement is at least partially restitutionary in operation.

<sup>143</sup> *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573, 577–8 (Diplock LJ).

protect the institution of personal property.<sup>144</sup> Each person owes their neighbour a duty to refrain from dealing with their neighbour's goods in a way inconsistent with their neighbour's title to them.<sup>145</sup> For this reason, it is said, conversion is a tort of strict liability: people dealing with goods do so at their peril.<sup>146</sup>

Change of position must be compatible with the law's protection of proprietary rights. This requires examination of the legitimacy of strict liability as a mechanism for achieving this end and whether change of position can temper it in appropriate cases without frustrating this rationale.

Strict liability in conversion seems to have arisen by chance as the tort gradually expanded to fill the role once played by detinue in English law.<sup>147</sup> Conversion appears to have traditionally been restricted to cases concerning losses occasioned by the deprivation of goods, rather than the wrongful detention or use of them, which was a role fulfilled by detinue.<sup>148</sup> Conversion, or 'trover', gradually expanded to encompass the wrongful use of goods, and in doing so absorbed some of the characteristics of detinue, such as strict liability.<sup>149</sup> This is somewhat of an historical anomaly rather than an essential mechanism for protecting proprietary rights and is not a persuasive reason to hold innocent converters liable at all times. We should not shrink from mollifying this arbitrary approach where a justification can be shown.<sup>150</sup>

The efficacy of strict liability depends on the remedy sought for conversion. In conversion, compensation undoes the plaintiff's loss as a result of the tort, whereas restitution requires the defendant to give up any gain made. These different emphases may justify strict liability for compensation, but never restitution. Arguably, a defendant should always compensate a plaintiff for losses caused. To allow even an innocent defendant to escape liability frustrates the aim of compensation: to undo the effect of the tort.<sup>151</sup> Furthermore, as a matter of logic, a defendant's change of position can never alter the fact that a plaintiff has suffered loss and ought to be compensated for it; the defence is gain-based and seems inappropriate where loss is at issue. Where the plaintiff claims restitution, however, a relaxation of strict liability cannot leave the plaintiff in a position of ultimate disadvantage. In restitution, the plaintiff ostensibly always claims the defendant's gain, hence loss or detriment is not a relevant consideration. The

<sup>144</sup> *Kuwait Airways* [2002] 2 AC 883, 1093 (Lord Nicholls).

<sup>145</sup> See J E Penner, *The Idea of Property in Law* (1997) 29, 139–40.

<sup>146</sup> See *Fowler v Hollins* (1872) LR 7 Ex 616, 639 (Cleasby B). See also *Caxton Publishing Co Ltd v Sutherland Publishing Co* [1939] AC 178, 202 (Lord Porter).

<sup>147</sup> D J Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 107–12.

<sup>148</sup> *Ibid.*

<sup>149</sup> See *Hambly v Trott* (1776) 1 Cowp 371, 374; 98 ER 1136, 1137 (Lord Mansfield CJ); *Cooper v Chitty* (1756) 1 Burr 20; 97 ER 166; Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623, 646–7; J H Baker, *An Introduction to English Legal History* (4<sup>th</sup> ed, 2002) 397–8; *ibid* 111–12.

<sup>150</sup> See *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 376 (Deane and Dawson JJ); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 554 (Gummow J).

<sup>151</sup> The aim is often described as being to place the plaintiff in the position they would have been in but for the tort: see, eg, *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn); *Commissioners for Executing the Office of High Lord Admiral of the United Kingdom v Owners of the Steamship Valeria* [1922] 2 AC 242, 248 (Viscount Dunedin).

defendant's subsequent dealings with a gain, though, may logically be relevant in determining the quantum of that gain which should be given up. The question then becomes whether the plaintiff should receive all gain attributable to the conversion or whether change of position renders that move inequitable.

Thus, the protection of personal property rights warrants strict liability only where the conversion causes loss for which compensation is sought. Where gain-based relief is desired, although the infringement of the plaintiff's rights should still be remedied, strict liability is no longer merited. A balance must be struck in such a case between protecting proprietary interests and avoiding hardship to honest defendants.<sup>152</sup> Change of position is an appropriate mechanism for striking this balance. This point is further illustrated by the operation of the restitutionary remedies for conversion.

## 2 Restitutionary Remedies for Conversion

User damages are a form of restitutionary damages, available where the defendant saves expense through an unauthorised use of the plaintiff's goods.<sup>153</sup> Change of position is appropriate in relation to this remedy because user damages are unconcerned with any loss to the plaintiff.<sup>154</sup> True, the defendant's unauthorised use of the goods infringes the plaintiff's proprietary rights to some extent, but it results in the derivation of a gain without permission rather than the infliction of harm. This is clearly a lesser type of infringement, justifying a more lenient approach to liability. The hardship that strict liability would engender to a defendant whose position has changed, in light of the fact that loss is not an issue, must outweigh the plaintiff's lesser interest to have the unauthorised use of their goods vindicated.<sup>155</sup>

A plaintiff may also elect to sue for the profits of a conversion;<sup>156</sup> this will be attractive where profits exceed actual loss. Assuming disgorgement is available

<sup>152</sup> The hardship being that which would occur if full restitution were required where some gain has been expended.

