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## Moses v. Macferlan 250 Years On

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# *Moses v. Macferlan 250 Years On*<sup>†</sup>

The Honourable Justice W.M.C. Gummow\*

## *Abstract*

*The continued influence of this decision of Lord Mansfield upon the scope of the action for money had and received is apparent in the Restatement (Third) of Restitution & Unjust Enrichment, recently adopted by the American Law Institute. The basic proposition that the action lies where the money was received in such circumstances that retention would offend equity and good conscience informs the Restatement. In particular, over definition and dissection of the defence of "change of position" by reference to "good faith" of the recipient diverts attention from the question whether in the circumstances of the case it would be inequitable for the claimant to require repayment. "Good faith" may require the exercise of caution and diligence by the recipient and, for example, may be lacking, even without dishonesty, if a financial institution fails to act in a commercially acceptable way.*

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### I. Introduction

On Monday May 19, 1760, the Court of King's Bench, led by Lord Mansfield, delivered its decision in a case which stood for their opinion upon a reservation by the trial judge. This was Lord Mansfield himself sitting at *nisi prius* at Guildhall in the City of London. The case was *Moses v. Macferlan*.<sup>1</sup>

Exactly 250 years later, on May 19, 2010, at its 87th annual meeting in Washington, D.C., the American Law Institute approved the final draft of the Restatement (Third) of Restitution & Unjust Enrichment ("the Restatement Third"). The publication of the Restatement Third will provide a new and important staging post for further development of the law, not only in the United States but also in Australia and elsewhere. The notes and comments by the Reporter, Professor Andrew Kull, supplement the succinct statements in the black law sections with a wealth of material provided by judicial and academic writings extending over a long period.

Not surprisingly, a significant component of the substratum for the Restatement Third is the decision in *Moses v. Macferlan* itself. I have endeavoured elsewhere to give an account of the litigation which led to the question reserved for the Court of King's Bench.<sup>2</sup> The essential point is that Macferlan had been bound by agreement not to sue Moses on four promissory notes (each for 30 shillings), and Moses now sued in the Court of King's Bench to recoup the £6 which had been recovered by Macferlan, in the Middlesex Court of Conscience, by action taken for breach of that agreement. Moses succeeded in his argument that the £6 was money had and received by Macferlan to the use of Moses.

### II. The Action for Money Had and Received

An examination of many of the modern authorities, which in general terms are described as "restitution" cases, shows that action was one for money had and received. It thus is appropriate to say something respecting that action.

The action for money had and received is the most comprehensive of the common counts, and significantly differs from the other common

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1. *Moses v. Macferlan* (1760) 97 Eng. Rep. 676 (K.B.); 2 Burr 1005.

2. *Roxborough v Rothmans of Pall Mall Austl. Ltd.* (2001) 208 CLR 516, 545–48 (Austl.); [2001] HCA 68 (providing an analysis of the *Moses v. Macferlan* decision).

counts. Writing in the recently published twelfth volume of *The Oxford History of the Laws of England*, Professor Lobban explains:<sup>3</sup>

In these counts [for goods sold or work done at the defendant's request], the originating debt was seen to have arisen from a contractual transaction, which could be implied from the fact of the defendant's request and receipt. By contrast, in the count for money had and received, the very wording of the declaration showed that the originating debt did not arise from a contractual transaction. In this count, the plaintiff did not aver a request, but stated that the defendant was "indebted to the plaintiff for money had and received to his use, and being so indebted promised to pay." Although it was essential, in *indebitatus assumpsit*, to allege that a promise had been made, proof of mutual assent and consideration were not necessary to sustain this action.<sup>4</sup> The promise was implied by the existing debt, and was not traversable,<sup>5</sup> and a plea of *non assumpsit* only put in issue whether there was a subsisting debt, or cause of action, at the time of commencing the suit<sup>6</sup>—that is, whether the defendant had money to the plaintiff's use.

