

TAKING STOCK OF THE CHANGE OF POSITION DEFENCE

The change of position defence is a developing doctrine and debate continues as to its true rationale and various facets of the defence remain unclear. Many issues surrounding the following two fundamental questions await clarifications from the courts: (a) What constitutes change of position? (b) What kind of conduct disqualifies a person from relying on the change of position defence? This article attempts to map out the contours of the debate which would hopefully be useful in framing the debate when this matter next comes before the courts.

TANG Hang Wu

*PhD, LLM (Cambridge), LLB (National University of Singapore);
Advocate and Solicitor (Singapore);*

Professor, School of Law, Singapore Management University;

Academic Director, Centre for Cross-Border Commercial Law in Asia.

I. Introduction

1 Change of position¹ as a defence to a claim in unjust enrichment was first formally recognised in England in *Lipkin Gorman v Karpnale Ltd*² (“*Lipkin Gorman*”) in 1991. Three years later, the defence was accepted in Singapore in *Seagate Technology Pte Ltd v Goh Han Kim*³ (“*Seagate Technology*”) More recently, Chan Seng Onn J said in *Cavenagh Investment Pte Ltd v Kaushik Rajiv*.⁴ “In the realm of restitution for an unjust enrichment, one can today confidently say that the change of position defence has been established as being a central and important defence.”⁵

2 How does the defence of change of position work? A simple illustration demonstrates the operation of the change of position defence. Let us suppose a shopkeeper mistakenly overpays a shopper \$100 in extra change. The shopper does not notice the overpayment and carries on with her shopping. Later in the day, after looking into her

1 For a very comprehensive account of the change of position defence see Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) and Richard Nolan, “Change of Position” in *Laundering and Tracing*, (Peter Birks ed) (Oxford University Press, 1995) at p 135.

2 [1991] 2 AC 548 at 579.

3 [1994] 3 SLR(R) 836 (noted in Yeo Tiong Min, “Restitution, Tracing and Change of Position” [1994] Sing JLS 138).

4 [2013] 2 SLR 543.

5 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [59].

purse, she notices that she has \$100 left. She is used to spending all the money in her purse on her shopping day. The shopper proceeds to treat herself to a lunch at a fancy hotel which costs her \$100 instead of her usual chicken rice lunch which would have cost \$5. In this case, the shopper has a defence of change of position of \$95. It is important to note from the outset that change of position is not a general hardship defence. There must be some causal connection between the change of position and the mistaken payment. So for example, if the shopper had been fined \$100 for jaywalking after the mistaken payment, this will not count as a change of position. Also, the change of position defence may only operate where the defendant had acted in good faith.⁶ So in our present scenario, if the shopper had been aware of the overpayment and deliberately spent all the money, she would not be entitled to rely on the change of position defence.

3 A leading commentator observed that the “defence is riddled with uncertainty, both as to when it will be applicable, but, even more significantly, as to what it is actually for”.⁷ As the change of position defence is a relatively new defence, this article attempts to take stock of recent developments in Singapore and the Commonwealth and seeks to map out the contours of the defence.

II. Rationale of the change of position

4 Although the defence of change of position has been recognised both in Singapore and England for close to 20 years, there is disagreement as to the underlying rationale of the defence. Virgo points out that “[t]his is significant, since, if we do not know what the defence is for, it is impossible to determine how it should be defined”.⁸ The competing justifications for the change of position defence are as follows: (a) the defendant’s disenrichment; (b) protecting the defendant’s security of receipt; (c) based on considerations of equity, justice and conscience; (d) protecting the defendant’s autonomy; and (e) a dual rationale of the justificatory reasons.⁹ The position taken in this article is that a dual rationale best explains the change of position defence.

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

7 Graham Virgo, “Change of Position: The Importance of Being Principled” [2005] RLR 34 at 34.

8 Graham Virgo, “Change of Position: The Importance of Being Principled” [2005] RLR 34 at 34.

9 See the valuable discussion in Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) at pp 211–219.

A. *Disenrichment*

5 Most leading commentators view the normative force of a restitution claim from the perspective of the defendant enjoying a continuous unjust gain at the expense of the claimant. As Birks said, “[t]he independence and necessity of the law of unjust enrichment derives from the peculiar normativity of extant gain”.¹⁰ The change of position defence is analysed almost exclusively from the perspective of the defendant’s *disenrichment* in good faith.¹¹ Take a simple example of *A* mistakenly paying *B* \$100. Suppose in reliance on the payment and in good faith *B* spends \$50 on something she would not have bought if she had not received the money. Leading restitution theorists would argue that *B* is liable only to pay *A* \$50 since *B* has changed her position by \$50. In other words, change of position is seen primarily as a defence based on the *disenrichment* of the payee. *B*, by spending the \$50 in good faith, has been *disenriched* by the same amount. It must be pointed out that the change of position must be in good faith.¹² Suppose in the example, *B* knows of *A*’s mistaken payment and spends the money immediately before *A* asks for restitution. In this situation, *B* would not be able to rely on the change of position defence because the change of position was not in good faith.

6 The disenrichment approach has the obvious advantage of making the law in this area simple and certain. But it could be argued that the price of certainty is at the expense of doing justice in individual cases. The disenrichment approach effectively ignores that a restitution claim may affect the autonomy interest of the defendant. Hanoch Dagan trenchantly criticises this approach as not appreciating that the stability of the payee’s receipt is “an autonomy based concern of the recipient, which parallels the interest of the mistaken party in correcting her involuntary transfer”.¹³ Elise Bant has also perceptively pointed out that the disenrichment approach struggles to accommodate cases:¹⁴

... where the defendant’s change of position is irreversible but defies a balance-sheet analysis, as where a defendant decides to conceive a

10 Peter Birks, *Unjust Enrichment* (Oxford: Clarendon, 2nd Ed, 2005) at p 208. See also Jessica Palmer, “Chasing a Will-o’-the-wisp? Making Sense of Bad Faith and Wrongdoers in Change of Position” [2005] RLR 53.

11 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at p 526.

12 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580 where Lord Goff said: “It is of course, plain that the defence 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.”

13 Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge: Cambridge University Press, 2004) at p 66.

14 Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) at p 211.

child in reliance on his receipt, or remains enriched on a balance-sheet approach but has re-ordered his life radically and irreversibly in reliance on his receipt.

As a matter of “fit”, the disenrichment approach struggles to explain why change of position is not available to a defendant who acted in bad faith. James Edelman J rightly says extra-judicially that if disenrichment is the sole explanatory force “then the defence should be available regardless of whether the defendant acted in bad faith”.¹⁵

B. Security of receipt

7 It is sometimes said that the rationale of change of position is that it protects the defendant’s security of receipt. The problem with this rationale is that security of receipt *per se* cannot explain the workings of the defence. Andrew Burrows rightly observed that security receipt cannot be the primary rationale of the defence. If this was so, “mere reliance, or even the mere raising of an expectation that an enrichment is the defendant’s to retain, would be sufficient to trigger the defence; yet the case law clearly establishes that detriment is required”.¹⁶ Edelman J, writing extra-judicially, has also observed: “‘Security of receipt’ is not a rationale; it is the *effect* of the defence. The rationale *explains* the degree of security which is given to the defence” [emphasis in original].¹⁷

C. Equity, justice and conscience

8 The reference to equity to justify the change of position defence is from the judgment in *Lipkin Gorman* where Lord Goff said that the change of position would be available to a person where “it would be inequitable in all the circumstances to require him to make restitution”.¹⁸ In subsequent cases such as *Dextra Bank and Trust Co Ltd v Bank of Jamaica*¹⁹ (“*Dextra Bank*”), the Privy Council has said the approach in *Lipkin Gorman* “appears to have adopted a broad approach based on practical justice, and to have avoided technicality”.²⁰ Similarly, Munby J in *Commerzbank AG v Gareth Price-Jones*²¹ stressed that the defence was “intended to be a broadly stated concept of practical justice” and that

15 James Edelman, “Change of Position: A Defence of Unjust Disenrichment” [2012] 92 BU L Rev 1009 at 1021.

16 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at p 527.