<sup>153</sup> As in the example involving L and K: see above n 138 and accompanying text. See also Virgo, *The Principles of the Law of Restitution*, above n 53, 470; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184; *Kuwait Airways Corporation v Iraqi Airways Co* [2004] EWHC 2603 (Comm) (Unreported, Cresswell J, 12 November 2004) [234]; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323 (Unreported, Gibson, Mance LLJ and Hooper J, 20 March 2003) [18] (Mance LJ).

<sup>154</sup> According to Lord Nicholls, it may be open to a court to award user damages in conjunction with compensatory relief if there is some loss suffered by the plaintiff in addition to any gain made by the defendant. A user damages award, however, is separate and focuses solely on gain: *Kuwait Airways* [2002] 2 AC 883, 1094 (Lord Nicholls).

<sup>155</sup> This view would also appear to be supported by the dictum of Lord Nicholls in *ibid* 1098. See below Part IV(B)(4).

<sup>156</sup> In *Lightly v Clouston* (1808) 1 Taunt 112, 114; 127 ER 774, 775, Mansfield CJ accepted that a plaintiff may sue for the 'produce' of a sale in an action for conversion, although it has been termed 'an action for money had and received' rather than an action for disgorgement of profits. See also *Oughton v Seppings* (1830) 1 B & Ad 241; 109 ER 776; *Parker v Norton* (1796) 6 TR 695, 700; 101 ER 779, 779–80 (Kenyon CJ); *Club 7 Ltd v EPK Holdings Ltd* (1993) 115 Nfld & PEIR 271, 314–16 (Puddester J).

against bona fide defendants,<sup>157</sup> there is considerable support for the view that change of position should be open in such circumstances.<sup>158</sup> Again, this lesser type of proprietary infringement, which a gain-based remedy seeks to correct, cannot outweigh the policy behind change of position. True, there will generally be some loss in disgorgement claims, since the plaintiff will have lost the market value of the goods, but the remedy is not concerned with such things.<sup>159</sup> Insofar as disgorgement is sought, there is no justification for holding the defendant strictly liable to make full restitution to the plaintiff if a change of position has occurred.

### 3 *The Irrelevance of a Corresponding Loss*

The preceding discussion reveals that restitution may arise in situations where a loss also occurs. Suppose B, a bank, is given a cheque forged by C for \$4000 in A's name and innocently credits \$4000 to C's account. Assuming B is liable in conversion, A may claim \$4000 from B in compensation or alternatively in restitutionary damages<sup>160</sup> as there has been a transfer of value of \$4000 occasioned by the conversion.<sup>161</sup> Assuming A desires to claim restitution, change of position would reduce the quantum of the B's liability. B's change of position is \$4000, so a restitutionary claim leaves A with no ultimate remedy, whereas a compensatory claim, for which there is no change of position defence, leaves A with a full damages award.

It may seem anomalous to allow change of position in relation to one claim and not another where they arise on the same facts,<sup>162</sup> however, this is readily explicable if we recall the logical connection between restitution and change of position. Restitution is unconcerned with loss.<sup>163</sup> The fact that a plaintiff suffers no detriment will not prevent a court ordering a defendant to make restitution of their gain.<sup>164</sup> The corollary of this is that a corresponding loss cannot influence

<sup>157</sup> See *Greenwood v Bennett* [1973] QB 195, 202 (Lord Denning MR). See also *Munro v Willmott* [1949] 1 KB 295. It is possible for these cases to be reanalysed as not awarding disgorgement but instead restitutionary damages which are traced into the higher value of the chattel: see Edelman, *Gain-Based Damages*, above n 6, 140–1. Nothing would appear to turn on this classification as regards the availability of change of position.

<sup>158</sup> See Goff and Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002), above n 6, 835–7; Tettenborn, above n 44, 278. See also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 525–7.

<sup>159</sup> *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101, 114–15 (Mason CJ, Deane, Dawson and Toohey JJ).

<sup>160</sup> This is also known as 'money had and received' in this situation. A similar instance of corresponding loss may arise in a disgorgement context: see above nn 156–9 and accompanying text.

<sup>161</sup> See *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573, 577 (Diplock LJ).

<sup>162</sup> Edelman considers this a reason to deny any role for change of position in relation to conversion: Edelman, *Gain-Based Damages*, above n 6, 96.

<sup>163</sup> *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 74 (Mason CJ). His Honour was speaking of restitution in the context of unjust enrichment, but the remedy of restitutionary damages in the law of wrongs appears to operate in exactly the same way.

