

## MORALLY BLAMELESS WRONGDOERS AND THE CHANGE OF POSITION DEFENCE

This article argues that, contrary to the position taken by some judges and commentators, morally blameless defendants who have committed torts of strict liability should be able to raise the change of position defence against claimants who sue for a release fee (also known as “Wrotham Park damages”). For the defence to be available, however, release fees need to be understood not as compensatory, as many currently insist, but as gain-based. The defence should not necessarily be available in the context of restitution for wrongs to all defendants who have changed position in good faith, as is the case for unjust enrichment by subtraction. Those who changed position by dissipating wealth for their own benefit should be denied the defence if their breach of the claimant’s rights was careless. Defendants who, in contrast, altered their circumstances in such a way that they derived no net enrichment as a result of their wrong should be allowed to rely on the defence, even if they acted without care.

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### I. Introduction

1 For certain torts, such as conversion and trespass, fault is not an element of the wrong and defendants who have infringed claimants’ rights are liable to compensate their victims for any loss suffered even if their actions were morally blameless. What is less clear is the extent to which defendants who have acted without fault in committing such torts might be subject to pay a reasonable fee for the use of goods they have possessed or land they have occupied. This article examines whether morally blameless wrongdoers who are sued for their gains can benefit from the defence of change of position that is widely available in the law of enrichment by subtraction.

2 The issue is important not least because of the growth in “release fees”:<sup>1</sup> awards reflecting what would have been a reasonable sum

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1 Reflecting the controversy as to its conceptual nature, there is no settled name for the form of relief in question. The term “Wrotham Park damages” is often  
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for the claimant to have charged in return for relaxing the right that was breached. However, the question is complicated by a controversy as to the conceptual nature of such relief. Given that the change of position defence is understood to be a response to restitutionary causes of action alone, it can be relevant in this context only if it is concluded that release fees are based on the defendant's gain rather than the claimant's loss. This article argues that there is a compelling case for allowing the use of the defence in this context and that this represents a powerful reason for favouring a gain-based analysis of this form of relief. Indeed, the importance of a gain-based reading of release fees was apparent in the decision of the High Court of Singapore in *Cavenagh Investment Pte Ltd v Kaushik Rajiv*<sup>2</sup> ("*Cavenagh Investment*"), a case in which a morally blameless defendant was permitted to rely on the change of position defence when sued for a release fee in the context of a trespass to land.

3 The article considers accounts that purport to establish that, as a matter of analytic logic, the change of position defence has no place in the context of restitution for wrongs. It makes the case that changes of position involving dissipation of wealth for the defendant's own purposes are morally salient in the context of restitution for wrongs in much the same way that they are in the context of subtractive unjust enrichment. To deny the defence to morally blameless defendants sued for release fees after they have altered their circumstances in reliance on their right to the benefit in question would fail to pay due respect to their interest in making informed choices about their spending.

4 It should not, however, be assumed that we should necessarily apply the change of position defence in this context in the same manner that we do in cases of enrichment by subtraction. There are important distinctions that might potentially influence the courts in their application of the change of position defence in restitution for wrongs. First, a distinction can be drawn between different types of changes of position which have attracted the use of the defence in enrichment-by-subtraction cases. Scholars have treated those cases in which defendants

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favoured (the term was used for the first time in a reported judgment by Nourse LJ in *Gafford v Graham* (1999) 77 P & CR 73 at 86). However, the eponymous decision was far from being the first case in which such an award was made and the term provides little indication as to the nature of such relief. The term "release fee" preferred in this article was used in *Kettel v Bloomfield* [2012] EWHC 1422 (Ch) at [37], *per* HHJ David Cooke QC and the following variants can be found in other recent cases: "reasonable release fee" in *118 Data Resource Ltd v IDS Data Services Ltd* [2014] EWHC 3629 (Ch) at [33], *per* D Halpern QC; "release fee damages" in *HKRUK v Heaney* [2010] EWHC 2245 (Ch) at [80], *per* Langen J; and "licence fee" in *Stadium Capital Holdings (No 2) Ltd v St Marylebone Property Co plc* [2010] EWCA Civ 952 at [13], *per* Sir Peter Smith LJ.

2 [2013] 2 SLR 543.

dissipate wealth for their own benefit as paradigmatic of the defence. However, the defence equally operates in some instances where a defendant's circumstances have changed in ways that do not result in the defendant ultimately gaining a net enrichment from the benefit in question. The denial of the change of position defence in circumstances in which a blameless defendant has gained no net enrichment from the benefit in question would be particularly egregious. A second potentially important distinction in this context is one which focuses on the degrees of fault. In cases of subtractive unjust enrichment, the defence is available to defendants who have acted in good faith, even if they ought to have realised that they had been unjustly enriched. In contrast, in the context of restitution for wrongs, it may be appropriate to deny the defence to good-faith defendants who were careless in breaching claimants' rights, at least in those cases where the defendants have personally benefited in the course of changing their position. In circumstances in which defendants were not enriched, on the other hand, it should be enough that defendants changed their position in good faith.

## II. Innocent wrongdoers and change of position defence<sup>3</sup>

### A. *Identifying when issue is likely to assume significance – Release-fee awards*

5 The question as to whether morally blameless wrongdoers are entitled to have recourse to the change of position defence will be of consequence only in cases in which it would be advantageous for claimants to found an action on the defendant's gain rather than on their own loss. For torts in respect of which the defendant is strictly liable for the claimant's loss, a claim in restitution will not ordinarily offer any substantive advantage over an action for compensatory damages. On the other hand, the change of position defence could prove important where a claimant seeks to recover gains that exceed her own loss.

6 In theory, it is possible that the defence might assume relevance for this reason where a claimant, rather than suing for damages in tort, elects to sue in assumpsit for the gain made by the defendant in committing the wrong. This would be the case, where, for example, the claimant, instead of seeking damages in conversion for a wrongful sale by the defendant, sued in assumpsit to recover proceeds of sale by the

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3 The issue is examined in Paul A Walker, "Change of Position and Restitution for Wrongs: 'Ne'er the Twain Shall Meet?'" (2009) 33 *Melbourne University Law Review* 235.

defendant where those proceeds exceeded the value of the chattel sold.<sup>4</sup> Commentators examining the issue tend to treat this as the paradigm case for the application of the change of position defence in the context of restitution for wrongs.<sup>5</sup> In truth, however, claimants elected to sue in assumpsit rather than in tort because the former cause of action was subject to less onerous rules of evidence<sup>6</sup> and to less restrictive adjectival rules governing its availability.<sup>7</sup> Most of the disadvantages facing those seeking to sue in tort have been removed,<sup>8</sup> with the consequence that the practice of claimants with an action in tort electing to sue in assumpsit has fallen into disuse.<sup>9</sup>

7 Equally, the defence might theoretically have a role to play in the context of claims where the claimant seeks an account of profits. In practice, the defence is irrelevant in actions in contract or tort, where such relief is regarded as extraordinary and would never be awarded against defendants who had acted in good faith.<sup>10</sup> The law does, in contrast, impose strict liability for consequential profits derived from breaches of fiduciary duty, reflecting an impulse to protect vulnerable relationships of trust and confidence. There is no prospect of the change of position defence being made available in this context as it would undercut the objectives of certainty and deterrence that the courts have privileged.<sup>11</sup> Moreover, it is worth bearing in mind that breaches of

4 Cf *Lamine v Dorell* (1701) 2 Ld Ray 1216.

5 See Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 698; Paul A Walker, “Change of Position and Restitution for Wrongs: ‘Ne’er the Twain Shall Meet?’” (2009) 33 *Melbourne University Law Review* 235 at 256.