17 James Edelman, “Change of Position: A Defence of Unjust Disenrichment” [2012] 92 BU L Rev 1009 at 1018.

18 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 579.

19 [2001] UKPC 50; [2002] 1 All ER (Comm) 193.

20 *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50 at [36]; [2002] 1 All ER (Comm) 193 at [36].

21 [2005] 1 Lloyd’s Rep 298.

“technicality and black letter law are to be avoided”. *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)*²² is another significant case because the Court of Appeal advocated a more flexible approach to the change of position defence. Clarke LJ thought that “the essential question is whether it would be inequitable or unconscionable, and thus unjust to allow the recipient of money paid under a mistake of fact to deny restitution to the payer”.²³ Similarly, Sedley LJ also thought that the theme of the change of position defence was a broad approach based on practical justice and one which avoided technicality. Both judges made references to *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*²⁴ where a similar analysis was advocated for the liability for unconscionable receipt. It is also significant that both judges said that the defence falls to be elaborated on a case-by-case analysis and is not tied to a single rigid standard.²⁵

9 In a case note,²⁶ Burrows argued that to describe the change of position defence as a matter of whether it is inequitable, unconscionable or unjust to deny restitution “would be to take us back to the dark ages of the subject [of the law of restitution]”.²⁷ In his view, “such broad tests tell us almost nothing”.²⁸ From the more recent judgments on change of position, the judges envisage that the change of position is a very fact-dependent defence. With regard to this general theme, the present writer is in complete agreement. However, what is more controversial is the judges’ observation that this necessarily means that the change of position defence is contingent on the question of whether it was unconscionable, inequitable or unjust to allow restitutionary liability. Although this writer has considerable sympathy to construct a more sensitive defence capable of taking into account the factual matrix, Burrows is right in saying that it is not very helpful just to say that the test is premised on unconscionability, unjustness or inequity.²⁹ It is likely that the Singapore courts would be inclined to adopt Burrows’ view. As

22 [2004] QB 985.

23 *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2004] QB 985 at 1000 and 1003.

24 [2001] Ch 437.

25 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 1012.

26 Andrew Burrows, “Clouding the Issues on Change of Position” (2004) 63 Camb LJ 276.

27 Andrew Burrows, “Clouding the Issues on Change of Position” (2004) 63 Camb LJ 276 at 280. Similar sentiments are expressed by James Edelman, “Change of Position: A Defence of Unjust Disenrichment” [2012] 92 BU L Rev 1009.

28 Andrew Burrows, “Clouding the Issues on Change of Position” (2004) 63 Camb LJ 276 at 278.

29 Andrew Burrows, “Clouding the Issues on Change of Position” (2004) 63 Camb LJ 276 at 276.

Andrew Phang Boon Leong JA said in the context of the remedial constructive trust in *Wee Chiak Sek Anna v Ng Li-Ann Genevieve*:³⁰

Like unconscionability, ‘fairness and justice’ are more properly conclusions which are arrived at the end of principled legal analysis, and not as a substitute for that legal analysis. If the function of a court is to arrive at its decision based solely on the requirements of ‘fairness’ and ‘justice’, this would clearly be an unsatisfactory position, not least because it gives the court *carte blanche* to do whatever it likes without reference to case law or to any legal principle or doctrine.

D. *Autonomy of the defendant*

10 Another possible rationalisation of the change of position is that it protects the autonomy of the defendant. Allowing a restitutionary claim potentially disrupts the autonomy of the defendant because it frustrates his or her expectations. Frustrated expectations are not trivial costs for two reasons: first, the payee faces a difficult evidentiary hurdle in proving reliance expenditure, especially when a considerable amount of time has elapsed between the payment and the claim; and secondly, a restitutionary claim might disrupt a payee’s individual *autonomy*. Hanoch Dagan points out that an individual’s expectation regarding her wealth informs her past, present and future life plans. Dagan says:³¹

People’s legitimate expectations regarding the availability of wealth in future inform their life-plans. Therefore, even with no material reliance in place, frustrated expectations are disruptive to individual autonomy.

11 The potential impact of a restitutionary claim is not really negligible and could prove to be devastating (both financially and emotionally) to the payee. Dagan is correct to point out that the assumption of our present wealth influences our everyday decisions. These decisions could be trivial (having a better meal, buying a new item of clothing or electrical goods, going on a holiday, spending more on entertainment) or major (having a baby, getting married, *etc*). It is arguable that the plurality of the High Court of Australia (Hayne, Crennan, Kiefel, Bell and Keane JJ) in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*³² supports this approach. It was said:³³

[A] mathematical assessment of enduring economic benefit does not determine the availability of restitutionary remedies. The equitable

30 [2013] 3 SLR 801 at [170].

31 Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge: Cambridge University Press, 2004) at p 48.

32 [2014] HCA 14.

33 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14 at [84].

doctrine which protects expectations, with which the notion of 'detriment' is associated, is not concerned with loss caused by a wrong or a breach of promise.

Another way of analysing the rationale of the defence on the ground of protecting the defendant's autonomy is provided by Edelman J. Edelman J writes extra-judicially as follows:³⁴

... if a claimant is entitled to restitution of a defendant's enrichment when the receipt of that enrichment is unjust, then the defendant should be entitled to defend that claim by showing that the defendant has subsequently been disenriched in circumstances which are unjust, as measured by the same yardstick. Change of position is essentially a defence of 'unjust disenrichment'.

Instead of focusing on the potential harm or detriment suffered by the defendant, Edelman J concentrates on the concept of "unjust disenrichment". According to Edelman J, a defendant "must prove that the disenrichment was caused by some unjust factor ... A defendant will not be entitled to the defence unless he or she was *unjustly* disenriched" [emphasis in original].³⁵ This approach is justified on the equal protection for the defendant's autonomy. In other words, a claimant in an unjust enrichment claim should not be allowed to insist upon a right to protection of his or her autonomy "without affording the same protection to the autonomy of the defendant in a defence".³⁶

E. A dual rationale defence

12 Elise Bant advances the theory that the change of position defence has two aspects.³⁷ First, the defence aims to protect the defendant from the harm he or she would suffer where a restitution claim would leave him or her in a worse off position prior to the receipt. Such protection will necessarily take into account the autonomy interest of the defendant. However, the level of protection given to the defendant is not absolute. Bant argues that the right to protection will only be to the extent where the defendant's change of position is irreversible.³⁸ If the change of position is not irreversible, then the claimant's right to restitution will trump the defendant's right to protection. This brings us

34 James Edelman, "Change of Position: A Defence of Unjust Disenrichment" [2012] 92 BU L Rev 1009 at 1022.

35 James Edelman, "Change of Position: A Defence of Unjust Disenrichment" [2012] 92 BU L Rev 1009 at 1033.

36 James Edelman, "Change of Position: A Defence of Unjust Disenrichment" [2012] 92 BU L Rev 1009 at 1021.

37 Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) at p 217.