<sup>164</sup> See, eg, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 529 (Gleeson CJ, Gaudron and Hayne JJ); *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, 400 (Morritt LJ). In a restitution for wrongs context, similar sentiments have been echoed: see, eg, *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101, 114 (Mason CJ, Deane, Dawson and Toohey JJ).

the quantum of gain that should be given up and therefore cannot limit the availability of change of position. In law, we often cannot have it both ways:<sup>165</sup> if the plaintiff wishes to remedy losses, the plaintiff must seek compensation where change of position is irrelevant.

In practice, the plaintiff will inevitably claim compensation whenever change of position reduces restorable gain below the quantum of the plaintiff's actual loss. This is not inappropriate. Where actual loss is claimed, the rationale of conversion merits absolute liability to compensate for that loss. A restitutionary remedy, though, engenders a different legal focus, hence the different result. Change of position will still be important in two cases: where the plaintiff suffers no loss as a result of the conversion and wishes to simply claim the defendant's gain, and where the defendant's gain is such that, even with a change of position defence, the quantum of restitutionary recovery nevertheless exceeds the plaintiff's loss. In both cases, change of position is a valuable mechanism for doing practical justice between the parties, by ensuring that only extant gain must be given up.

#### 4 *Judicial Support for a Relaxation of Strict Liability*

There have been recent indications that the law of conversion may relax its hardline approach towards innocent wrongdoers. Lord Nicholls recently advocated reduced liability for bona fide defendants where consequential losses are claimed for conversion.<sup>166</sup> More significantly though, his Lordship seemed to envision a role for change of position wherever the plaintiff claims restitution, stating that:

all those who convert [a plaintiff's] goods should be accountable for benefits they receive. ... The goods are his, and he is entitled to reclaim them and any benefits others have derived from them. Liability in this regard should be strict *subject to defences available to restitutionary claims such as change of position* ...<sup>167</sup>

Andrew Burrows has suggested that Lord Nicholls may have been referring to claims in unjust enrichment here,<sup>168</sup> and not restitution for wrongs.<sup>169</sup> Lord Nicholls, however, also commented that a 'radical reappraisal of the tort of conversion along these lines was not pursued on these appeals.'<sup>170</sup> There would be nothing 'radical' in simply reiterating change of position as a defence in

<sup>165</sup> This somewhat inelegant proposition may be thought to underlie a number of legal doctrines, for example the rule that a plaintiff must elect between two inconsistent and alternative remedies and cannot obtain both: see, eg, *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 32 (Windeyer J). See also *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, 521–2 (Lord Nicholls for Lords Keith, Lloyd, Nicholls, Steyn and Hardie Boys J).

<sup>166</sup> *Kuwait Airways* [2002] 2 AC 883, 1098.

<sup>167</sup> *Ibid* 1093 (emphasis altered).

<sup>168</sup> This is possible due to the operation of concurrent liability, which provides that the same facts may give rise to both an action in unjust enrichment and an action in wrongdoing. For a general discussion of concurrent liability, see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

<sup>169</sup> Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 525.

<sup>170</sup> *Kuwait Airways* [2002] 2 AC 883, 1093.

unjust enrichment, hence the implication is that Lord Nicholls did indeed envision change of position as a defence to conversion.<sup>171</sup> His Lordship's dictum supports the suggested role for change of position in this area. Where the benefits of the tort are claimed, strict liability is not warranted and the plaintiff's proprietary interests are adequately protected by a prima facie liability to make restitution, subject to change of position.

### 5 Conclusions

Conversion is generally understood as a tort of strict liability. This approach is apparently justified to protect the plaintiff's title to goods. Strict liability to compensate for any loss caused by the result of the conversion seems to uphold this rationale. The gain-based nature of a restitutionary remedy, however, does not call for strict liability to achieve this goal. Wherever a plaintiff claims the gain from the tort, the law responds to a lesser infringement of property rights. The plaintiff's rights have still been invaded, but where no loss is occasioned strict liability is not essential to achieve the aim of the tort. The plaintiff always has a prima facie right to claim any gain occasioned by the conversion; but change of position does better practical justice between the parties by reducing the quantum of a restitutionary award to the extent that the defendant has changed their position as the result of a bona fide conversion of the plaintiff's goods. In that regard, the inequity rationale of the defence and the merits of extending it to innocent wrongdoers, as mentioned in Part III, resurface to warrant recognition of change of position in this context.

### C Breach of Fiduciary Duty

This article now examines the wrong of breach of fiduciary duty. A fiduciary is a party in whom another (the 'principal') places an exceptionally high degree of trust and confidence. The classic example of a fiduciary relationship is between trustee and beneficiary, where the trustee is entrusted with the legal ownership of property that belongs in equity to the beneficiary. The beneficiary is particularly vulnerable to any abuse of the trustee's position. As such, the trustee must refrain from acting in a manner that is potentially adverse to the high standard of fidelity expected of the trustee.<sup>172</sup> As P D Finn has written, 'the "fiduciary" standard ... enjoins one party to act in the interests of the other — to act selflessly and with undivided loyalty.'<sup>173</sup> The duty is manifested in two fundamental rules:<sup>174</sup> the fiduciary must not make any unauthorised profit,<sup>175</sup> and the fiduciary must avoid

<sup>171</sup> See Palmer, above n 46, 78.