6 It was suggested, for example, that claimants might elect to sue in assumpsit to foreclose the possibility of a defendant’s resorting to wager of law: *Feltham v Terry* (1772) Lofft 207 at 209, *per* Aston J.

7 See J Beatson, “The Nature of Waiver of Tort” (1978-9) 17 *University of Western Ontario Law Review* 1 at 6. Early discussions of waiver of tort generally assumed that an action for money had and received would lead to a lower level of recovery than would a claim for compensation: see *Feltham v Terry* (1772) Lofft 207 at 208, *per* Lord Mansfield.

8 See J Beatson, “The Nature of Waiver of Tort” (1978-9) 17 *University of Western Ontario Law Review* 1 at 6.

9 Indeed, the last occasion in which a claimant with an action in tort was permitted by a court to gain an advantage by electing to sue in assumpsit appears to have been over 50 years ago in *Chesworth v Farrar* [1967] QB 407.

10 See *Attorney General v Blake* [2001] 1 AC 268, *Forsyth-Grant v Allen* [2008] 2 EGLR 16; [2008] EWCA Civ 505 and *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2009] Ch 390; [2008] EWCA Civ 1086.

11 The rule that fiduciaries may not profit from their position is strengthened by an approach that provides that a fiduciary will be liable for profits linked to a breach of duty even if the principal would have consented to the behaviour in question if such permission had been sought: see *Murad v Al-Saraj* [2005] All ER (D) 503; [2005] EWCA Civ 959. In addition, any benefit obtained in breach of a fiduciary duty will be held on trust for the principal, thereby allowing the principal to trace

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fiduciary duty, even if committed in good faith, are never entirely without fault, in that the law clearly spells out the prohibitions in question.

8 In practice, the change of position defence is most likely to aid a wrongdoer who is sued for a release fee in circumstances in which the claimant has suffered little or no loss. One reason the defence is potentially significant in this context is because the prevailing orthodoxy is that, even if such relief is viewed as gain-based in nature, claimants have the right to demand a release fee against morally blameless transgressors.<sup>12</sup> It is clear that the change of position defence would be relevant in only a small subset of claims for release fees. While deliberate wrongdoers will not be in a position to avail themselves of the defence, morally blameless wrongdoers who have committed torts of strict liability, such as trespass or conversion, would be potential beneficiaries of the defence. The defence might, for example, protect a defendant who enjoyed the possession of a chattel that was given or lent to him and who is able to demonstrate that he changed his position in good faith in the belief that the transferor had good title to that chattel. In addition, as *Cavenagh Investment* illustrates, the defence might avail good-faith purchasers sued for a release fee that would exceed the extent of any consequential loss suffered by the claimant.<sup>13</sup>

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into any profits made with the initial benefit received by the defendant: see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250; [2014] UKSC 45.

- 12 While there is no clear authority in English law for the award of release fees against morally blameless defendants, commentators generally assume that liability to make restitution in respect of the market value of the right breached is strict and devote attention only to the question of whether the change of position defence might be available: see, eg, James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) at p 81 and Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) ch 15. The orthodoxy in US law is that liability to account for use-value is strict: see Restatement Third, Restitution and Unjust Enrichment (2011) § 3 (providing a statement of general principle) and § 40 (providing the application of this principle to the torts of trespass and conversion). In *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543, Chan Seng Onn J advanced on the basis that the defendant's liability was strict, subject to the change of position defence.
- 13 At first sight, it might be argued that the example of the good-faith purchaser does not represent a paradigmatic example of a relevant change of position because the defendant's detrimental reliance takes place prior to or simultaneously with the transfer of the benefit. Nonetheless, it has been held that the defence might apply in cases where the relevant acts of detrimental reliance preceded the receipt of the benefit: *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193; [2001] UKPC 50. This is consistent with the approach taken by Chan Seng Onn J in *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543, where the defendant, who had paid a rent to a fraudulent third party, was entitled to rely on the defence.

## B. Conceptualisation of release-fee awards

9 Many judges and some commentators have insisted on characterising release-fee awards as loss-based in nature. Some argue that this form of relief should be understood as compensation for the loss of an opportunity to bargain.<sup>14</sup> However, the reality is that the courts do not insist on proof that, but for the defendant's breach, the claimant would have realised a valuable bargain.<sup>15</sup> Others argue that release-fee awards are properly characterised as compensatory not on the basis that they provide damages for consequential loss, but rather as compensation for a breach of the claimant's right *per se*. According to this analysis, such relief repairs "normative" harms rather than factual losses.<sup>16</sup> At present, however, there seems to be little judicial enthusiasm for an account of "vindictory damages".<sup>17</sup>

10 Commonwealth courts are divided on the question as to how release fees should be classified. The state of the authorities in England and Wales has reached the confused point where awards for the rental value of land are treated as gain-based,<sup>18</sup> while release fees awarded in other contexts are generally viewed as compensation for loss.<sup>19</sup> Courts in Australia have generally favoured a loss-based interpretation of release

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14 A seminal academic analysis in these terms was provided by Robert J Sharpe and S M Waddams: "Damages for Lost Opportunity to Bargain" (1982) 2(2) *Oxford Journal of Legal Studies* 290. Important judicial expressions of this view include Bingham MR in *Jaggard v Sawyer* [1995] 1 WLR 269 at 281–282 and Chadwick LJ in *WWF – World Wide Fund for Nature v World Wrestling Federation Entertainment, Inc* [2008] WLR 445; [2007] EWCA Civ 286.

15 For judicial recognition that release-fee awards cannot be analysed as compensation for loss of a chance, see *O'Brien Homes v Lane* [2004] EWHC 303 (QB) at [22], *per* David Clarke J, *Field Common Ltd v Elmbridge Borough Council* [2008] EWHC 2079 (Ch) at [90]–[91], *per* Warren J; see also Craig Rotherham, "Wrotham Park Damages' and Accounts of Profits: Compensation or Restitution?" [2008] *Lloyd's Maritime and Commercial Law Quarterly* 25 at 30.

16 The distinction between factual and normative losses draws heavily on the work of Ernest Weinrib: see Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995). For such accounts of release fees, see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at pp 67–68 and 79–84. For other accounts of release fees as compensatory, see Mitchell McInnes, "Gain, Loss and the User Principle" [2006] RLR 76; James Edelman, "Gain-Based Damages and Compensation" in *Mapping the Law: Essays in Memory of Peter Birks* (Andrew Burrows & Alan Rodger eds) (Oxford University Press, 2006) at p 141.

17 *Lumba v Secretary of State for the Home Department* [2012] AC 245; [2011] UKSC 12.

18 See *Lewisham LBC v Masterson* (2000) 80 P & CR 117 (CA); *Gondal v Dillon Newsagents Ltd* [2001] RLR 221; *Stadium Capital Holdings v Marylebone Property Co plc* [2010] EWCA Civ 952; *Enfield LBC v Outdoor Plus Ltd* [2012] EWCA Civ 608.