It is important to observe further that the action is a qualification the law places upon what otherwise (but, nevertheless, subject to such matters as the action for conversion of negotiable instruments, equitable doctrines of tracing, "claw-back" provisions of insolvency and bankruptcy laws, and the laws respecting fraudulent conveyances) might be said to be the overriding importance attached to the security of actual receipts.<sup>7</sup>

The root of the doctrinal problem presented to the King's Bench in *Moses v. Macferlan* was the absence of an accepted basis for the action for money had and received. Lord Mansfield gave a number of settled instances where the action lay,<sup>8</sup> but the instant case did not fall within any

3. Michael Lobban, *Contract*, in 12 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 295, 564 (Sir John Baker ed., 2010).

4. While the debt was regarded as the consideration for the implied promise, in practice, "in an action for money had and received, a direct consideration moving from the plaintiff is seldom shewn." *Lilly v. Hays*, (1836) 111 Eng. Rep. 1272 (K.B.) 1273 (Patterson, J.); see also James Barr Ames, *The History of Assumpsit: II. Implied Assumpsit*, 2 HARV. L. REV. 53, 63 (1888).

5. Richard M. Jackson, *THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW* 44 (1936).

6. William Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, in 6 PERSONAL ACTIONS 686 (1817) ("The 'indebtedness' is therefore a bracketing together of different types of legal obligation. The promise does not give any difficulty, because it was not traversable after *Slade's Case*.").

7. Cf. *Dextra Bank & Trust Co. Ltd. v Bank of Jam.* [2002] 1 All E.R. (Comm.) 193 (P.C.) 204–05 (discussing the security of an "actual receipt").

8. See *Moses v. Macferlan* (1760) 97 Eng. Rep. 676 (K.B.) 678–79; 2 Burr 1005,

of them. Lord Mansfield also sought to find a principle within which past, present, and future cases might be accommodated. Given what he saw as the rigidities of the common law, Lord Mansfield looked to equity for an appropriate analogy upon which the common law should draw. Hence his general statements, then<sup>9</sup> and later,<sup>10</sup> that the action for money had and received was a liberal action in the nature of a bill in equity where on the general issue the defendant was entitled to raise by way of answer matters showing that receipt or retention of the payment was not unjust.

That was how *Moses v. Macferlan* was received in the United States case law. These decisions are sufficiently represented by the statements of Justice Cardozo in *Atlantic Coast Line Railroad Co. v. Florida*<sup>11</sup> that the action for money had and received was a common law action which was equitable in origin and function, and that:

The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.<sup>12</sup>

The third edition of Bullen and Leake's *Precedents of Pleadings*, published in 1868 and long indispensable in New South Wales, spoke to the same effect.<sup>13</sup>

What then has happened in England? The answer is pinpointed in the observations of Chief Justice Mason in *Baltic Shipping Co. v. Dillon*.<sup>14</sup> Shortly put, Lord Mansfield's explanation of the action was accommodated within the system of common law pleading by means of a fictitious assumpsit or promise. The pervasive influence in the 19th century of legal positivist theories disfavoured the apparent looseness of equitable analogies in the common law as expressions of "well-meaning sloppiness of

1009–10 (providing a number of examples where such an action would lay).

9. See *id.* at 679–80 (discussing the beneficial defences available to a defendant).

10. See *Clark v. Shee & Johnson*, (1774) 98 Eng. Rep. 1041 (K.B.) 1042; 1 Cowp 197, 199–200 ("This is a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subjectmatter [sic] of it, the plaintiff may well support this action.").

11. *Atlantic Coast Line R.R. Co. v. Florida*, 295 U.S. 301 (1935).

12. *Id.* at 309.

13. See 3 EDWARD BULLEN & STEPHEN MARTIN LEAKE, PRECEDENTS OF PLEADINGS IN PERSONAL ACTIONS IN THE SUPERIOR COURTS OF COMMON LAW 44 (1868) (discussing "[m]oney payable by the defendant by plaintiff for money received by the defendant by use for the plaintiff").