<sup>172</sup> See, eg, *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223.

<sup>173</sup> P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, 4.

<sup>174</sup> *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J). See also *ibid* 27; R P Meagher, J D Heydon and M J Leeming (eds), *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) 169–82.

<sup>175</sup> *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46; *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

any conflict of interests.<sup>176</sup> A breach renders the fiduciary liable to equitable sanction.<sup>177</sup>

The availability of disgorgement ('account of profits') against defaulting fiduciaries is well known.<sup>178</sup> In *Regal (Hastings) Ltd v Gulliver*, Lord Porter said that 'one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position, or, if he does, he must account for the profit so made.'<sup>179</sup> This is a cardinal principle of equity.<sup>180</sup>

A more vexing issue is whether restitutionary damages exist in this context. In *Personal Representatives of Tang Man Sit v Capacious Investments Ltd*, the Privy Council appears to have awarded damages for use and occupation of land in breach of trust,<sup>181</sup> which Edelman has shown is best analysed as reversing a transfer of value.<sup>182</sup> We can therefore point to situations where restitutionary damages might be awarded for a breach of fiduciary duty.

Although relatively uncommon,<sup>183</sup> a bona fide breach of fiduciary duty is possible. Any unauthorised profit obtained from the fiduciary relationship constitutes a breach; the fact that the fiduciary acted honestly,<sup>184</sup> or that the fiduciary's gain would not, or could not, have been made by the principal,<sup>185</sup> does not matter. It is also irrelevant that the principal suffered no loss.<sup>186</sup> Change of position, then, could be satisfied by defaulting fiduciaries as the specific restitutionary remedies in this context disclose.

If even a bona fide fiduciary must disgorge any unauthorised profits,<sup>187</sup> it follows that a fiduciary could innocently make a profit and pay it away in good faith, thereby effecting a change of position. *Boardman v Phipps* provides a good example.<sup>188</sup> In that case, had the solicitor spent the profits derived from the unwitting breach of fiduciary duty before it became apparent that the fully informed consent of all beneficiaries had not been obtained, he may justifiably

<sup>176</sup> *Bray v Ford* [1896] AC 44, 51 (Lord Herschell); *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1983) 5 DLR (4<sup>th</sup>) 452, 481 (Griffiths J); *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592–3 (Rich, Dixon and Evatt JJ).

<sup>177</sup> *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 137 (Viscount Sankey), 144 (Lord Russell).

<sup>178</sup> *Ibid.* See also *Hospital Products Pty Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 107 (Mason J); *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 560 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

<sup>179</sup> [1967] 2 AC 134, 158; see also at 137 (Viscount Sankey), 143 (Lord Russell). This decision was approved in *Boardman v Phipps* [1967] 2 AC 46.

<sup>180</sup> *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 153 (Lord Macmillan); *Chan v Zacharia* (1984) 154 CLR 178, 198 (Deane J).

<sup>181</sup> [1996] AC 514.

<sup>182</sup> Edelman reached this view because the evidence in the case disclosed that the plaintiff would not have let the properties himself, hence the award could not reasonably be analysed as compensatory: Edelman, *Gain-Based Damages*, above n 6, 208.

<sup>183</sup> See Nolan, above n 73, 153.

<sup>184</sup> *Birtchnell v Equity Trustees, Executor and Agency Co Ltd* (1929) 42 CLR 384, 409 (Isaacs CJ, Gavan Duffy, Rich, Starke and Dixon JJ); *Boardman v Phipps* [1967] 2 AC 46; *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592, 617 (Martland, Judson, Ritchie, Spence and Laskin JJ).

<sup>185</sup> *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 144–5 (Lord Russell), 159 (Lord Porter).

<sup>186</sup> *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 394 (Gibbs J).

<sup>187</sup> See, eg, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

<sup>188</sup> [1967] 2 AC 46.

have argued that he be excused from liability because he had acted in good faith in reliance on his prima facie entitlement.

The situations where equity reverses a transfer of value accruing from a breach of fiduciary duty are far more unclear. The very nature of the remedy as restitutionary in relevant situations has not been elucidated, but it seems restitution for use and occupation of land in breach of duty could occur innocently. A fiduciary might, for instance, honestly and reasonably, but mistakenly, believe that they had the principal's consent to use and occupy the land.<sup>189</sup>