19 See, *eg*, *Jaggard v Sawyer* [1995] 1 WLR 269 at 281–282, *per* Bingham MR; *WWF v WWF* [2008] 1 WLR 445; [2007] EWCA Civ 286, *per* Chadwick LJ.

fees.<sup>20</sup> For its part, the Singaporean judiciary has shown a willingness to entertain a gain-based analysis of release fees in recent years. In *ACES System Development Pte Ltd v Yenty Lily*,<sup>21</sup> Andrew Phang Boon Leong JA, delivering the judgment for the Court of Appeal of Singapore, suggested that, in the absence of proof of actual loss, the award of a hire fee in a case involving the detention of personal property might be regarded as restitutionary. Ultimately, however, the court did not find it necessary to decide the point. The potential importance of analysing the issue in these terms had already been made apparent a few months before in *Cavenagh Investment*, where it enabled Chan Seng Onn J to conclude that the defendant was entitled to rely on the change of position defence.<sup>22</sup> As a consequence, the latter decision features prominently in this article.

11 For the most part, little of practical importance turns on the conceptual distinctions at issue. Regardless of whether we classify release-fee awards as compensating some form of harm or as gain-based in nature, there is no dispute that this form of relief should indeed be available in the vast majority of contexts in which it is employed. This points to one reason for examining the question of the extent to which morally blameless wrongdoers may, even in the absence of claimants' suffering any loss, be required to pay a release fee: for this is a context in which the classification of such an award may well determine the availability of relief. This article focuses on one possible limit on the liability of morally innocent wrongdoers.<sup>23</sup> As *Cavenagh Investment* highlights, if an action is conceived of as based on the defendant's enrichment, it might be asked whether the defendant might be permitted to limit liability by pleading the change of position defence. In contrast, the defence logically has no role to play if release fees are conceptualised as compensating the claimant's loss.

### III. State of law on the question

12 Much of the debate in Commonwealth jurisdictions surrounding the issue as to whether the change of position defence

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20 See *Bunnings Group Ltd v CHEP Australia Ltd* [2011] NSWCA 342 at [175], per Allsop P with Macfarlan JA concurring; cf at [199]–[205], per Giles JA; *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* [2012] WASC 285, per Edelman J.

21 [2013] 4 SLR 1317.

22 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543.

23 Another key issue concerns the relevance of “subjective devaluation” in measuring the extent of the defendant's enrichment. This is briefly addressed at paras 48–51 below, where it is argued the application of this technique to morally blameless wrongdoers provides an analogy that supports the use of the change of position defence in this context.

might be available to wrongdoers has centred on remarks of Lord Goff in *Lipkin Gorman v Karpnale Ltd*<sup>24</sup> (“*Lipkin*”). His Lordship observed:<sup>25</sup>

It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer ... [emphasis added]

13 Lord Goff did not, it would seem, use the term “wrongdoer” to signify those who are morally blameworthy.<sup>26</sup> After all, any change of position by such an actor could not, by definition, be in good faith and therefore would not meet an essential precondition for the defence. In consequence, it may be inferred that his Lordship was using the term to refer simply to those who have committed a legal wrong, and his observation is of interest precisely because it would apply to defendants who acted in good faith in committing wrongs of strict liability.

14 Lord Goff’s remarks have subsequently not only been treated as if authoritative by courts, but they have been applied surprisingly widely.<sup>27</sup> This reverence for the *dictum* in question is puzzling for at least three reasons. First, Lord Goff’s remarks are plainly *obiter*.<sup>28</sup> Secondly, his Lordship prefaced his observations by noting that, “[t]hese are matters which can, in due course, be considered in depth in cases where they arise for consideration”.<sup>29</sup> Thirdly, his remarks regarding the defence and wrongdoers were presented as being no more than a description of received wisdom, presumably for the reason that this reflected the position taken in the first Restatement of Restitution.<sup>30</sup> His

24 [1991] 2 AC 548.

25 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580.

26 Some commentators have favoured such a reading of Lord Goff’s remarks. See Paul A Walker, “Change of Position and Restitution for Wrongs: ‘Ne’er the Twain Shall Meet?’” (2009) 33 *Melbourne University Law Review* 235 at 245 and Jessica Palmer, “Chasing a Will-o’-the-Wisp? Making Sense of Bad Faith and Wrongdoers in Change of Position” [2005] RLR 53 at 76–80.

27 See, eg, *Barros-Mattos Junior v MacDaniels Ltd* [2005] 1 WLR 247; [2004] EWHC 1188 (Ch) (*dictum* applied on the basis that defendant’s actions in changing position breached foreign exchange regulations) and *FII v HMR&C* [2008] EWHC 2893 (Ch) (state treated as a “wrongdoer” for the purposes of a claim based on unlawfulness of tax).

28 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

29 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580.

30 Restatement, Restitution (1937) § 142(2). The position taken in the latest Restatement on the issue is unclear. The fact that there is no explicit provision denying the defence to wrongdoers and the reporter’s comments state that defence cannot be used by “conscious wrongdoers” might suggest that it would be available to defendants who are described in the Restatement as “unconscious wrongdoers”: see Restatement Third, Restitution and Unjust Enrichment (2011) § 65, Comment g. On the other hand, § 65 specifies that the defence is available to

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Lordship did not suggest that he necessarily endorsed this view and he made no effort to subject it to critical scrutiny.

15 Some judicial support for the view that the change of position defence might be available to wrongdoers can be found in *Kuwait Airways Corp v Iraqi Airways Co*.<sup>31</sup> After noting that some took the view that those who convert goods should be accountable for benefits gained as a result,<sup>32</sup> Lord Nicholls remarked: “[l]iability in this regard should be strict subject to defences available to restitutionary claims such as change of position”.<sup>33</sup>

16 The High Court of Singapore held that the change of position defence should be available in the context of a claim for mesne profits damages for trespass in *Cavenagh Investment*.<sup>34</sup> While it is a first instance decision, it deserves to be taken seriously. For one thing, in contrast to the abstract discussion found in earlier cases addressing the issue, the analysis of the question is clearly part of the *ratio* of the case. In addition, Chan J’s judgment featured a careful and thorough analysis of the relevant authorities and academic commentary.

17 The claimant in *Cavenagh Investment* was one of a group of companies that owned rental properties and were all owned by Ching Mun Fong. The rental properties were managed in turn by a company run by Ching and a few employees. The defendant was the victim of an elaborate fraud carried out by one of those employees who kept payments that the defendant intended to go to the landlord for himself. The defendant occupied the property for two and a half years in the honest belief that he was leasing it from the claimant. Upon discovering the fraud (which was part of a broader scheme including other properties managed by the company), the claimant brought an action against the defendant, claiming \$352,704 on the basis that this reflected the property’s market rental value during the period in question.

18 Chan J considered at length the controversy relating to the conceptualisation of release fees, concluding that liability could be

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“innocent recipients”, which is to say those defendants who receive property that makes them liable to make restitution without them being liable for a wrong. This implies that it is not available to unconscious wrongdoers.

31 [2002] 2 AC 883; [2002] UKHL 19.

32 See para 8, n 12 above.

33 *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883 at 1093; [2002] UKHL 19.