38 See *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14.

to the second aspect of the change of position defence. According to Bant, “the level of protection given to the defendant [is] by reference to the defendant’s fault”.³⁹ The second aspect would require the defendant take reasonable steps to protect himself or herself against the possibility that the receipt of the enrichment might be impeachable. Bant calls this mixed rationale a case of “irreversibility protection and prophylaxis”.⁴⁰

13 It is suggested that the dual rationale best explains the change of position defence. While the disenrichment approach may explain most cases where the change of position defence has been applied, there are some fact situations where the disenrichment approach does not provide us with an answer. For example, the disenrichment approach struggles to accommodate non-pecuniary changes of position. In contrast, non-pecuniary changes of position may easily be justified on the ground that the law protects the autonomy interest of the defendant from being impinged by a restitution claim. Furthermore, no one has come up with a satisfactory explanation of *Goss v Chilcott*⁴¹ and *Haugesund Kommune v Depfa ACS Bank*.⁴² In both these cases, the defendants were disenriched and yet they were held not to be entitled to plead the change of position defence. It is suggested that these cases may be justified on the ground that the defendant’s autonomy interest was not affected by the unjust enrichment claim. Both cases will be explored below.

III. Elements of the change of position defence

14 In *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd*,⁴³ Yong Pung How CJ said that the elements of the defence are: (a) the person enriched had changed his position; (b) the change was *bona fide*; and (c) it would be inequitable to require the person enriched to make restitution or to make restitution in full. In addition, there must be some causal connection between the change of position and the enrichment which has been conferred.

39 Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) at p 217.

40 Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) at p 217.

41 [1996] AC 788.

42 [2012] QB 549; [2012] 2 WLR 199; [2011] 1 All ER 190. Cf James Edelman, “Change of Position: A Defence of Unjust Disenrichment” [2012] 92 BU L Rev 1009 at 1025 who argues that in these cases the shared condition or basis of the payment had not failed.

43 [2002] 1 SLR(R) 418 at [35].

A. *Change of position: Disenrichment or irreversibility?*

15 As mentioned above, leading restitution scholars such as Burrows⁴⁴ view change of position as primarily as a matter of disenrichment. For example, Burrows defines the defence as such:⁴⁵

Although the defendant was initially enriched (or appeared to be initially enriched) the change of position defence responds to the fact that that enrichment has subsequently (or even in anticipation of the initial enrichment) been countered by causally related loss or detriment so that overall the defendant has not been enriched.

16 In contrast, Bant argues that change of position is premised on the fact that the defendant has irreversibly changed her position.⁴⁶ While Bant says that the disenrichment and irreversibility approach are closely related, there are subtle differences. The most significant distinction is that the irreversibility approach allows the change of position defence when the change of circumstances is not pecuniary in nature. Thus, the irreversibility approach may accommodate non-pecuniary changes of position more easily than the disenrichment approach. Situations such as where the defendant gives up a more lucrative job or decides to start a family in reliance of an enrichment may be considered to be a relevant change of position. Between both approaches, it is suggested that Bant's approach is preferable as a restitutionary claim might severely disrupt the payee's life and frustrate his or her expectations which may not be readily quantified in monetary terms.

B. *Examples of irreversible change of position*

17 The quintessential situation where the change of position defence has been applied is where the defendant incurs financial expenditure which is causally related to the enrichment. In other words, the test is whether the defendant would have incurred the financial expenditure but for the enrichment. The following example illustrates how the change of position defence operates. If a defendant in reliance on a mistaken payment of \$500 decides to have an expensive meal costing \$500, this will count as a complete defence to an unjust enrichment claim. However, if it can be shown that the defendant is a very affluent person who has such lavish meals all the time, then the cost of the meal would not be regarded as a change of position. An

44 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at pp 526–527.

45 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at p 526.

46 Elise Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) at pp 130–138. This is a view endorsed in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14.

illustration of this principle may be found in the case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*.⁴⁷ In this case, the defendant pleaded that it had changed its position pursuant to an enrichment by paying dividends, excise duties, rebates and debts. The defence failed because the defendant could not prove a causal link between these expenditures and the enrichment. A likely inference is that the defendant would have incurred these expenditures in any event and these payments were not causally related to the enrichment.

18 There is some confusion in the case law both in England⁴⁸ and Singapore⁴⁹ as to whether the change of position must be in the form of an objectively *extraordinary* expenditure. It is suggested that the change of position defence does not require an objectively extraordinary expenditure. While it is true that an expenditure which is extraordinary in nature would strongly indicate that it was incurred in reliance on the enrichment, this does not mean that expenditure that is not extraordinary may not qualify as a change of position. Two examples may be given to illustrate this point. In the first scenario, let us say that the defendant went on a round-the-world trip after receiving what she thought was her year-end bonus. The round-the-world trip may be characterised as an extraordinary expenditure which is indicative that the defendant had relied on the enrichment. Therefore, the defendant should succeed in pleading change of position as a defence to an unjust enrichment claim. In the second scenario, the defendant received \$3,000 which she thought was her year-end bonus and she went on a holiday to Phuket. Let us suppose the defendant is well known to be a frugal person and has not gone for a holiday for the last ten years. While a trip to Phuket is not an extraordinary expenditure to most middle class persons, it is suggested that in the present case the defendant ought to be allowed to avail herself to the change of position defence. This is because the defendant is able to show a causal connection between the expenditure and receipt of the enrichment. Graham Virgo rightly argues that the test of extraordinary change of position ought to be assessed *subjectively* by reference to the defendant's particular circumstances.⁵⁰ Thus, in the second example, while a holiday to Phuket is not an extraordinary expenditure to most middle class persons in Singapore; it

47 [2011] 3 SLR 540.

48 *Dextra Bank v Bank of Jamaica* [2001] UKPC 50; [2002] 1 All ER (Comm) 193 at [38].

49 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 SLR(R) 788 (HC) at [323]–[324]; [2011] 3 SLR 540 (CA) at [140] and [143]–[144] (noted in Yip Man, “Restitution for Victims of Fraud” [2011] Sing JLS 570).

50 Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 2nd Ed, 2006) at p 697.

is nevertheless an extraordinary expenditure to this particular defendant.

19 In Singapore, there is case law establishing that payment to third parties in reliance on an enrichment is considered to be a relevant change of position.⁵¹ What is the position with regard to a defendant paying off a pre-existing debt? *Scottish Equitable plc v Derby*⁵² suggests that this is not considered to be a change of position. In this case, Scottish Equitable plc (“Scottish Equitable”) overpaid Derby a sum of £172,451 when he cashed in his pension policy on 16 June 1995. There was no evidence that Derby knew of the mistake. Derby used £41,671 to pay off his mortgage and £9,662 on modest improvements to his lifestyle. Scottish Equitable asked for the money back in October 1996. With regard to the payment of £41,671, the judges did not consider that the payment of a pre-existing debt was considered a change of position. In theory, Derby is left no worse off because he could have obtained another loan of the equivalent sum from another bank, but in practice no bank would have lent more than £40,000 to an impecunious pensioner. In these circumstances, Scottish Equitable’s remedy should *not* be a recovery of the £41,671 in a single lump sum; rather, Scottish Equitable should be subrogated to the original mortgagee’s position or a restitutionary order be made on terms,⁵³ allowing Derby to repay the sum on similar terms as the discharged mortgage.