### 1 *The Nature of Strict Liability in Equity*

Change of position has never been directly invoked in fiduciary duty claims; we are thus forced to examine the wider policy concerns surrounding the issue. The biggest hurdle is the potential conflict between change of position and the rationale behind the fiduciary duty. The law holds all fiduciaries to exacting standards by strictly requiring them to give up gains made in breach of duty.<sup>190</sup> This is premised on a rationale of deterrence,<sup>191</sup> to ensure fiduciaries are extremely conscious of their duties and are not tempted to abuse their positions of trust.<sup>192</sup> As Virgo suggests, this may justify denying them the defence.<sup>193</sup> Yet, while these concerns are noted, it is submitted that a tempering of strict liability with change of position would not upset this primary concern and indeed would be compatible with general equitable doctrine. The key is to recognise the limited circumstances in which change of position would operate. Most breaches of fiduciary duty will be committed *mala fide* and change of position could only apply where a defendant acted honestly at all times. Similarly, the defence could arise only where a restitutionary remedy was sought — a fiduciary would never escape the obligation to compensate the principal for any losses. Yet, where restitution is claimed and the fiduciary has acted honestly throughout, the fiduciary should not be unduly prejudiced for a mere innocent breach.

More specifically, the deterrent rationale is not frustrated if an innocent defendant must give up only extant gains. Strict liability does not deter an innocent defendant with no knowledge that the relevant conduct was ever wrongful. Any defendant with an impugned conscience could never change position in good faith, thus change of position could never undermine the deterrent rationale. Where the fiduciary standard has failed, for whatever reason, to prevent the innocent breach of duty occurring, the defendant should not be 'punished' (in effect) by being made to restore more than extant gain.<sup>194</sup> 'equity and penalty are

<sup>189</sup> See *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 All ER 1222, 1227 (Lord Wilberforce for Lords Wilberforce, Hodson, Pearson, Diplock and Simon). See also *Boardman v Phipps* [1967] 2 AC 46, 112 (Lord Hodson), 117 (Lord Guest), 128 (Lord Upjohn).

<sup>190</sup> See *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J).

<sup>191</sup> As Cardozo CJ said in *Meinhard v Salmon* 164 NE 545, 546 (NY, 1928), the rule is designed to ensure fiduciaries conduct themselves 'at a level higher than that trodden by the crowd'.

<sup>192</sup> *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J); Finn, above n 173, 27.

<sup>193</sup> Virgo, *The Principles of the Law of Restitution*, above n 53, 705.

<sup>194</sup> In *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101, 114, Mason CJ, Deane, Dawson and Toohey JJ stressed that the 'purpose of an account of profits is not to punish the defendant but to prevent its unjust enrichment.'

strangers'.<sup>195</sup> Leniency is appropriate in the limited circumstances where a fiduciary innocently makes a gain in breach of duty and then changes their position in reliance on that gain. This argument is bolstered when the specific restitutionary remedies are considered.

## 2 Disgorgement of Profits

Birks doubted that change of position was available for disgorgement,<sup>196</sup> but he conceded that it might arise de facto if a plaintiff elected to pursue the defendant for extant profits only.<sup>197</sup> Equity's remedial flexibility, however, is always capable of allowing for a change of position in determining the appropriate measure of relief. While a fiduciary's liability to account is generally considered unwavering,<sup>198</sup> this is not entirely accurate. Disgorgement in this context is inherently flexible because, as an equitable response, it is necessarily governed by general concepts of practical justice.<sup>199</sup> '[H]e who seeks equity must also do equity',<sup>200</sup> and an equitable remedy must always 'be fashioned to fit the nature of the case and the particular facts.'<sup>201</sup> In *Barnes v Addy*, Lord Selborne LC pointed out that there is 'no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.'<sup>202</sup> In a similar vein, Deane J stressed in *Chan v Zacharia* that 'liability to account ... will not arise in circumstances where it would be unconscionable to assert it'.<sup>203</sup> Indeed, in *Warman International Ltd v Dwyer*, the High Court of Australia accepted that 'the stringent rule requiring a fiduciary to account for profits can be carried to extremes and ... the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.'<sup>204</sup> Equity's fundamental desire to do justice between the parties would clearly be frustrated if innocent fiduciaries were strictly liable to account for all profits, notwithstanding a change of position. It would be 'unconscionable' to insist upon disgorgement of all profits in this situation.

<sup>195</sup> *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 302 (Somers J). See also *Hospital Products Pty Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 109 (Mason J); *Yuse v Foster* (1872) LR 8 Ch App 309, 333 (James LJ). For a masterly discussion on the non-punitive nature of equity, see the judgment of Heydon JA in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 341–424.

<sup>196</sup> See, eg, Birks, 'Unjust Enrichment and Wrongful Enrichment', above n 17, 1786–8.

<sup>197</sup> Birks, *Unjust Enrichment*, above n 6, 213.

<sup>198</sup> See, eg, *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

<sup>199</sup> See *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278–9 (Lord Blackburn); *Spence v Crawford* [1939] 3 All ER 271, 288 (Lord Wright).

<sup>200</sup> See, eg, *Cheese v Thomas* [1994] 1 All ER 35, 41 (Nicholls V-C). See also *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 114–16 (Deane, Dawson, Toohey, Gaudron and McHugh JJ); Gummow, above n 106, 32.