34 See Rachel Leow, “Change of Position in Restitution for Wrongs: A View from Singapore” (2014) 130 LQR 18, Tang Hang Wu, “Taking Stock of the Change of Position Defence” (2015) 27 SAclJ 148 and Kelvin Low, “The User Principle: *Rashomon* Effect or Much Ado about Nothing?” (2016) 28 SAclJ 984 at 1000-1001.

compensatory, restitutionary or both depending on the facts of a particular case.<sup>35</sup> However, given that the claimant had not received any offers to rent the property during the period, he reasoned that it could not be said that the defendant's occupation of the premises had caused the claimant any loss.<sup>36</sup> As a consequence, he concluded that the only action that the claimant could bring was one based on the defendant's gain. The principal effect of this analysis was, of course, to open up the possibility that the change of position defence might be raised to meet such a claim. Chan J concluded that, on the facts of the case, the defendant was indeed entitled to rely on the defence.

#### IV. Academic arguments against recognition of the defence in restitution for wrongs

19 Commentators who take the view that the change of position defence should not operate in the context of restitution for wrongs make their case by attempting to draw salient distinctions that would justify denying the defence to defendants in circumstances in which it would be allowed in favour of a defendant in a claim for enrichment by subtraction. The following three sections examine different types of arguments made by commentators who are hostile to the notion that morally innocent defendants might be allowed to avail themselves of the change of position defence.

##### A. Significance of fact that defendant has committed a wrong

20 In arguing that the change of position defence should not be available in this context, it is common to emphasise that the defendants concerned are "wrongdoers". The strongest claim in this regard is that it would be morally inappropriate to allow a defendant who has committed a wrong to escape liability by relying on the change of position defence. Ross Grantham and Charles Rickett, for example, suggested that the maxim that "no one should profit from his own wrong" justifies denying the defence.<sup>37</sup> There are a number of difficulties with this contention. First, in *Attorney General v Guardian Newspapers*

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35 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [44]–[50].

36 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [52]. This was a consequence of the claimant's policy of insisting on letting its property only for very high rentals because it was "selective of its tenants".

37 Ross Grantham & Charles E F Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000) at p 354. At one time, Andrew Burrows appeared to assume as much in that he treated the exclusion of the defence for tortfeasors as unproblematic: see Andrew Burrows, *The Law of Restitution* (Oxford University Press, 1st Ed, 1993) at p 431. Burrows now bases his opposition to the defence on different grounds: see para 24 below.

*Ltd (No 2)*,<sup>38</sup> Lord Goff himself observed that, “[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 particular problem in any particular case”.<sup>39</sup> Secondly, the argument assumes that the maxim was intended to apply to morally blameless defendants without explaining why. In reality, the maxim draws its intuitive force from the notion that it would be inappropriate that the blameworthy should profit from their actions; it loses that force when applied to defendants who have clear consciences.

21 A different suggestion is that it somehow follows from the fact that the wrongs in question are ones of strict liability that a defence of change of position should not be available. In his monograph on gain-based relief, James Edelman suggested that to make the defence available in the context of conversion would be inconsistent with what he characterised as “a long-standing principle of English law”<sup>40</sup> encapsulated in Baron Cleasby’s remark in *Fowler v Hollins* that people “exercise acts of ownership over [chattels] at their peril”.<sup>41</sup> It is difficult to see that the statement deserves to be characterised as a “principle” as such; it is more a description of the state of the law than a rationale justifying it. Moreover, the remark is made in the context of a claim for compensatory damages. The assumption that the change of position defence should not apply to a claim for gain because no such defence is available to an action for loss ignores the different bases for the two forms of liability in question. Where a defendant is sued in conversion for damages, the concern is the claimant’s loss, and nothing that the defendant has done to change his position in reliance on his right to a chattel alters the claimant’s situation in this regard. Where, in contrast, the defendant is sued for a gain, evidence of a change of position is relevant to show that it would be unfair to require the defendant to account to the claimant for that gain. Given the quite different normative foundations of the two actions, there is no necessary inconsistency in holding that a change of position might provide a defence to one action but not the other.

22 Strict liability for loss in conversion is more an accident of history than the realisation of some well-defended principle.<sup>42</sup> Indeed, it

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38 [1990] 1 AC 109.

39 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 286; see also Paul A Walker, “Change of Position and Restitution for Wrongs: ‘Ne’er the Twain Shall Meet’?” (2009) 33 *Melbourne University Law Review* 235 at 253.

40 James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) at p 96.

41 (1872) LR 7 QB 616 at 639.

42 See David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) at p 112; S F C Milsom, *Historical Foundations of the* (cont’d on the next page)

is difficult to justify imposing liability for loss on a morally blameless defendant.<sup>43</sup> Nevertheless, it is clear that strict liability for loss is so firmly established that the courts are unlikely to contemplate reversing this position, nor are they likely to be inclined to extend its reach.<sup>44</sup> The law relating to restitutionary liability for wrongs is, in contrast, undeveloped and, indeed, is still often treated by the courts as anomalous.<sup>45</sup> In light of this and of the relatively recent recognition of the change of position defence, the courts have a choice to make in determining the scope of gain-based liability. There is little to be said for holding that the defence should be denied in this context simply to ensure that liability for gain is as strict as liability for loss.

**B. *Notion that change of position defence is analytically specific to claims for subtractive enrichment***

23 Some commentators have advanced accounts that are essentially analytical in nature to explain why the defence should not be available in this context. Those who take the view that the change of position defence has a role to play in restitution for wrongs tend to reason that the defence should be available by analogy with its use in cases of enrichment by subtraction, on the basis that both are concerned with unjust gains. Those who, in contrast, take the position that the defence should not be available to wrongdoers reason that the analogy is a weak one. In their view, the rationale of the change of position defence reflects concerns which equally inform the principles underlying subtractive unjust enrichment but which are quite alien to the norms providing relief for restitution for wrongs.

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*Common Law* (Butterworths, 2nd Ed, 1981) at p 378; Simon Douglas, “The Nature of Conversion” (2009) 68(1) *Cambridge Law Journal* 198 at 199; Paul A Walker, “Change of Position and Restitution for Wrongs: ‘Ne’er the Twain Shall Meet?’” (2009) 33 *Melbourne University Law Review* 235 at 257.

43 Indeed, Simon Douglas recently observed that “[p]ractitioners and courts are clearly uncomfortable with the strict liability of the action”: Simon Douglas, “The Nature of Conversion” (2009) 68 *Cambridge Law Journal* 198 at 198.

44 A good indication of this is the refusal of the House of Lords to extend conversion to cover interferences with choses in action in *OBG Ltd v Allan* [2008] 1 AC 1; [2007] UKHL 21. Lord Hoffmann, in particular, showed a concern with extending the reach of strict liability.

45 For illustrations of judicial tendency to regard gain-based relief as exceptional, see *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 (CA); [1988] 3 All ER 394 (CA) at 397, *per* Nourse LJ, *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 (CA) at 1369–1370 (CA), *per* Steyn LJ and *Halifax Building Society v Thomas* [1996] Ch 217 (CA) at 227–228, *per* Peter Gibson LJ.

24 In this vein, Andrew Burrows explained his conclusion that the defence is unavailable to innocent wrongdoers on the basis that:<sup>46</sup>

[C]hange of position is inextricably bound up with the cause of action of unjust enrichment [that is, enrichment by subtraction] alone and ... ensuring security of receipt, which is one of the purposes of change of position, is simply not relevant to restitution for wrongs. A cause of action of unjust enrichment requires a reversal of a transfer of value for reasons that do not relate to the need to 'remedy' a wrong so that, while change of position operates to counter the non-wrongful transfer of value, it cannot ever outweigh the policies justifying restitution for a wrong ...