20 It is interesting to contrast *Scottish Equitable plc v Derby* with *Gertsch v Atsas*⁵⁴ (“*Gertsch*”). In *Gertsch*, the defendant innocently received \$100,000 pursuant to a forged will. After receiving the money, the defendant used \$70,000 to pay off her mortgage, gave up employment and went to university to become a full-time student. In assessing the defendant’s plea of change of position, the learned judge took into account the fact that she had given up employment and become a student in reliance on the legacy. If she had stayed in full employment, the mortgage debt would have been reduced to \$10,000 by the time restitution of the moneys was claimed. The judge therefore held that the defendant had been unjustly enriched in the sum of \$13,750. While this approach may be criticised as being imprecise, it is suggested that *Gertsch* ought to be followed because it takes into account the defendant’s non-pecuniary change of circumstances.

51 *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836; *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543.

52 [2001] EWCA Civ 369; [2001] 3 All ER 818.

53 See, eg, *Boscawen v Bajwa* [1996] 1 WLR 328 at 340–341 and *Gertsch v Atsas* [1998] NSWSC 898. See also Charles Mitchell, “Change of Position: The Developing Law” [2005] LMCLQ 169 at 171–173.

54 [1999] NSWSC 898.

21 Matters become trickier when the enrichment is used to improve the defendant's real property.⁵⁵ An unjust enrichment should *never* leave an innocent landowner in a position where he or she has to sell the land to meet the claim. This proposition may be justified on either of the following grounds: (a) that this protects the landowner's autonomy; or (b) a forced sale will constitute a change of position. A forced sale of land represents a severe disruption of the affairs of the defendant and hence should be avoided especially where the defendant is a passive recipient. This proposed requirement is consistent with the philosophy that land is usually treated as unique and that damages are regarded as an inadequate remedy to compensate a claimant for a breach of a contract for sale of land.⁵⁶ Arguing by analogy, if the defendant is compelled to sell his or her land, then this would cause the defendant to lose a unique property.

C. *Wide and narrow view of change of position*

22 Burrows has been extremely influential in articulating a "wide version" of the change of position defence.⁵⁷ The "narrow" view of the change of position defence is similar to estoppel except for the fact that a representation is not required; the main element of the defence is that the defendant must have acted detrimentally in reliance on the receipt of the enrichment. On the other hand, a "wide" version of change of position envisages detrimental reliance as "not a necessary ingredient and that the defendant should have a defence, where his position, consequent on the benefit has so changed that it would be inequitable to order restitution".⁵⁸ The defence applies so long as the defendant can prove a loss of benefit which is causally linked with the enrichment. Burrows gives two illustrations: one, money paid is immediately stolen or destroyed by fire; and two, a building being erected by the claimant is half completed when it is destroyed by fire.⁵⁹ The wide version has been endorsed by *Scottish Equitable plc v Derby*. It is suggested that the "wide" version of the defence ought to be adopted in Singapore because it is consistent with the goal of protecting the autonomy of the defendant. Otherwise, the defendant is left in a worse position due to the unjust enrichment claim.

55 See generally Tang Hang Wu, "An Unjust Enrichment Claim for the Mistaken Improver of Land" [2011] Conv 8. See also *John Ruskin College v Harley* [2013] EWHC 3714 which suggests that an important issue to be determined was whether the improvement resulted in an increase in the sale price of the house.

56 *Cf E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32.

57 The "wide" version of the defence was endorsed by *Scottish Equitable plc v Derby plc* [2001] EWCA Civ 369; [2001] 3 All ER 818.

58 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at pp 528–530.

59 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011).

D. Causal connection

23 The test for causation in relation to the change of position defence both in England⁶⁰ and Singapore⁶¹ appears to be the “but for” test. In short, the defendant must show that *but for* the enrichment received, the defendant would not have suffered the loss. *Commerzbank AG v Gareth Price-Jones*⁶² is an example where there was insufficient causal connection between the change of position and the enrichment. This case concerned a dispute between a bank and one of its analysts who was guaranteed a bonus of £250,000. A letter was issued to the analyst informing him that he was entitled to a £265,000 bonus. The analyst thought he was getting an extra £265,000 when in actual fact the bank intended to pay him only an additional £15,000. Due to an error, the bank paid the analyst both sums. When the bank realised the mistake, it asked the analyst for restitution of £250,000. The analyst’s defence was that, but for his expectation of the additional bonus, he would not have stayed on in the bank. Mummery LJ held that the alleged change of position was not “sufficient, significant or precise” enough to qualify for the defence. Both Mummery LJ and Munby J rightly pointed out that the analyst’s decision to stay on in the bank for the year ending 2000 was *not* prompted by the mistaken payment in December 2000, but the analyst’s own misunderstanding of the terms of the letter. As this was a *unilateral* misinterpretation of the contract, this could not count as a change of position.

E. Surviving enrichment

24 If the defendant spends the enrichment which leaves no traceable residue, then this will definitely count as a change of position. What happens if the defendant retains the asset? Let us say a defendant in reliance on a mistaken payment of \$10,000 uses all the money to buy an expensive watch. Assume the defendant still retains the watch when the plaintiff institutes an unjust enrichment claim. In such a case, the defendant should make restitution to the plaintiff subject to the decline in value of the watch between the date of purchase and the date of proceedings.⁶³ This is consistent with Lord Templeman’s analysis in *Lipkin Gorman* where he said:⁶⁴

Complications arise if the donee innocently expends the stolen money in reliance on the validity of the gift before the donee receives notice of the victim’s claim for restitution. Thus if the donee spent £20,000 in

60 *Scottish Equitable plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818.

61 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540.

62 [2003] EWCA Civ 1663.

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

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

the purchase of a motor car which he would not have purchased but for the gift, it seems to me that the donee has altered his position on the faith of the gift and has only been unjustly enriched to the extent of the secondhand value of the motor car at the date when the victim of the theft seeks restitution.

This result may be justified on the fact that the defendant can easily sell the asset which is still in his or her hands. This part has some similarities with the issue of whether a defendant is considered enriched when he or she has a benefit which is realisable. The present writer takes the position that if the asset may easily be sold, then the defendant must make restitution of the value of the asset at the date of the proceedings. Thus, in the case of a watch or car which is still in the defendant's hands, the defendant can mitigate the harm that he or she will suffer by selling off the watch or car. The defendant is not left in a worse position due to the restitution claim. Therefore, it is only fair that the defendant makes restitution of the value of the asset as at the date of the proceedings.

25 Matters assume a different complexion when the asset retained does not have a secondary market value or the market value is *de minimis*. This is illustrated by the well-known case of *RBC Dominion Securities Inc v Dawson*.⁶⁵ In this case, the defendant was overpaid approximately \$4,919. The defendant claimed that she spent the money on the following: (a) refurbishing a dining room table and chairs; (b) purchasing a video recorder; (c) purchasing a kitchen table and chairs; (d) purchasing a chesterfield; (e) purchasing a floor lamp and shades and drapes; and (f) purchasing clothing. The Newfoundland Court of Appeal found that she had changed her position by purchasing all these things except the chesterfield which she would have bought in any event. Cameron JA said this case was “not unlike the person who lives at higher standard of living because more money is available but would not have done so were it not for the windfall”.⁶⁶ Perhaps, a better explanation is the surviving enrichment in this case is minimal. Where the quantum of the claim is very small and the asset retained has a minimal second hand value, the court should not force the defendant to go through the inconvenience of selling the asset. In this case, there was no utility in forcing Dawson to sell the furniture and clothing which would probably have yielded a negligible sum.

65 (1994) 111 DLR (4th) 230.

66 *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4th) 230 at 239–240.

F. *Non-pecuniary changes of position, mental or physical harm*

26 Peter Birks, in his last case note and book,⁶⁷ seems to have implicitly accepted the fact that a payee's frustrated expectation and non-pecuniary change of position might be a defence to a restitutionary claim for a mistaken payment. Birks postulated that if a payee could establish that "[t]his mistaken £100,000 persuaded us that we could at last start a family" and the payee's wife was already pregnant, this might serve as a valid defence.