14. See *Baltic Shipping Co. v. Dillon* (1993) 176 CLR 344, 356–57 (Austl.); [1993] HCA 4 (discussing the action on a fictitious assumpsit).

thought,"<sup>15</sup> and supported a rigid dichotomy between contract and tort. These together were seen as comprising the relevant legal universe. In that setting the action for money had and received now was to be supported only as an annex to an action in contract and it was said that any alleged promise had to be capable of implication in fact.

That view of the matter has not been the law in Australia since *Pavey & Matthews Pty Ltd. v Paul*,<sup>16</sup> if not earlier. But why does this change of legal vision not bring with it a return to the understanding of *Moses v. Macferlan* evinced by such diverse lawyers as Bullen, Leake, and Justice Cardozo?

The response in much of the English academic writing (but not all of it) and some of the recent case law appears to be to impose a new form of taxonomic dogma. This does not recognise that "the development of common law doctrine over centuries means it cannot be corralled into very few principles," nor that the explanation of many of the cases by a broad concept does not necessarily elevate that concept to a test for liability.<sup>17</sup> The new taxonomy requires reappraisal of *Moses v. Macferlan*, and cautions, with respect to the broad terms in which Lord Mansfield spoke, that "ambiguity rots the foundations of rationality," and urges reconciliation between the common law and the law of unjust enrichment as understood in "every jurisdiction on the Roman side of the western legal tradition."<sup>18</sup>

The English doctrine would direct attention to the presence of "unjust enrichment" and to the absence of a defence such as that of "change of position." It would turn away from an approach which is now taken in the Restatement Third Sections 1 and 4 and is based on the anterior notion of good conscience which may call for restitution for unjustified enrichment. The Reporter for the Restatement Third took this course notwithstanding the advice offered from England by Professor Birks under the title "A Letter to America: The New Restatement of Restitution."<sup>19</sup> In Australia, the High Court has rejected the new English thinking, most recently in *Bofinger v Kingsway Group Ltd.*<sup>20</sup>

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15. See *Holt v. Markham* [1923] KB 504 at 513 (Eng.).

16. See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; [1987] HCA 5.

17. Matthew Conaglen & Peter Turner, *Subrogation, Accounting and Unjust Enrichment*, 69 CAMBRIDGE L. J. 30, 32 (2010).

18. Peter Birks, *A Letter to America: The New Restatement of Restitution*, 3 GLOBAL JURIST FRONTIERS 1, 4 (2003).

19. *Id.*

20. See *Bofinger v Kingsway Group Ltd.* (2009) 239 CLR 269; [2009] HCA 44 ("The respondents . . . in this Court correctly eschewed any attempt to support the outcome in the

## II. The Basis of the Action

Writing in 1986, in *National Commercial Banking Corp. of Australia Ltd. v Batty*,<sup>21</sup> Chief Justice Gibbs said of the theoretical basis of the action for money had and received:

Whether the action is based on an implied promise to pay, or on a principle designed to prevent unjust enrichment, the emphasis on justice and equity in both old and modern authority on this subject supports the view that the action will not lie unless the defendant in justice and equity ought to pay the money to the plaintiff.<sup>22</sup>

Shortly thereafter, the High Court held in *Pavey & Matthews Pty Ltd. v Paul* that the right to recover on a *quantum meruit* does not depend upon the existence of an implied contract, and the discarding there of the implied contract theory in Australia would also deny it as a foundation for the action for money had and received.<sup>23</sup> Subsequently, in *David Sec. Pty Ltd. v Commonwealth Bank of Austl.*,<sup>24</sup> it was said by five Justices that recovery for money had and received depends upon the existence in respect of the receipt of a qualifying or vitiating factor such as mistake (whether of law or fact), duress, or illegality.<sup>25</sup>

This course of High Court authority would appear to leave in command of the field in Australia the second theoretical basis mentioned by Chief Justice Gibbs in *Batty*, namely "a principle designed to prevent unjust enrichment."<sup>26</sup> But the range of circumstances in which the action for money had and received lies, the need for a qualifying or vitiating factor

Court of Appeals by application of reasoning in the recent English cases.").