<sup>201</sup> *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

<sup>202</sup> (1874) LR 9 Ch App 244, 251.

<sup>203</sup> (1984) 154 CLR 178, 204.

<sup>204</sup> (1995) 182 CLR 544, 561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). This use of 'unjust enrichment' would appear to be in a non-technical sense: see James Edelman, 'Money Had and Received: Modern Pleading of an Old Count' [2000] *Restitution Law Review* 547, 562–3.

One could argue in response that equity's inherent flexibility makes a specific change of position defence unnecessary and that it is sufficient to subsume the notion within the discretionary nature of equitable relief. Explicit recognition of the defence, however, would ensure better elucidation of equity's remedial elasticity,<sup>205</sup> thereby preventing disgorgement from operating unfairly due to confusion about its scope. Consequently, explicit recognition of change of position is desirable.

Wherever disgorgement is available, the defendant may receive a monetary allowance to reflect their contribution to the ultimate gain.<sup>206</sup> It is further submitted that this award is symptomatic of a legal predisposition that supports recognition of change of position. In *Harris v Digital Pulse Pty Ltd*, Heydon JA considered that the allowance was available only if the defendant could show that it would be inequitable to order an account of the entire profits.<sup>207</sup> Presumably this requires proof that the defendant's efforts warrant some pecuniary recognition. Effectively, if the law sets off, against the profits to be disgorged, an amount to reflect the defendant's contribution to those profits, it already displays a concern to ensure the defendant is not 'worse off' as a result of making restitution.<sup>208</sup> Change of position, by reducing restitutionary liability to the extent it would be inequitable to do otherwise, has the same effect.

Elise Bant and Peter Creighton have argued that the allowance for skill and effort is 'counter-restitutionary' and thus designed to prevent the plaintiff's unjust enrichment, rather than to avoid hardship to the defendant.<sup>209</sup> Counter-restitution requires a plaintiff seeking restitution to restore to the defendant any benefits which the plaintiff has already obtained from the defendant, so that the plaintiff is not unjustly enriched overall.<sup>210</sup> If the allowance is counter-restitutionary, change of position has no necessary application because the defendant's change of position cannot affect the plaintiff's unjust enrichment.<sup>211</sup> This contention, however, is unconvincing. Given that counter-restitution is designed to prevent the plaintiff's unjust enrichment, even defendants who act in bad faith are arguably entitled to counter-restitution as of

<sup>205</sup> See, eg, Palmer, above n 46, 77.

<sup>206</sup> See *Brown v Litton* (1711) 1 P Wms 140, 142; 24 ER 329, 329 (Lord Harcourt); *Lord Provost v Lord Advocate*; *Ex parte M'Laren* (1879) 4 App Cas 823, 838–9 (Lord Hatherley); *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 467–9 (Fox LJ).

<sup>207</sup> (2003) 56 NSWLR 298, 384. Heydon JA adopted this approach in concluding that a refusal in any given situation to award an allowance was not 'punitive' but a matter of the defendant failing to discharge this onus. In doing so, he approved (at 383–4) a comment by the High Court of Australia in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

<sup>208</sup> See Nolan, above n 73, 154; Phillip Hellwege, 'The Scope of the Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study' [1999] *Restitution Law Review* 92, 99.

<sup>209</sup> Bant and Creighton, 'The Australian Change of Position Defence', above n 39, 229.

<sup>210</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 348–9 (Mason CJ); see also at 367 (Brennan J), 383 (Toohey J), 387 (Gaudron J). See also *Spence v Crawford* [1939] 3 All ER 271, 288–9 (Lord Wright); *Adam v Newbigging* (1888) 13 App Cas 308; Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 539; Edelman and Bant, above n 6, 348–9.

<sup>211</sup> That is, the focus of the inquiry is on the plaintiff, not the defendant.

right.<sup>212</sup> Reprehensible conduct does, however, affect the availability of the allowance. In *Harris v Digital Pulse Pty Ltd*, Heydon JA confirmed that the defendant must negate dishonesty in order to establish an entitlement to the award:

the onus on the defendant is to negate dishonesty ... and hence the position is not so much that an account of the entire profits is a punishment, but rather that an absence of grave misconduct is a passport to an indulgence in favour of the defendant.<sup>213</sup>

Effectively, then, the award is not independent of the defendant's conduct because a dishonest defendant has no entitlement to it. If this award were counter-restitutionary, the defendant's actions could not affect their entitlement. The inescapable conclusion, then, is that the allowance is not counter-restitutionary. The better view is that it is granted where it would be inequitable to award an account of the entire profits.<sup>214</sup> When a defendant acted honestly at all times, it would be clearly unfair to withhold an allowance for the defendant's effort in contributing to the ultimate profits. Change of position also addresses the inequity of demanding strict restitution; ergo, both change of position and the allowance for skill further the same end. Consequently, since the law already shows concern to avoid hardship to the defendant, recognition of change of position would be a logical and appropriate step in doing practical justice between the parties in disgorgement claims for breach of fiduciary duty.