27 The suggestion made here is that the courts can and should provide the defendant with some relief for the loss of autonomy. The courts have had experience in quantifying loss of autonomy in *Rees v Darlington Memorial Hospital*⁶⁸ ("Rees") involving negligent sterilisation. Although *Rees* is a tort case and the monetary award was for a wrong done to the defendant, it is suggested that this case demonstrates by analogy that putting a monetary figure on loss of autonomy is not an impossible task. If the defendant can show non-financial detriment and frustrated expectations causally linked to the mistaken payment, then the restitution claim should be reduced accordingly to reflect the defendant's loss of autonomy. While it is not suggested that the disruption to the defendant's autonomy in a case of a mistaken payment is as great as being a victim of a negligent sterilisation, the point to be gleaned from this case is that the courts can put a monetary figure to take into account the disruption to a person's individual autonomy. This sum can be used to reduce the amount claimed by the claimant. As to the amount, this will depend on various factors such as the amount mistakenly paid, the length of time between the payment and the claim, and the individual circumstances of the payee.

28 An unresolved question is whether a defendant who suffered mental or physical harm due to the stress of an unjust claim may plead change of position as a defence. In *Scottish Equitable plc v Derby*, the English Court of Appeal did not take these factors into account. However, Mitchell⁶⁹ points out that Walker LJ did not completely rule out relief for mental or physical harm in *Scottish Equitable plc v Derby*. Walker LJ's exact words were:⁷⁰

67 Peter Birks, "Change of Position: The Two Central Questions" (2004) 120 LQR 373. See also Peter Birks, *Unjust Enrichment* (Clarendon Press, 2nd Ed, 2005) at pp 260–261.

68 [2004] 1 AC 309.

69 Charles Mitchell, "Change of Position: The Developing Law" [2005] LMCLQ 169 at 177.

70 *Scottish Equitable plc v Derby* [2001] EWCA Civ 369 at [31]; [2001] 3 All ER 818 at 828.

The fact that the recipient may have suffered some misfortune (such as a breakdown in his health, or the loss of his job) is not a defence *unless* the misfortune is causally linked (at least on a 'but for' test) with the mistaken receipt. [emphasis added]

Therefore, if the defendant can prove that his or her health has broken down due to the stress brought on by an unjust enrichment claim, this should be taken into account as a form of change of position. The difficulty is with quantifying this as a form of change of position. This is not an impossible task. For example, if the defendant had become depressed and had to give up employment, the change of position may be pegged to loss of earnings and treatment costs.

IV. Anticipatory change of position

29 Change of position may relate to *anticipatory*, as well as subsequent, change of position. This was established in the case of *Dextra Bank* and accepted in Singapore by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*. Lords Goff and Bingham in a joint judgment said:⁷¹

Here what is in issue is the justice or injustice of enforcing a restitutionary claim in respect of a benefit conferred. In that context, it is difficult to see what relevant distinction can be drawn between (1) a case in which the defendant expends on some extraordinary expenditure all or part of a sum of money which he has received from the plaintiff, and (2) one in which the defendant incurs such expenditure in the expectation that he will receive the sum of money from the plaintiff, which he does in fact receive. Since *ex hypothesi* the defendant will in fact have received the expected payment, there is no question of the defendant using the defence of change of position to enforce, directly or indirectly, a claim to that money. It is surely no abuse of language to say, in the second case as in the first, that the defendant has incurred the expenditure in reliance on the plaintiff's payment or, as is sometimes said, on the faith of the payment.

The approach of recognising anticipatory change of position has been endorsed by the Court of Appeal in *Commerzbank AG v Gareth Price-Jones* and in Singapore by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*.⁷²

71 *Dextra Bank v Bank of Jamaica* [2001] UKPC 50 at [38]; [2002] 1 All ER (Comm) 193 at [38].

72 See Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 8th Ed, 2011) at paras 27-29–27-30.

V. Proof of change of position

30 While the burden of proof in establishing change of position is on the balance of probabilities, case law suggests that the courts take a broad-brush approach as to the evidence that the defendant needs to produce in order to demonstrate a change of position. This is because change of position is difficult to establish especially after a long period of time. Furthermore, the change of position may be subtle in that it affects the defendant's spending pattern. Steve Hedley perceptively observes:⁷³

Who has *not* decided whether they can afford to go out for a night's entertainment, and if so what it should consist of, by seeing how much money they have until next pay-day? Current spending is always influenced by the amount of money you think you have. [emphasis in original]

As Sheldon J found in *Avon County Council v Howlett*,⁷⁴ the more the defendant had in their pocket "the more they were able to spend – a better cut of meat, maybe, from time to time, or something extra from the grocer".⁷⁵ These changes of position are difficult to detect and prove especially after a long period of time. Thus, it is eminently sensible for the courts to use a broad-brush approach to matters of proof of change of position.

31 There is growing awareness that a payee might face insuperable difficulties in proving change of position. This was recognised in the Canadian case of *RBC Dominion Securities v Dawson* where Cameron JA said that a private individual payee was not expected to prove her expenditures as if the claim was for damages in an action for negligence. Cameron JA said:⁷⁶

It was the plaintiff's error that put her in the funds in the first place and led her to believe the funds was hers to spend without having to account to anyone for expenditures ... In the circumstances, the trial judge was not in error to be satisfied with reasonable approximations.

Parker J echoed this sentiment in *Philip Collins v Davis*⁷⁷ and also adopted a broad-brush approach to change of position. Walker LJ endorsed this position in *Scottish Equitable plc v Derby* by saying: "[I]t may be right for the court not to apply too demanding a standard of proof when an honest defendant says that he has spent an overpayment

73 Steve Hedley, *Restitution: Its Division and Ordering* (London: Sweet & Maxwell, 2001) at p 27.

74 [1981] IRLR 447.

75 *Avon County Council v Howlett* [1981] IRLR 447 at 450.

76 *RBC Dominion Securities v Dawson* (1994) 111 DLR (4th) 230 at 240.

77 [2000] 3 All ER 808.

by improving his lifestyle, but cannot produce any detailed accounting”⁷⁸.

VI. Disqualification

A. *Bad faith*

32 The starting point in the inquiry as to what constitutes bad faith is Lord Goff’s famous observation in *Lipkin Gorman* where he said:⁷⁹

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.

33 The Court of Appeal in *Seagate Technology* considered the issue of the degree of knowledge of facts disentitling a defendant from pleading the change of position defence. L P Thean JA said that the true analysis is that the defendant must have acted dishonestly. Dishonesty comprises (a) actual knowledge; (b) wilfully shutting one’s eyes to the obvious; and (c) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. However, this test may have been superseded by judicial developments. As Chan Seng Onn J in *Cavenagh Investment Pte Ltd v Kaushik Rajiv* perceptively points out, the test in *Seagate Technology* was influenced by the older authorities on knowing receipt.⁸⁰ Subsequent cases have moved away from analysing liability for knowing receipt using specific levels of knowledge.⁸¹ Chan J thought that the following test was more apposite in analysing bad faith:⁸²

A defendant will be held to have had a lack of good faith if he acts in a commercially unacceptable way, and such behaviour is made out if he fails to query the irregular shortcomings of the transaction that ordinary honest people would so query.

78 *Scottish Equitable plc v Derby* [2001] EWCA Civ 369 at [33]; [2001] 3 All ER 818 at 827–828.