21. *Nat'l Commercial Banking Corp. of Austl. Ltd. v Batty* (1986) 160 CLR 251; [1986] HCA 21.

22. *Id.* at 268 (citing *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.) 680–81; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (H.L.) 61, 64; *Fischler v. Adm'r of Roumanian*, [1960] 3 All E.R. 433 (H.L.) 446–47; *Campbell v Kitchen & Sons Ltd.* (1910) 12 CLR 515, 531 (Austl.); [1910] HCA 50; *R v Brown* (1912) 14 CLR 17, 25 (Austl.); [1912] HCA 6; *Watney v Mass* (1954) 54 SR (NSW) 203 (Austl.)).

23. *See Pavey & Matthews Pty Ltd. v Paul* (1987) 162 CLR 221, 227; [1987] HCA 5 (holding that the "right to recover on a quantum meruit does not depend on the existence of an implied contract").

24. *David Sec. Pty Ltd. v Commonwealth Bank of Austl.* (1992) 175 CLR 353; [1992] HCA 48.

25. *See id.* at 379 ("[R]ecovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.").

26. *Nat'l Commercial Banking Corp. of Austl. Ltd. v Batty* (1986) 160 CLR 251, 268; [1986] HCA 21.

attending the receipt, and the subsequent development of authority since *David Securities*, indicates the need here for caution.

In Comment a to Section 1 of the Restatement Third, the following appears:

It is by no means obvious, as a theoretical matter, how "unjust enrichment" should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system. Such questions preoccupy much academic writing on the subject of restitution. This Restatement has been written on the assumption that the law of restitution can be usefully described without insisting on an answer to any of them.<sup>27</sup>

However, in Australia an authoritative answer has been given to these questions. The doctrine settled by decisions of the High Court is that the concept of unjust, or unjustified, enrichment of a defendant at the expense of the plaintiff is not a principle of law which supplies a sufficient premise for direct application in a particular case. The most recent statement of principle is that in *Bofinger*.<sup>28</sup> Two points may be made respecting that statement of principle as it applies to the action for money had and received.

The first is that the action is not circumscribed by requirements that it only lies if the facts disclose "unjust enrichment" of the defendant "at the expense" of the plaintiff. Authorities such as *Martin v Pont*<sup>29</sup> show that the action may lie although the defendant who refuses to account to the plaintiff has not been enriched (e.g., because of an intervening defalcation by an employee of the defendant).<sup>30</sup> Further, a fiduciary who acknowledges receipt from a third party of moneys representing a profit from abuse of fiduciary duty (e.g., a bribe or secret commission) will be liable for money had and received at the instance of the principal, albeit the profit was from a

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27. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (2011).

28. See *Bofinger v Kingsway Group Ltd.* (2009) 239 CLR 269, 299; [2009] HCA 44 ("[T]he concept of unjust enrichment was not a principle supplying a sufficient premise for direct application in a particular case. The same is true of the equitable doctrine of subrogation . . .").

29. *Martin v Pont* [1993] 3 NZLR 25 (CA).

30. See *Roxborough v Rothmans of Pall Mall Austl. Ltd.* (2001) 208 CLR 516, 543–44 ("[P]rincipal who entrusted money to an agent for the purpose of investing it with a nominated finance company was entitled to recover from the agent whom, by reason of a defalcation by an employee of the agent which did not benefit the agent, the purpose was not carried out.").



transaction the principal would not or could not have conducted.<sup>31</sup> To apply the remarks of Lord Porter in *Reading v Attorney General*:

[T]he fact that the Crown in this case, or that any master, has lost no profits or suffered no damage is, of course, immaterial and the principle so well known that it is unnecessary to cite the cases illustrating and supporting it. It is the receipt and possession of the money that matters, not the loss or prejudice to the master.<sup>32</sup>

The second point to be made from what was said in *Bofinger* is that nevertheless the concept of unjust enrichment may assist in the understanding of what has come to be identified as the defence of "change of position."<sup>33</sup> It is to this defence that I now turn.