### 3 Restitutionary Damages

Change of position is also appropriate in restitutionary damages claims. As with disgorgement, the absence of both loss and bad faith should justify relaxing the fiduciary's otherwise strict liability to make restitution. While restitutionary damages are likely to be fairly rare, this article examines the situation where a fiduciary innocently occupies land in breach of duty and thereby obtains 'value' from its use.<sup>215</sup> In this respect, restitutionary damages operate like mesne profits for trespass.<sup>216</sup> If the principal would not otherwise have used the land, no loss is occasioned and there are no material 'profits' justifying disgorgement. Clearly, though, this is a transfer of value that the law should generally reverse.<sup>217</sup> The fiduciary ought to make restitution of the benefit obtained in breach of duty, but,

<sup>212</sup> See *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 590–1 (Lord Hope); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 385 (Lord Goff); Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 540–1.

<sup>213</sup> (2003) 56 NSWLR 298, 384. See also Meagher, Heydon and Leeming, above n 174, 206.

<sup>214</sup> *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

<sup>215</sup> See above n 182 and accompanying text.

<sup>216</sup> Mesne profits in trespass for the use and occupation of land are widely accepted as restitutionary: see *Gondal v Dillon Newsagents Ltd* [1998] EWCA Civ 1324 (Unreported, Simon Brown, Pill LJ and Sir John Vinelott, 29 July 1998), reported in [2001] *Restitution Law Review* 221, 228 (Simon Brown LJ); *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432; *Ministry of Defence v Ashman* [1993] 2 EGLR 102; *Ministry of Defence v Thompson* [1993] 2 EGLR 158; *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240; *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359, 361–2 (Lord Denning MR).

<sup>217</sup> Edelman, *Gain-Based Damages*, above n 6, 81.

as argued above, this prima facie entitlement cannot be considered unwavering. Given the absence of loss to the plaintiff, a full restitution award would be arbitrary if a bona fide change of position has occurred. Issues of remedial flexibility, which no doubt apply here as well,<sup>218</sup> also support the defence's imposition.

There may, however, be a problem: in unjust enrichment, or even conversion, the defendant will invariably receive a specific asset in reliance upon which the change of position occurs. In this situation, though, the defendant merely obtains the value of occupying the land.<sup>219</sup> Is this distinction significant? It is suggested not. Change of position seems wide enough to encompass any deliberate act in reliance upon a perceived increase in wealth and would not require receipt of a specific asset. Where restitution is sought for use and occupation of land, the value of the use is effectively transferred from the plaintiff to the defendant. In effect, the fiduciary 'receives' a benefit in the form of money saved through use of the land.<sup>220</sup> Where the fiduciary changes position in reliance on this received value, the defence would, in theory, be just as appropriate as where a specific asset is acquired.

A precise knowledge of what value was received would not seem necessary, provided the fiduciary has a conscious perception of increased material wealth which results in an irreversible change of position.<sup>221</sup> Such situations are conceivable, although they would be uncommon. For instance, the fiduciary might give up rental accommodation in the mistaken belief that they had the principal's consent to use and occupy land for a time. The fiduciary would know that this move saved expense, and if some irreversible act were performed in reliance on this belief, such as giving a proportionate amount to charity, change of position would be appropriate in a later claim for restitutionary damages for the reasons discussed above.

#### 4 Conclusions

It is axiomatic that a fiduciary's duty must be onerous: the fiduciary must never be tempted to stray from dutiful performance of their obligations in pursuit of self-interest.<sup>222</sup> As a basic approach this is unassailable; but strict liability to make restitution of gains can work injustice. Where a fiduciary has changed position bona fide in reliance on gains obtained in breach of duty, the deterrent rationale should not take on a punitive function by requiring the fiduciary to give up more than surviving gain. In the province of equity, the avoidance of unjust

<sup>218</sup> As we are in the province of equity, this is a universal concern.

<sup>219</sup> As Edelman has said in relation to mesne profits for trespass to land, '[v]alue, in the form of the use of the landlord's premises, has been transferred to the trespassing tenant': Edelman, *Gain-Based Damages*, above n 6, 67.

<sup>220</sup> *Ibid.*

<sup>221</sup> The need for the courts to adopt a broad-brush approach to this type of inquiry and to be satisfied with reasonable approximations was acknowledged by Jonathan Parker J in *Philip Collins Ltd v Davis* [2000] 3 All ER 808, 827 and approved by Robert Walker LJ in *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 827–8.

<sup>222</sup> See *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592, 609–10 (Martland, Judson, Ritchie, Spence and Laskin JJ).

outcomes is a clear prerogative; this justifies a relaxation of the prima facie strict liability to make restitution of gains. Where change of position is made out, the principal should be entitled to restitution of all gains made by the fiduciary, subject to change of position. The inequity rationale of change of position clearly warrants this step.