79 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580. Cited with approval in *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836 at 850.

80 *Eg Agip (Africa) Ltd v Jackson* [1900] Ch 265.

81 See *George Raymond Zage III v Rasif David* [2009] 2 SLR(R) 479 (HC); [2010] 2 SLR 589 (CA). For an excellent review of this area see Pauline Ridge, “Equitable Accessorial and Recipient Liability in Singapore” [2013] Sing JLS 361.

82 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [71]. This was the test advocated by Moore-Bick J in *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] 2 All ER (Comm) 705.

34 In contrast, the English position on bad faith is articulated by the Court of Appeal in *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)*. This case involved a bank, Crédit Agricole Indozuez (“CAI”), which received money on behalf of its customer pursuant to a letter of credit issued by Bank Sepah which was acting for Niru Battery Manufacturing Co (“Niru”). CAI paid the money out on its customer’s instructions. It turned out that CAI’s customer had defrauded Niru, that is, tricked the latter into believing that the goods were shipped. The Court of Appeal held that CAI was liable to make restitution to Niru because CAI knew that the ingots could not have been shipped; Niru had paid under a mistake of fact and CAI was not entitled to the change of position defence. The fact that CAI had knowledge that the ingots were not shipped was crucial to CAI being held not to be entitled to rely on the change of position defence. It was also significant the way the judges characterised the defence. Clarke LJ thought that “the essential question is whether it would be inequitable or unconscionable, and thus unjust to allow the recipient of money paid under a mistake of fact to deny restitution to the payer”.⁸³ Similarly, Sedley LJ also thought that the theme of the change of position defence was a broad approach based on practical justice and one which avoided technicality. Both judges made references to *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* where a similar analysis was advocated for the liability for unconscionable receipt. It is also significant that both judges said that the defence falls to be elaborated on a case-by-case analysis and is not tied to a single rigid standard.⁸⁴

35 Similarly in *Commerzbank AG v Gareth Price-Jones*⁸⁵ Munby J characterised the change of position defence as follows:⁸⁶

The focus of debate is accordingly to identify whether in the particular case it would in all the circumstances be an ‘injustice’ or ‘inequitable’ to require the overpaid recipient to make restitution of that which the payer is *prima facie* entitled to recover as of right. That is not, with all respect to those who might suggest otherwise, an exercise in judicial discretion. It is an exercise in judicial evaluation. The judge is required to make a value judgment in the light of all the relevant circumstances. And there is nothing particularly difficult or unusual about this. It is an exercise of a type familiar in many different areas of both law and more particularly equity.

83 *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2004] QB 985 at 1000 and 1003.

84 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 1012.

85 [2003] EWCA Civ 1663.

86 *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 at [53].

36 In *Abou-Rahmah v Abacha*⁸⁷ the claimants were tricked by some rogues to make payment to a London bank for the account of the defendant, a Nigerian bank. Upon instructions of their client, the defendant then paid the money into their client's account. The money was then withdrawn by the rogues. The claimants sued the defendant for, *inter alia*, unjust enrichment. The defendant was held to be able to rely on the change of position defence. While the defendant had some suspicions that the client was involved in money laundering, it had conducted relevant checks as required by Nigerian law and did not harbour any residual suspicion. Arden LJ (with Pill LJ agreeing) said:⁸⁸

It is not the function of the court in deciding whether a defence of change of position is made out to punish a defendant for conduct which is unrelated to the transactions on which the cause of action of the claimant is based.

37 *John Ruskin College v Harley*⁸⁹ is another illustration of the application of the change of position defence. Harley was seriously injured while playing for the John Ruskin College ("College") team. After the matter was settled by the College's insurer, there remained some money (£25,000) which was paid into court by the College. The money was eventually paid to Harley. This turned out to be a mistake because Harley's claim had already been fully satisfied by the insurer. Bean J found that Harley genuinely thought that the money was due to him. As such, the learned judge rejected allegations of fraud, recklessness and commercially sharp practice on Harley's part. Thus, Harley was entitled to rely on the change of position defence. On the facts, the judge found that Harley had changed his position with respect to expenses relating to a photo booth at his wedding, a honeymoon in Florida, a holiday in Las Vegas and a car he bought for his then wife.

38 What then are the lessons to be drawn from the cases above with regard to the change of position defence? From the judgments, the judges envisage that the change of position is a very fact-dependent defence. Some of the following pertinent observations might be useful in developing the ambit of the defence:

(a) **Change of position and dishonesty.** A defendant is precluded from relying on the change of defence if he or she behaved dishonestly.⁹⁰ However, is the converse true? In other words, if the defendant did not behave dishonestly, is he or she entitled to rely on the change of position defence as a matter of course? The answer to this question is "no". Conduct falling

87 [2007] 1 All ER (Comm) 827.

88 *Abou-Rahmah v Abacha* [2007] 1 All ER (Comm) 827 at [84]. Cf Rix LJ's uneasiness about the potential money laundering aspect of the case.

89 [2013] EWHC 3714.

90 *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836.

short of dishonesty may disqualify a defendant from relying on change of position. *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* suggests that bad faith does not necessarily mean that the defendant must be shown to have been dishonest.⁹¹

(b) **Change of position and negligence.** Although the threshold of dishonesty is not required to preclude the defence of change of position, it is also not sufficient merely to show that the defendant was negligent.⁹²

(c) **Change of position and the limits of good faith.** Good faith is a broad concept and has to be worked out through the cases. It includes “a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself”.⁹³

(d) **Change of position and actual notice.** If the defendant had actual notice of the mistaken payment, the defendant is precluded from relying on the change of position defence.⁹⁴

(e) **Change of position and doubt.** Where the defendant has grounds for suspicion that the money was paid to the defendant by mistake, it is incumbent on the defendant to make inquiries with the payer.⁹⁵ Otherwise the defendant is precluded from invoking this defence. The challenge is to discover the level of doubt necessary in the defendant’s mind to disqualify the application of the defence. Further guidance from the courts is needed on this issue.

B. *Institutional payees*

39 This part of the article is purely prescriptive in nature.⁹⁶ It is suggested that a different rule ought to apply where the mistaken payment involves a small amount of money and is made by an institutional payee to a consumer. In light of the disastrous

91 *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2004] QB 985 at 999 and 1012, *per* Sedley LJ.

92 *Niru Battery Manufacturing v Milestone (No 1)* [2004] QB 985 at 1012, *per* Sedley LJ. See also *United Overseas Bank v Bebe* [2006] 4 SLR(R) 884 in the context of Torrens fraud.

93 *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 2 All ER (Comm) 705 at 741, [135], *per* Moore-Bick J. This was endorsed by Clarke LJ in *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2004] QB 985 at 1004 and *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543.

94 *Jones v Churcher* [2009] Lloyd’s Rep 94.

95 *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836.

96 The full argument is made in Tang Hang Wu, “The Role of Negligence and Non-financial Detriment in the Law of Unjust Enrichment” [2006] RLR 55.

consequences a mistaken payment could have on a payee, it is surely reasonable for the law to be more sensitive in assessing the detriment caused by such mistaken payment. In appropriate circumstances, the law should insist on payers, especially institutional ones, taking *some* precautions against committing such errors. Furthermore, an institutional payer is systematically superior in taking mistake avoidance precautions; hence, it is only fair to place the onus on such institutions.