Burrows based his conclusion in part on the notion that the change of position defence is available in the context of cases of enrichment by subtraction for reasons that do not apply in cases of enrichment by wrongs. It would be difficult to disagree with the claim that there is a distinction to be drawn between the rationale for the use of the defence in the context of subtractive enrichment, on the one hand, and in relation to enrichment by wrongs, on the other. It seems reasonable to say that "security of receipt" is not relevant in the context of restitution for wrongs because this category is not concerned with transfers of wealth from the claimant. On the other hand, it is less clear that this analytical distinction carries the normative significance that Burrows attributed to it. Defendants who have without fault occupied land or possessed goods have a reasonable expectation that they should not be required to account for the value of their use of such assets. This interest in the "security of benefits" resulting from such an innocent infringement can appropriately be addressed through the change of position defence.

25 Burrows' account appears to assume that the centrality of the policy of "security of receipt" to the concept of change of position demonstrates that the defence has no role in the context of restitution for wrongs. Yet, the premise on which his argument rests does not appear to be powerful enough to support this conclusion. Burrows claims only that security of receipt is "one of the purposes" of the defence; he does not make the argument that it is so central to the defence that, logically, it can operate only in response to transfers of value from the claimant. A transfer of value from the claimant is simply one way in which the defendant may be enriched. There is no reason *a priori* why such a transfer should be a necessary condition for the availability of the change of position defence.

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46 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at pp 699–700.

26 It is far from clear that a concern with security of receipt should be regarded as being at the heart of the change of position defence. After all, if it were an overwhelming concern, it would justify holding that the innocent receipt of a benefit *per se* gave rise to a defence, without insisting on the presence of detrimental reliance. Equally, if security of receipt were so important, the defence should operate to excuse the defendant of liability completely rather than operating to eliminate it only to the extent of any change of position. The fact that the defence applies only to the extent that defendants have changed their position in good faith to their detriment suggests that the defence is not concerned with security of receipt *per se*; rather, its concern is with the unfairness of requiring restitution in these circumstances.<sup>47</sup> There is no obvious reason why such a concern should not equally arise in some cases of restitution for wrongs.

27 Finally, even if we assumed the validity of the premises of Burrows' analysis, there is no reason to accept the conclusion that he derived from them. Even if it were true that the change of position defence were deployed in cases of unjust enrichment by subtraction because of a concern with the security of receipt, it would not logically follow that it might not be made available in the context of restitution for wrongs for other reasons.

28 In *Cavenagh Investment*, Chan J noted Burrows' analysis of the area in considering whether a morally blameless defendant might benefit from the change of position defence in the context of a claim to recover a release fee in the form of mesne profit damages.<sup>48</sup> Ultimately, he rejected Burrows' preference for a blanket exclusion of the defence in this context, favouring instead an approach that considered whether the policies underlying the particular wrong outweighed the rationale for the defence.<sup>49</sup>

### C. *Policy-based justifications for denial of the defence*

29 A third type of rationale for denying that the change of position defence has any role in restitution for wrongs evokes considerations of policy. Here, the suggestion is that allowing the defence would in some way be inconsistent with the policies underlying the defendant's wrong.

30 Elise Bant, the author of a monograph on the defence, took a more cautious position. While she suggested that there is no reason in principle why the change of position defence should not be used in the

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47 See Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 215.

48 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [62].

49 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [63]–[64].

context of wrongs of strict liability, she concluded that the extension of the defence in such circumstances raises difficult policy questions. This led her to make the following observation:<sup>50</sup>

Unfortunately, it is not a question capable of general reply. Each wrong must be individually addressed to see whether recognition of a change of position defence would undermine the law's prohibition. Certainly the position taken by the law to date in respect of innocent converters and breaching fiduciaries has indicated that it will. This is most likely because permitting the defence is seen to undermine the protection of claimants' proprietary rights in the first case and because of the need to deter breaches of fiduciary duty in the second ...

31 It is difficult to disagree with the notion that a nuanced approach is desirable and that we should resist the urge to offer universal answers. Moreover, Bant's suggestion that special considerations apply in the context of fiduciaries is very plausible.<sup>51</sup> However, the notion that the courts have already taken a position on the availability of the defence for innocent converters is unconvincing. We should, moreover, be suspicious of vague appeals to notions of absolute property rights that hardly do justice to the nuanced manner in which the common law protects rights to different resources in diverse contexts.<sup>52</sup> The interest in protecting one party's proprietary rights that would be promoted by holding wrongdoers liable for any benefit must be judiciously balanced against a morally blameless defendant's interest in freedom of action. An appropriate balance would not be struck if such defendants were held strictly liable to make restitution despite having their changed position to their detriment.

32 In *Cavenagh Investment*, Chan J adopted Bant's view that the courts should consider whether the policy objectives underlying a particular wrong would be unduly undermined by the application of the change of position defence.<sup>53</sup> His Lordship cited Bant's conclusion that the reasons for granting the defence were likely to be overridden by policy considerations favouring the protection of property rights.<sup>54</sup> He then proceeded, however, to apply the defence in just such a case, baldly stating, "I do not think that there is any overriding policy rationale requiring the remedying of the wrong of trespass to land with the award of restitutionary damages that would be stultified by the application of

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50 Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 172.

51 Craig Rotherham, "Deterrence as a Justification for Awarding Accounts of Profits" (2012) 32(3) *Oxford Journal of Legal Studies* 537 at 549.

52 Craig Rotherham, "The Normative Foundations of Restitution for Wrongs: Justifying Gain-Based Relief for Nuisance" in *The Goals of Private Law* (Andrew Robertson & Tang Hang Wu eds) (Hart Publishing, 2009) at pp 400–407.

53 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [63]–[64].

54 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [63]

the change of position defence.”<sup>55</sup> Thus, he concluded that the defendant was entitled to be relieved of liability for the period during which he was unaware of the claimant’s rights.<sup>56</sup>

## V. Normative basis for recognising change of position as defence to claims for release-fee awards

### A. “Core case”: Changes of position involving beneficial dissipation of enrichment

33 Most of the discussion regarding the basis and scope of the defence has centred on a type of case that has been treated as the paradigmatic example of a relevant change of position. This “core case”, as Bant has described it,<sup>57</sup> involves a defendant whose receipt of a benefit leads him to indulge in expenditure or consumption of assets that he otherwise would have avoided. To the extent that the defendant incurs such expenditure or indulges in such consumption, it is argued that there is no “surviving enrichment”.<sup>58</sup>

34 The application of the defence in these circumstances is often described as responding to “disenrichment”.<sup>59</sup> An argument that is sometimes made in these terms is that such evidence of dissipation of assets goes further than simply providing the basis of a defence to a claim for unjust enrichment.<sup>60</sup> Instead, it is reasoned, such evidence indicates that the defendant was not enriched at all. Understood in this way, a plea of change of position might be interpreted not as raising a

55 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [65].

56 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [73].

57 See Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at pp 2–3.

58 Peter Birks, “Change of Position and Surviving Enrichment” in *The Limits of Restitutionary Claims: A Comparative Analysis* (William Swadling ed) (United Kingdom National Committee of Comparative Law, 1997).