## V CONCLUSION

The great scholar Professor Birks once wrote:

The independence and necessity of the law of unjust enrichment derives from the peculiar normativity of extant gain. ... The defence of [change of position] ties the defendant's liability to the amount of his extant gain ...<sup>223</sup>

This article has shown that Birks's insightful statement needs broadening. Change of position is a gain-based defence and is pertinent wherever a plaintiff claims restitution (a gain-based remedy) from a defendant. It defines the point at which it is inappropriate to require restitution of more than extant gain. This is a universal concern which is operative in relation to any claim for restitution, notwithstanding whether the claim is sourced in wrongs or unjust enrichment.<sup>224</sup>

For this premise to be accepted, change of position and restitution for wrongs must be compatible. The first issue is whether the defence is itself peculiar to unjust enrichment. Part III showed that there is no reason to define change of position this narrowly. Lord Goff did not restrict it in this way. Furthermore, if the defence is based on notions of inequity, it is clearly relevant wherever questions of injustice or hardship to a defendant are raised. It is just as unfair to require an innocent wrongdoer to make restitution as it is to demand such of the innocent recipient of a mistaken payment. Finally, it is practically just to allow innocent wrongdoers to invoke the defence; the law should always strive to be fair where other considerations do not warrant a different approach. These conclusions show that change of position is not sensibly confined to unjust enrichment claims.

The second issue is whether, in practice, change of position is somehow adverse to the policy advanced by particular legal wrongs and the remedies awarded for them. Part IV discussed the remedies of restitutionary damages and disgorgement and clarified that neither is generally incapable of supporting a change of position defence. It then examined the wrongs of conversion and breach of fiduciary duty, which traditionally have imposed strict liability on defendants. In relation to conversion, it was seen how the protection of the plaintiff's proprietary interests may warrant strict liability to compensate for loss or damage to chattels, even if the defendant acted bona fide. This approach, however, is not soundly invoked where all that is claimed is the defendant's gain

<sup>223</sup> Birks, *Unjust Enrichment*, above n 6, 208. Note that Birks himself used the term 'disenrichment' rather than 'change of position', as he considered that change of position was better interpreted as an 'enrichment-related' defence with little other application. This statement, therefore, is equally valid in relation to 'change of position'.

<sup>224</sup> For fuller discussion of Birks's taxonomy of private law, see above Part II.

from the wrong. In that case, strict liability is not essential to protect the interests advanced by the tort of conversion. A prima facie obligation to make restitution, tempered by change of position, is better equipped to do practical justice between plaintiff and defendant.

The same is broadly true of breach of fiduciary duty: the deterrent objective that underpins equity's strict approach to liability, even in the absence of loss to the plaintiff, is fundamentally justifiable. Where, however, a defendant has changed their position bona fide in reliance on gain obtained by the breach, equity's overriding concern to avoid unjust outcomes supports the invocation of a change of position defence to reduce the quantum of restitutionary recovery. Although the High Court of Australia recently criticised unjust enrichment's potential to distort well-established doctrines without clear justification,<sup>225</sup> their comments have no bearing on the central proposition of this article, which relates to the extension of change of position as a defence to claims for restitution for wrongs in situations where the interests of practical justice clearly warrant it.<sup>226</sup>

Ultimately, the peculiar role fulfilled by restitutionary remedies is the linchpin of the argument for extending change of position to innocent wrongdoers and reinforces the need to widen Professor Birks's statement. Since restitution is a gain-based remedy, it is always logical to query how much gain should be given up to the plaintiff.<sup>227</sup> The answer to the question must depend on the defendant's dealings in relation to that gain. Where a bona fide change of position has occurred, the law's prima facie concern to order restitution is displaced to the extent that it would be inequitable to do so. This is the rationale of change of position. It is clearly inequitable to require an innocent converter or defaulting fiduciary to make restitution of more than extant gain when there are no counter-vailing policy concerns which mandate denial of the defence to these wrongdoers.

It is said the law should always strive to '[t]reat like cases alike ... and treat different cases differently'.<sup>228</sup> Although restitution for wrongdoing and restitution for unjust enrichment exhibit numerous differences, this article has shown that the remedy of restitution is the universal symptom which renders the two fundamentally alike. It is therefore right to say that, as far as restitution for wrongs and change of position are concerned, 'verily the twain do meet'.

<sup>225</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 155–6 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>226</sup> The High Court appeared to base much of their criticism on the fact that the first limb in *Barnes v Addy* (1874) LR 9 Ch App 244, of which the New South Wales Court of Appeal had adopted an 'unjust enrichment' analysis, was not shown to be 'unjust' so as to warrant its recasting: see *ibid* 158–9 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>227</sup> Notions of remoteness of damage and mitigation address similar concerns in relation to compensation, that is, to what extent the plaintiff's right to be compensated for losses should be restricted: see *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, 393 (Lord Morris); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 91 (Mason CJ and Dawson J).

<sup>228</sup> H L A Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) 159. See also Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002), above n 6, 1–2; Edelman and Bant, above n 6, 1.