40 If the payment is not exceptionally large and the mistake was discovered only after a considerable delay, restitutionary liability should either be denied on the grounds of estoppel or change of position.⁹⁷ In these circumstances, the payee would have inevitably changed her position and proof of such changes is very difficult to establish. If the payment to the individual is exceptionally large, the payee should be asked to refund some of the money to the payer.⁹⁸ In deciding the amount refundable, the courts should consider the payee's monetary, non-financial prejudice and disruption to personal autonomy. With regard to the former, a broad-based approach should be taken because the payee should not be expected to keep detailed records of her monetary change of position.⁹⁹ The amount refundable should also be reduced appropriately to compensate the payee for the distress, anxiety and frustrated expectation caused by the payment. This could be achieved either by interpreting the change of position or estoppel defences in a more flexible manner.

C. *Illegality*

41 *Barros Mattos Junior v MacDaniels Ltd*¹⁰⁰ suggests that a defendant is precluded from relying on the change of position defence if the defendant's change of position is illegal. In this case, the defendant's alleged change of position involved a payment to a third party which was in breach of Nigerian foreign exchange law. Laddie J refused to entertain a plea of change of position. The learned judge said: "The recipient cannot put up a tainted claim to retention against the victim's untainted claim for restitution."¹⁰¹ Burrows correctly criticises this

97 See, eg, *Skyring v Greenwood* (1825) 4 B & C 281; *Holt v Markham* [1923] 1 KB 504; *Lloyds Bank v Brooks* [1947–1954] 6 *Legal Decisions Affecting Bankers* 161; *Avon County Council v Howlett* [1983] 1 WLR 605; and *Rowe v Vale of White Horse District Council* [2003] 1 Lloyd's Rep 418.

98 See, eg, *Scottish Equitable plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818.

99 *Scottish Equitable plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818. See also *RBC Dominion Securities v Dawson* (1994) 111 DLR (4th) 230 and *Philip Collins v Davis* [2000] 3 All ER 808.

100 [2005] 1 WLR 247.

101 *Barros Mattos Junior v MacDaniels Ltd* [2005] 1 WLR 247 at [43].

approach as being too rigid.¹⁰² Instead, he argues, the better approach is “one [which] compares the seriousness of the illegality with the consequences of allowing restitution”. Another possible approach is to say that the alleged illegality is too remote and/or not central to the change of position. A hint of this approach is found in Arden LJ’s judgment in *Abou-Rahmah v Abacha*. Recall in this case that the claimants argued that the defendant should be precluded from relying on the change of position defence because the defendant opened a bank account despite having some suspicion of money laundering activities. Arden LJ (with Pill LJ agreeing) said:¹⁰³

It is not the function of the court in deciding whether a defence of change of position is made out to punish a defendant for conduct which is unrelated to the transactions on which the cause of action of the claimant is based.

42 The argument on remoteness and lack of centrality is premised on two contract cases – *21st Century Logistic Solution v Madysen*¹⁰⁴ (“*Madysen*”) and *ParkingEye Ltd v Somerfield Stores Ltd*¹⁰⁵ (“*ParkingEye*”). In *Madysen*, 21st Century was a company incorporated by Darren King to perpetrate Value Added Tax (“VAT”) fraud. In this type of fraud, a trading entity is incorporated and registered for VAT in the UK. The trading entity then purchases high value, low volume goods from suppliers outside the UK but within the European Union effectively free of VAT. Subsequently, the entity then sells the goods on in the UK charging VAT. The goods are often passed down a chain of contracts, VAT being charged on each supply but with the intermediate suppliers setting off the output tax arising on the onward supply against the input tax arising on the acquisition. The trading entity, however, has no intention of accounting for the output tax due on the supply it makes to the first buyer in the chain. Instead, it pockets the price, including the VAT, and then disappears without paying the VAT tax. In this case, 21st Century sold goods to Madysen. Madysen contended that it was not liable for the price of the contract on the grounds of illegality. In rejecting Madysen’s defence, Field J stated:

In my opinion 21st C’s fraudulent intention is too remote from the contract for it to be held that the contract is unenforceable on grounds of illegality. The VAT element in the price paid for a supply is not held on trust by the supplier for HMCE. A taxable supplier’s only material obligations under the VAT legislation are to account for VAT at the end

102 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at pp 542–543. See also A M Tettenborn, “Bank Fraud, Change of Position and Illegality: The Case of the Innocent Money Launderer” [2005] LMCLQ 6.

103 *Abou-Rahmah v Abacha* [2007] 1 All ER (Comm) 827 at [84]. Cf Rix LJ’s uneasiness about the potential money laundering aspect of the case.

104 [2004] 2 Lloyd’s Rep 92.

105 [2013] 2 WLR 939.

of each accounting period and to keep proper records. The use of the VAT element of sale proceeds on some purpose other than payment of VAT due to HMCE is therefore not unlawful. It follows that the fraud on HMCE intended by 21st C would only have been finally committed when 21st C failed to account to HMCE at the end of the relevant accounting period. The contract between 21st C and Madysen was a straightforward agreement for the sale of goods. In and of itself it was a lawful contract. It provided the opportunity for Darren King [the mastermind behind this fraudulent scheme] to profit from the intended fraud but that was all: the crucial act that had to be performed to work the fraud was a failure to account to HMCE.

In *ParkingEye* there was a contract to provide an automated monitoring and control system to some of the car parks owned or operated by the defendant, Somerfield Stores Ltd. Somerfield Stores Ltd committed a repudiatory breach which was accepted by the claimant, ParkingEye Ltd, who then sued for damages for lost revenue. The defendant raised illegality as a defence. It referred to letters which the claimant would send to recover “fines” from motorists who had defaulted on parking charges. Some of these letters falsely suggested that the claimant had the authority to and was intending to commence legal proceedings to recover the parking charges. The sending of the letters was held by the trial judge to have amounted to the tort of deceit. However, he found that the sending of the illegal letters was not one of the purposes of the contract, the most important of which was the installation of the system in car parks. He therefore concluded that any illegality was too remote to render the agreement unenforceable. On appeal, this judgment was upheld.

43 Both *Madysen* and *ParkingEye* were applied in Singapore in the Court of Appeal in *Ting Siew May v Boon Lay Choo*¹⁰⁶ (“*Ting Siew May*”). In *Ting Siew May*, the plaintiff backdated an option to purchase a house to obtain a more favourable loan arrangement in contravention of a notice to the banks issued by the Monetary Authority of Singapore. When the plaintiff sought to enforce the option to purchase against the defendant seller, the defendant argued that the option was unenforceable due to an illegality. Andrew Phang Boon Leong JA held that:¹⁰⁷

... where a contract is entered into with the object of committing an illegal act, the general approach that the courts should undertake is to examine the relevant policy considerations underlying the illegality principle so as to produce a *proportionate* response to the illegality in each case. [emphasis in original]

106 [2014] 3 SLR 609.

107 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [66].

In assessing the proportionality of the law's response, Phang JA said the courts would look at:¹⁰⁸

- (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and the conduct of the parties; and (e) the consequences of denying the claim.

It is predicted that the Singapore courts will adopt such a test with the necessary modifications if it is confronted with a problem of illegality in the context of change of position.