59 See Tang Hang Wu, “Taking Stock of the Change of Position Defence” (2015) 27 SAclJ 148 at 156. The scope of the change of position defence in cases of unjust enrichment by subtraction is a matter of contention. In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, the Australian High Court favoured a broad conception of the defence and concluded that, in instances where it was difficult to value the extent of the detriment suffered by the defendant as the result of a change of position, the defence should operate to exclude liability altogether. While there is English appellate authority that would appear sympathetic with such a broad approach (see, eg, *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663), there is equally a strong current of opinion among English academics that provides that the defence should permit defendants to avoid liability only so far as they can establish that a change of position has resulted in “disenrichment”. This controversy is beyond the scope of this article.

60 For an account and evaluation of such arguments, see Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at pp 126–130.



defence properly speaking but rather as an argument that the claimant has not established an element necessary to his cause of action.<sup>61</sup>

35 This analysis is misconceived. Where the change of position takes the form of the dissipation of wealth for the defendant's own benefit, the absence of surviving enrichment does not imply that the defendant was not enriched as result. The fact that the defendant dissipated wealth on goods or services of his choosing suggests that he could not deny that he valued those benefits. The best justification of the defence is that, despite his enrichment, it would be unfair to require the defendant to make restitution because the receipt of the benefit in question caused him to indulge in expenditure in a fashion that would not have reflected his spending priorities had he been aware that he would have to account for that benefit. In cases of enrichment by subtraction, this reflects a judgment that a good faith defendant's interest in making fully informed spending choices outweighs the fact that the defendant has been enriched by a transfer of wealth from the claimant.

36 The argument for holding morally blameless defendants liable for their gains in the first place is relatively unpersuasive. Where a claim is made for enrichment by subtraction, the defendant's gain is equal to the claimant's loss. In terms of moral desert, the claimant in such a situation has a particularly compelling case for relief.<sup>62</sup> After all, an award of restitution will do no more than return the parties to the *status quo ante*, while a refusal to grant such relief will leave the defendant enjoying an enrichment corresponding to the loss suffered by the claimant. On the other hand, actions for enrichment "by wrongs" are based upon the fact that the defendant's enrichment represents a profit derived from a wrong to the claimant, without relying on establishing that the claimant has suffered an equivalent loss. Justifying the provision of relief on such a basis is in some ways harder, and English courts have tended to be somewhat reluctant to accept that it should be widely available.<sup>63</sup> Generally, the intuition that gain-based relief should be awarded for a wrong follows from the view that it would be appropriate to punish and/or deter those who have profited from blameworthy conduct. Adopting this perspective, the case for holding deliberate wrongdoers liable for their gains appears to be straightforward. The conventional view that even morally blameless defendant should pay a release fee for any advantage gained from a wrong is harder to justify.

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61 See, eg, Mitchell McInnes, "Enrichment Revisited" in *Understanding Unjust Enrichment* (Jason W Neyers, Mitchell McInnes & Stephen G A Pitel eds) (Hart Publishing, 2004) at p 196.

62 L L Fuller & William R Perdue Jr, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52 at 56.

63 See para 22, n 45 above.

The willingness to impose liability on such defendants suggests that there is a rights-based justification for such relief. However, the basis of any such right has not been adequately explained and can only be regarded as fragile at best.

37 It follows that it should be relatively easier to explain why a morally innocent wrongdoer should be able to rely on the change of position defence than it is to justify the provision of that protection to a defendant in an action for subtractive enrichment. In the first instance, allowing the defence would do no more than deny the claimant a windfall, leaving him in the position he was in before the wrong. In contrast, in the latter context, allowing a defendant to raise the defence leaves the claimant to suffer a loss.

38 It would be useful to consider in some detail instances in which the defence might be raised in circumstances in which the defendant made use of the claimant's property for his own benefit in reliance on his presumed entitlement to do so. Consider, firstly, an example from the original Restatement of Restitution:<sup>64</sup>

A transfers the title to his car to B because of B's fraudulent misrepresentations. B lends the car to C who has no notice of the fraud. C uses it for business purposes for a period of four months and then stores it for a further period of two months. Upon learning of the facts, C returns the car. A is entitled to restitution from C of the reasonable value of the use of the car for four months.

Let us assume that C needed a car during the period in which he used the vehicle in question and would have had to have rented one if he had not benefited from the gift from B. As a result, there is no difficulty in saying that C was incontrovertibly benefited by his use of A's property. The result contemplated in the Restatement would seem relatively uncontroversial if we could say that C's use deprived A of the use of his car, as this would effectively present itself as a case of restitution by subtraction where A suffers a loss that corresponds to C's gain. Alternatively, such a result could be provided for by a claim for consequential loss, for which defendants are plainly strictly liable in conversion. What is more contentious is that a defendant might be strictly liable for an enrichment that does not correspond to any loss suffered by the claimant. Let us imagine, then, that the facts are that A had already bought a new car and was persuaded to sell his second car, which was not in use, to B (who paid with a cheque that was subsequently dishonoured). Let us, equally, assume that C is able to demonstrate that, treating the saved expenditure as a windfall, he spent an equivalent sum on an overseas vacation. With the addition of these

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64 Restatement, Restitution (1937) § 157, Comment e, Illus 7.

facts, the scenario provides a good basis for considering whether an innocent converter should be entitled to resort to the change of position defence.

39 The case in favour of allowing the defence in the context of this example is an easy one. A's claim is a relatively weak one. Should there be a claim against C simply because he enjoyed the valuable use of A's car, if A suffered no harm from the episode? While that result is not particularly shocking, is it really justified? Why should C be liable to pay A a sum that he would never have earned otherwise? It might be argued that this is a windfall that should be left to lie where it fell. The contrary argument is, of course, that a defendant should not enjoy a gain from breaching someone else's rights. What seems clear, however, is that the change of position on the part of C would make the imposition of gain-based liability manifestly unjust. To require such a defendant to make restitution would be to disregard his interest in determining his own spending priorities while giving a claimant a windfall for no compelling reason.

**B. *Beyond the “core”: Changes of position resulting in defendants’ deriving no enrichment***

40 As mentioned, most of the discussion regarding the basis and scope of the defence has centred on what has been treated as “the core case”, in which the defendant argues that his receipt of the advantage in question caused him to indulge in exceptional expenditure and that his liability should be limited only to any enrichment that “survives”.<sup>65</sup> A feature of such cases where the defence is applied on this basis is that defendants are excused of liability despite the fact they were personally enriched by the dissipation of wealth involved in their change of position.

41 Instances where the gist of the defence is that there is no extant enrichment because the defendants have dissipated wealth may be contrasted with circumstances where the defendant is able to demonstrate that his change of position was such that he derived no gain from the benefit in question. This may happen in quite different ways. One example is provided by agents who pay over benefits to their principals.<sup>66</sup> While English law recognised a defence in these circumstances prior to the recognition of the change of position, the protection afforded to agents in these circumstances is regarded in American law as a particular application of the more general defence. Equally, Lord Goff suggested that the law's approach to this problem

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65 See paras 33–35 above.