D. *Wrongdoing*

44 In *Lipkin Gorman*, Lord Goff said: “[I]t is commonly accepted that the defence should not be open to a wrongdoer.”¹⁰⁹ The controversy here is whether the change of position defence is capable of applying to a claim for restitution for a wrong.¹¹⁰ *Cavenagh Investment Pte Ltd v Kaushik Rajiv*¹¹¹ is an interesting case which considered this issue in some detail. In this case, the plaintiff was the owner of a penthouse unit in Pebble Bay. Without the plaintiff's knowledge, the plaintiff's employee, Razali, tenanted out the property to the defendant's employer for \$9,000 *per* month. The monthly rental was paid to Razali. When the fraud came to light, the plaintiff sued the defendant for, *inter alia*, trespass. The defendant pleaded the change of position defence. One of the issues, Chan J had to decide was whether the defence applied in the context of a wrong, that is, trespass. Chan J first had to decide whether this was a claim for compensatory damages or restitution. The learned judge thought this claim was not an action for compensatory damages because there was evidence that the plaintiff was unable and unwilling to lease the property to anyone else. As such, there was no indication that the defendant's occupation had prevented the plaintiff from letting the property to someone else. Instead, the claim was restitutionary in nature, that is, in the form of the gain the defendant enjoyed in occupying the property. Chan J allowed the defendant to rely on the plea of change of position. The learned judge said:¹¹²

I do not take the view that there should be a blanket ban on the defence of change of position applying to all cases of restitution for wrongs. Where the wrong involves some moral turpitude, the defence

108 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].

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

110 See Paul A Walker, “Change of Position and Restitution for Wrongs: ‘Ne’er the Twain Shall Meet?’” (2009) 33 MULR 235.

111 Noted in Rachel Leow, “Change of Position in Restitution for Wrongs – A View from Singapore” (2014) 130 LQR 18.

112 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [64].

would ordinarily not apply in any case because such a defendant cannot be said to have acted in good faith. Where there is no moral turpitude, but the wrong involved is one which the law has prescribed the remedy for a particular policy reason, then the defence also ought not to apply, but this is a question to be determined when each particular case arises to be decided.

On the facts, Chan J held there was no moral turpitude since the defendant had inadvertently trespassed on the plaintiff's property. If the defendant had wrongfully occupied the property with knowledge of and blatant disregard for the rights of plaintiff, the defence would ordinarily not be applicable for want of good faith. Furthermore, there is no overriding policy which would be stultified by the application of the change of position defence. Since the defendant was entitled to a housing allowance from his employer and the money was eventually paid to Razali, the defendant was held to have changed his position.

VII. Scope of the defence

A. *Undue influence*

45 In most of the reported cases in Singapore, undue influence is alleged by one party (usually a family member, *eg*, a wife, son or daughter) against another party (usually the family patriarch) with regard to the signing of a personal guarantee or the provision of security in the form of the family home to a bank.¹¹³ The purpose of these guarantees and securities is in exchange for a loan or overdraft facilities by the bank to the family business. The claim is usually brought against the bank to vitiate the guarantee/security based on the principles articulated in *Royal Bank of Scotland v Etridge*.¹¹⁴ Can the bank defeat this claim by pleading a change of position defence? In other words, can the bank argue that extending credit to the family business or husband represents a change of position on its part? It is suggested that the bank cannot invoke the change of position defence because this would stultify the protective policies underlying the doctrine of undue influence. Otherwise, in most cases, the claim would be defeated by the application of the change of position defence.

113 See, *eg*, *Oversea-Chinese Banking Corp v Chng Sock Lee* [2001] 3 SLR(R) 369.

114 [2002] 2 AC 773.

B. Failed loans

46 There are two cases which suggest that the change of position defence does not apply in the context of a failed loan.¹¹⁵ The first case is *Goss v Chilcott*. In this case, the plaintiff advanced money to the defendants. The loan was secured by a mortgage over the defendants' property. Once the money was received, the defendants lent the money to one Haddon. It turned out that the mortgage instrument was void because it was altered by Haddon. The plaintiff sued the defendants for a return of the loan amount on the basis of a total failure of consideration. The defendant pleaded change of position, that is, they had lent the money to Haddon and could not recover the money from him. Lord Goff refused to apply the change of position defence in this context. The learned judge said:¹¹⁶

[The defendant] allowed the money to be paid to Mr Haddon in circumstances in which, as they well knew, the money would nevertheless have to be repaid to the company. They had, therefore, deliberately taken the risk that he would be unable to repay the money, in which event they themselves would have to repay it without recourse to him.

Goss v Chilcott was applied in *Haugesund Kommune v Depfa ACS Bank*. In this case, the action was an unjust enrichment claim pursuant to money received under a void interest swap agreement. The Court of Appeal held that the defendant was not entitled to raise the change of position defence on the ground that the defendant had lost all the borrowed money due to disastrous investments. Aikens LJ said the defendant took the risk in this case since they always knew that the money had to be repaid whatever happened to the investments.

47 Graham Virgo rationalises *Goss v Chilcott* as a matter of risk allocation. According to Virgo, the defendant in *Goss v Chilcott* had taken the risk of the detrimental change of position. Hence, the defendant was not entitled to rely on the change of position defence. Aikens LJ accepted Virgo's explanation in *Haugesund Kommune v Depfa ACS Bank*.¹¹⁷ The problem with this explanation is that the concept of assumption of risk is a slippery and sometimes elusive concept. It is suggested that a better rationalisation of these two cases is that the unjust enrichment claim had no impact on the autonomy interests of

115 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at pp 546–547.

116 *Goss v Chilcott* [1996] AC 788 at 799.

117 *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549; [2012] 2 WLR 199; [2011] 1 All ER 190 at [125]–[126].

the defendant. Aikens LJ is correct to observe in *Haugesund Kommune v Depfa ACS Bank*:¹¹⁸

I have concluded also that the cases draw a clear distinction between two different types of circumstance ... The first is where the defendant obtains ... money in circumstances where he understands, in good faith, that it is his to keep and do what he likes with. Then that defendant spends the money, in good faith, on the basis of that understanding. The second type of case is where a defendant obtains money and, at the time of receipt, he understands that he will have to repay that sum at some stage in the future, which point has usually been identified between the payer and the payee, usually in a contract or what was, at the time, thought to be a valid contract.

48 Both these cases fall within the second type of case identified by Aikens LJ. At the start of the story, the defendant thinks that he or she has a contractual liability to return the money to the plaintiff. The defendant then spends the money. It turns out that there was no contractual liability to return the money. However, the law of unjust enrichment kicks in and imposes a legal liability on the defendant to make restitution to the plaintiff. If we analyse these facts using the disenrichment approach, we would come to the *prima facie* conclusion that the defendant is entitled to rely on the change of position defence since the defendant is disenriched. It is suggested that these cases may be explained on the basis that an obligation to make restitution in this context does not affect the autonomy interest of the defendant or frustrate the defendant's expectations. Initially, the defendant was under a contractual duty to repay the loan. It turns out this belief was false. The resultant position is that the defendant is not under a contractual duty to repay the money but is under obligation to repay under the principle of unjust enrichment. It follows that the unjust enrichment claim does not affect the defendant's autonomy or frustrate his or her expectations. This is because from the defendant's perspective it does not matter whether he or she was under an obligation to repay the money under contract or unjust enrichment. At the point when the defendant spent the money, the defendant was always under the belief that he or she had to pay back the loan to the plaintiff.

VIII. Conclusion

49 As can be seen from this article, the change of position defence is a developing doctrine. Debate continues as to its true rationale and various facets of the defence remains unclear. Many issues surrounding

118 *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549; [2012] 2 WLR 199; [2011] 1 All ER 190 at [123].

the following two fundamental questions await clarifications from the courts:

- (a) What constitutes change of position?
- (b) What kind of conduct disqualifies a person from relying on the change of position defence?

A theme that emerges from a close examination of the change of position defence is that it is a very fact-sensitive defence, making it very difficult to lay down broad propositions of law which apply across the board in all situations. This article has tried to map out the contours of the debate which would hopefully be useful in framing the debate when this matter next comes before the courts.