66 Restatement Third, Restitution and Unjust Enrichment (2011) § 65, Comment b.

“can arguably be said to rest upon change of position”.<sup>67</sup> Another example of such a change of position is provided by instances where a third party tricks a claimant into transferring a benefit to the defendant who is equally fooled into passing that benefit onto the fraudster.<sup>68</sup> A third type of case falling within this category involves defendants who act to their detriment by providing consideration in circumstances in which the *bona fide* purchaser defence is not available.<sup>69</sup> A final illustration of such a case might be one where the defendant changes his position not in acquiring goods or services for his own benefit but instead gives the money away to a third party.<sup>70</sup>

42 There is a normatively salient distinction to be drawn between cases in which the basis for the defence is that the defendant changed his position by dissipating enrichment and those where he can argue that his actions were such that he gained no net enrichment from the benefit. Whereas the aphorism that a defendant should not profit from a wrong still has force in the former case, it has no relevance in the latter. Indeed, it is difficult to see what the argument could be for compelling a defendant who acted without fault to account for the receipt of a benefit from which he ultimately derived no enrichment. The defendant would not be required simply to account for a gain but would rather be left to suffer a net loss. This result would be particularly difficult to justify in the context of restitution for wrongs as the outcome would involve not a bid by the claimant to shift a loss onto the defendant but rather an attempt to obtain a windfall.

43 It is mysterious quite why cases of beneficial dissipation of wealth have been treated as so essential to the analysis of the change of position defence in the Commonwealth. *Lipkin*, the decision in which the defence was recognised in English law was, indeed, a case in which the defendant avoided liability to the extent that it gained no net enrichment from its receipt of the traceable proceeds of the claimant’s property. In his judgment, Lord Goff supported the recognition of the defence by relying on examples in which defendants’ actions would have arguably resulted in them obtaining no net advantage.<sup>71</sup> Lord Templeman, in contrast, invoked instances of extraordinary

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67 [1991] 2 AC 548 (HL) at 578; see also Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 65.

68 See, eg, *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

69 See, eg, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 and *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543.

70 See the examples given by Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 579.

71 The examples involve defendants paying the money over to charity: see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 579.

expenditure to illuminate his discussion of the defence.<sup>72</sup> It is the latter form of change of position that has generally attracted attention in academic discussion.

44 Such a focus on instances of beneficial dissipation of wealth is not apparent in the Restatements of Restitution. Most of the examples of the defence provided in the original Restatement involve defendants who have derived no net enrichment from their change of position.<sup>73</sup> In the most recent Restatement, the defence is justified on the basis that liability to make restitution in full “without deduction ... would exceed the net enrichment of the recipient attributable to the transaction with the claimant”<sup>74</sup>

45 One result of the failure to focus on the difference between instances of dissipation of wealth, on the one hand, and cases of no net enrichment, on the other, is that it has encouraged an assumption that there is a single rationale for permitting a defendant to escape liability. The reality is that the justifications for excusing a defendant of liability are quite discrete in these two instances; and the case for permitting a defence in situations where a defendant gains no net enrichment is patently stronger than it is on occasions involving the extraordinary dissipation of wealth for the defendant’s own benefit. It follows that it would not be unprincipled for a legal system to choose to deny a defence in cases of dissipation of wealth but to allow it in instances where the defendant derived no net enrichment. This is indeed consistent with the fact that a defence was afforded to agents who had passed on the benefit following their principals’ instructions long before the recognition of a wider change of position defence.

46 Equally, there are signs in American law that, despite the orthodoxy that those who have committed a tort should not be permitted to avail themselves of the change of position defence, defendants who have gained no enrichment from the benefit in question might be permitted to escape liability. Thus, in the example from the original Restatement of Restitution, cited above, it is concluded without explanation that the defendant would not be liable for a period in which he was in possession of the claimant’s car but made no use of it.<sup>75</sup> While a market value could be attached to the possession of the vehicle, it is assumed that the defendant should be excused of liability to the extent that he derived no actual benefit from his custody of it. This result is explained as “being based upon the principle which underlies § 142

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72 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 560.

73 See Restatement, Restitution (1937) § 142, Comment b.

74 Restatement Third, Restitution and Unjust Enrichment (2011) § 65, Comment a.

75 Restatement, Restitution (1937) § 157, Comment e, Illus 7; see also para 38 above.

dealing with change of position”.<sup>76</sup> Yet, it is difficult to square this explanation with the Restatement’s position that the defence is not available to tortfeasors.

47 It is against this background that we can appreciate why the argument for allowing the defendant the protection of the change of position was irresistible in the context of a claim for mesne profits in *Cavenagh Investment*.<sup>77</sup> The case for allowing the defence was an easy one. The claimant was not in a position to demonstrate that it had suffered any loss as a result of the defendant’s trespass, while the defendant had in good faith paid the market rental rate for the premises in question and thus derived no net enrichment from his transgression. In these circumstances, there was no compelling reason to hold the defendant liable to pay a fee reflecting the market rental price. The only gain-stripping claim that would have been appropriate would have been one against the claimant’s fraudulent employee.

### C. *Change of position and subjective devaluation*

48 The notion that the change of position defence has no place in the law of restitution for wrongs is undermined by the willingness of English courts to respond to autonomy-focused concerns by allowing certain wrongdoers to avoid liability by pleading that they did not freely choose a benefit and should not be held liable to the extent that they were not incontrovertibly enriched.<sup>78</sup> The seminal decision on the question is *Ministry of Defence v Ashman*<sup>79</sup> (“*Ashman*”). The defendant continued, out of necessity, to occupy housing provided by the claimant after being lawfully required to vacate the premises. A majority of the UK Court of Appeal concluded that the defendant’s liability should be limited to reflect rents charged for subsidised accommodation provided by local authorities.<sup>80</sup> Hoffmann LJ characterised this treatment as “subjective devaluation” of the benefit in question.<sup>81</sup> Given that the defendant in *Ashman* was allowed to “devalue” the relevant benefit despite the fact that she had deliberately committed an act of trespass, it

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76 Restatement, Restitution (1937) § 157, Comment e.

77 For a discussion of the case, see paras 16–18 above.

78 For an analysis of the issue, see Craig Rotherham, “Subjective Valuation of Enrichment in Restitution for Wrongs” [2017] *Lloyd’s Maritime and Commercial Law* 412.

79 [1993] 2 EGLR 102 (CA).

80 See *Ministry of Defence v Ashman* [1993] 2 EGLR 102 (CA) at 104–105, *per* Kennedy LJ and at 105, *per* Hoffmann LJ.

81 See *Ministry of Defence v Ashman* [1993] 2 EGLR 102 (CA) at 105. Just 6 months later, in *Ministry of Defence v Thompson* [1993] 2 EGLR 107 (CA), a case with similar facts, the UK Court of Appeal unanimously applied the same approach.

is scarcely disputable that a defendant who has breached a claimant's rights unknowingly and without fault would be entitled to do the same.

49 The use of the change of position defence in cases of beneficial dissipation of enrichment and the doctrine of subjective devaluation share a concern with ensuring that a defendant's freedom of choice is protected. Subjective devaluation, on the one hand, is concerned with benefits that are not incontrovertibly enriching and which were not freely chosen by defendants.<sup>82</sup> As mentioned, in the context of the "core case", the change of position defence is concerned with decisions to expend wealth that are not fully informed for the reason that the defendants did not understand they would have to account for the value dissipated.<sup>83</sup> Prior to the recognition of the change of position defence, Peter Birks argued that the strongest argument for such a defence was provided by the concern for defendants' autonomy demonstrated by the willingness of the courts to allow defendants to subjectively devalue benefits.<sup>84</sup> Given that the concept of subjective devaluation and the defence of change of position both respond to a concern for the autonomy of good faith defendants, it is implausible to suggest that we might allow morally blameless wrongdoers to subjectively devalue benefits and yet maintain the view that the change of position defence is excluded as a matter of analytic logic. It is not surprising then that those academics who argue that the change of position defence has no role to play in restitution for wrongs are critical of the use of subjective devaluation in this context.<sup>85</sup>

50 Birks was, nevertheless, overstating the case when he suggested that the protection afforded by these two concepts is so analogous that one could not logically permit defendants the benefit of subjective devaluation while denying the change of position defence in cases that involve extraordinary expenditure incurred for the defendant's own benefit. While it is true that the two concepts share a concern with defendants' autonomy, the arguments for holding that defendants who cannot be shown to have valued a benefit should not have to account for it are stronger than those for excusing defendants who have been subjectively enriched by the wrong in question but have dissipated that

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82 On the role of subjective devaluation in protecting defendants' autonomy, see Mitchell McInnes, "Enrichments and Reasons for Restitution: Protecting Freedom of Choice" (2003) 48 McGill LJ 419 and A V M Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing, 2012) ch 6.

83 See para 35 above.

84 See Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Rev Ed, 1989) at p 413.

85 See Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 626 and James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) at p 71.

enrichment in good faith. In the first instance, the defendant's case is that the claimant cannot prove that the defendant valued the enrichment at all. In the second instance, the defendant seeks to avoid being held to account for enrichment that he plainly did prize. It follows that it would not be logically inconsistent to draw a line in balancing the interests of claimants seeking restitution against the autonomy of defendants by allowing morally blameless defendants to plead subjective devaluation but denying them the change of position defence. Such an approach might be taken in relation to restitution for wrongs, although it would be difficult to explain why the law should strike a balance in this context that is different from that favoured in relation to cases of enrichment by subtraction.

51 It would, on the other hand, be impossible to justify allowing defendants to plead subjective devaluation while denying the change of position defence in cases in which a morally blameless defendant gained no net enrichment as a result of the wrong. A defendant who is able to demonstrate that he was not personally enriched as a result of a wrong has a stronger case for escaping liability than does one who simply relies on the fact that the claimant cannot conclusively prove that the defendant valued the benefit in question.

## VI. “Crossing the line” – Further issues to be determined in delimiting availability of the defence in release-fee cases

52 A good proportion of scholars reflecting on the subject favour the view that the change of position defence should be available in response to a claim for gain-based relief in the context of wrongs of strict liability.<sup>86</sup> These commentators have, however, offered few details as to how the defence would operate. In the process, they have failed to heed Birks' warning that while, “[i]t may be difficult to hold [the] line” that wrongdoers cannot avail themselves of the change of position defence, “it will also be difficult to know how to cross it”.<sup>87</sup>

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86 See Richard Nolan, “Change of Position” in *Laundering and Tracing* (P B H Birks ed) (Clarendon Press, 1995) at pp 153–154, Charles Harpum, “Knowing Receipt: The Need for a New Landmark: Some Reflections” in *Restitution: Past, Present & Future: Essays in Honour of Gareth Jones* (W R Cornish, Richard Nolan, J O'Sullivan & G Virgo eds) (Hart Publishing, 1998) at p 250, Phillip Hellwege, “The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study” [1999] RLR 92, Andrew Tettenborn, *The Law of Restitution* (Cavendish Press, 3rd Ed, 2001) at p 278, Graham Virgo, *Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at p 693, John D McCamus, “Rethinking Section 142 of the Restatement of Restitution: Fault, Bad Faith and Change of Position” (2008) 65 Wash & Lee L Rev 889 at 919 and *Goff and Jones: The Law of Restitution* (Gareth Jones ed) (Sweet & Maxwell, 7th Ed, 2009) at p 866.

87 Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd Ed, 2005) at p 98.



53 One question that would have to be addressed is whether wrongdoers seeking to raise the defence would be subject to the same preconditions that apply in respect of subtractive unjust enrichment claims, for which the defence is available provided the defendant acted in good faith.<sup>88</sup> Chan J in *Cavenagh Investment*,<sup>89</sup> concluded that, even if he had taken the view that the defendant had been careless in the course of being defrauded by the claimant's employee, the defence ought still to have been available.<sup>90</sup>

54 It might be objected that the assumption that the defence should equally be available to all good faith wrongdoers is misconceived. We allow a good faith recipient of an enrichment transferred to him without any wrongdoing on his part to raise the defence, even if he acted carelessly in changing his position, because he owed no duty of care to the claimant in these circumstances. A defendant who has, in contrast, gained from breaching the claimant's rights before changing his position by dissipating wealth for his own benefit does not necessarily deserve the same protection. While defendants in enrichment-by-subtraction claims have typically had their enrichment thrust upon them as result of a mistake on the claimant's part, a defendant in an enrichment-by-wrongs claim has acquired the benefit as a result of breaching the claimant's rights. Thus, it might reasonably be thought that a different balance should be struck where the defence is raised in the context of restitution by wrongs.

55 It may be that in negotiating the threshold for the defence, we should play closer attention to different types of change of position than we do in cases of subtractive unjust enrichment. Where the defendant's actions are such that he does not ultimately gain from the breach in question, there is a strong case for concluding that good faith should be a sufficient requirement for establishing the defence. Thus, on the facts of *Cavenagh Investment*, where the defendant was a *bona fide* purchaser of a possessory interest in land, Chan J was probably right to conclude that, even if the court had taken the view that the defendant had been careless in the course of being defrauded by the claimant's employee, the defence ought still to have been available.<sup>91</sup>

56 On the other hand, it is hardly clear that it would be desirable to permit a defendant who has carelessly breached another's rights to be excused from paying a release fee where his change of position involved dissipating the benefit received for his own benefit. In such a case, it

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88 *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

89 For an analysis of the case, see paras 16–18 and 47 above.

90 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [72].

91 See *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [72].

might be preferable to make the defence available only to those defendants who have acted without fault and to deny it to defendants who ought to have been aware that they were infringing another's rights.

## VII. Conclusion

57 The question of the liability of innocent wrongdoers for benefits derived from breaching a claimant's rights raises a series of interesting normative issues. In addition, this inquiry has the virtue of throwing light upon an unresolved disagreement concerning demarcation of the boundary between gain-based and compensatory relief. This rather fundamental issue of taxonomy has proved to be intractable in large part because it has seemed to be without practical consequence. Studying the question of the liability of morally blameless wrongdoers to pay a release fee is useful precisely because the way in which such relief is classified will determine the choices we have in deciding whether such liability should be subject to the change of position defence. This article suggests that the defence should be available to morally blameless wrongdoers and that none of the arguments to the contrary withstand close analysis. The autonomy of such defendants is as deserving of respect as that of those who are sued for enrichment by subtraction. It follows that it is imperative that release fees should be understood as gain-based, because it is only if they are so categorised that the courts will be able to do justice for morally blameless wrongdoers. Questions remain to be answered as to the preconditions for the use of the defence in restitution for wrongs. It should not be assumed that the defence should be available to all good-faith defendants in the way that it is in cases of unjust enrichment by subtraction. Nor should it be presumed that all forms of changes of position should be protected in the same way that they are in the context of unjust enrichment by subtraction. In the context of restitution for wrongs, there are good reasons for distinguishing between defendants who have personally benefited from their change of position and those whose alteration of circumstances results in them obtaining no net enrichment.

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