### III. The Genesis of the Change of Position Defence

The term "change of position" was used by Keener in 1887 when he asked, in an article titled "Recovery of Money Paid Under Mistake of Fact," published in the first volume of the *Harvard Law Review*: "How far is a change of position which prevents the defendant being put *in statu quo* an answer to an action brought to recover money paid under mistake?"<sup>34</sup> The term appears to have been put into wider currency in Keener's work *A Treatise on the Law of Quasi-Contracts*, published in New York in 1893 after he had left the Harvard Law School to become Dean of the Columbia Law School.<sup>35</sup> He wrote:

To say that a plaintiff can recover money paid by mistake notwithstanding the recovery will throw a loss upon the defendant provided the plaintiff is under no obligation to the defendant, is to lose

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31. See *Roxborough v Rothmans of Pall Mall Austl. Ltd.* (2001) 208 CLR 516, 541; [2001] HCA 68 ("The action may lie in respect of the money improperly received by a fiduciary."); *Turner v New S. Wales Mont de Piete Deposit & Inv. Co. Ltd.* (1910) 10 CLR 539, 546–47, 553, 556–57; [1910] HCA 15 (describing the principle in the context of fiduciary duties).

32. *Reading v. Attorney General*, [1951] A.C. 507 (H.L.) 516; see also *Morison v. Thompson*, [1874] 9 L.R.Q.B. 480 at 485–86 (Eng.) (noting that when a person is an agent for others, "all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers").

33. *Bofinger* (2009) 239 CLR at 300.

34. William A. Keener, *Recovery of Money Paid Under Mistake of Fact*, 1 HARV. L. REV. 211, 221–22 (1887).

35. See Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. OF LEGAL STUD. 297, 305–07 (2005) (discussing Keener's decision to leave Harvard Law School).

sight of the grounds upon which a recovery is allowed,—namely, that the defendant has money which in conscience he cannot keep. . . . The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant.<sup>36</sup>

Professor Keener referred to the decision of the Court of Common Pleas in *Brisbane v. Dacres*<sup>37</sup> as denying recovery on several grounds, one of which<sup>38</sup> was to the effect, in Keener's words, that "the defendant's position had been irrevocably changed in consequence of the payment."<sup>39</sup> However, this reference to irrevocable change was not an adoption as a defence to the action for money had and received of the denial of the equitable remedy of rescission of conveyances where restitution *in integrum* as understood in Chancery<sup>40</sup> was not possible.<sup>41</sup> Rather the approach in *Brisbane v. Dacres* in 1813 was the sequel to a number of statements by Lord Mansfield. These are exemplified by his remarks in *Dale v. Sollet*<sup>42</sup>:

This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience<sup>43</sup> and equity entitled to: Which can be no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded.<sup>44</sup>

In *Moses v. Macferlan* itself, when extolling the benefits of the action for money had and received, Lord Mansfield had said of the position of the defendant:

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36. WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 67 (1893).  
 37. *Brisbane v. Dacres*, (1813) 128 Eng. Rep. 641 (K.B.); 5 Taunt 143.  
 38. *Id.* at 648–49.  
 39. KEENER, *supra* note 36, at 59. The expression "change of position" was taken up by Woodward. See, e.g., FREDERIC CAMPBELL WOODWARD, THE LAW OF QUASI CONTRACTS § 25 (1913).  
 40. *Alati v Kruger* (1955) 94 CLR 216, 223–24 (Austl.); [1955] HCA 64.  
 41. Cf. *Freeman v. Jeffries*, (1869) 4 L.R. Exch. 189, 198 (denying recovery where plaintiff "knowingly deprived himself and the defendant of the means of rectifying any error which might have been committed, or of reinstating themselves in their original condition").  
 42. *Dale v. Sollet*, (1767) 98 Eng. Rep. 112 (K.B.); 4 Burr 2133.  
 43. *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.) 679–80; 2 Burr 1005, 1010–12.  
 44. *Dale*, 98 Eng. Rep. at 113; see also *Buller v. Harrison*, (1777) 98 Eng. Rep. 1243 (K.B.) 1244–45; 2 Cowp 565, 568 (finding defendant has no defence where he has suffered no prejudice); Ben Kremer, *The Action for Money Had and Received*, 17 J. CONT. L. 93, 116–17 (2001).

It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff, *ex aequo & bono*, is not intitled to the whole of his demand, or to any part of it.<sup>45</sup>

This skein of current legal thought is apparent in Section 65 of the Restatement Third. Section 65 appears with Sections 62–70 under the general title "Defences to Restitution" and is headed "Change of Position." It reads:

If receipt of a benefit has led an innocent recipient to change position in such manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient's liability in restitution is to that extent reduced.<sup>46</sup>

It will be apparent that, contrary to the views of the Privy Council in *Dextra Bank & Trust Co. Ltd. v. Bank of Jam.*,<sup>47</sup> this is not to equate the defence with an inquiry which makes it necessary "to balance the respective faults of the two parties."<sup>48</sup> Rather, the receipt of moneys paid, for example, by mistake, requires the recipient to account to the payer. That is the obligation of the recipient unless it would be inequitable to require this of the recipient. One ground rendering repayment inequitable will be change in position of the necessary character to raise the defence.

However, it is important to appreciate that "change of position" is a species of the genus "inequitable," not a synonym for it. The various references, beginning with the decisions of Lord Mansfield and continuing with the Restatement Third, to circumstances rendering it inequitable to oblige the recipient to provide restitution, wholly or in part, exemplify a striking characteristic of the common law. This is that in the action for money had and received the common law thereby has a means of accommodating both certainty and flexibility when faced with novel situations.<sup>49</sup> The generality in which notions of good conscience are

45. *Moses*, 97 Eng. Rep. at 679.

46. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (2011).

47. *Dextra Bank & Trust Co. v. Bank of Jam.*, [2002] 1 All E.R. (Comm.) 193 (P.C.).

48. *Id.* at 205–07.

49. *See Roads & Traffic Auth. (NSW) v Dederer* (2007) 234 CLR 330, 350 (Austl.); [2007] HCA 42 ("[H]ere is a product of the common law technique which looks to precedent and operates analogically as a means of accommodating certainty and flexibility in the law. Equity, by contrast, involves the application of doctrines themselves sufficiently comprehensive to meet novel cases.").

expressed is not an instance of ambiguity rotting the foundations of rationality. No doubt difficult judgments will be made in particular circumstances but this will always be in the context of deciding the rights and duties of identified parties.<sup>50</sup> The relevant conscience, as Chief Justice Gleeson put it in *Australian Broadcasting Corp. v Lenah Game Meats Pty Ltd.*,<sup>51</sup> is one properly formed and instructed with respect to the conduct in question.<sup>52</sup>

In its early decisions, the High Court approached the action for money had and received in this vein. Justice Barton said in *Campbell v Kitchen & Sons Ltd.*<sup>53</sup> that the action "depends largely on the question whether it is equitable for the plaintiff to demand or for the defendant to retain the money,"<sup>54</sup> and Chief Justice Griffith concluded:

In the present case, so far from thinking that it is inequitable that the defendants should retain the money which had been paid to them monthly for a period of seventeen years, and which they have no doubt taken into account in estimating and dividing their annual profits, I think that the rule of the common law is an equitable and just rule. I think, therefore, that on this part of the case the appellant must succeed, and the action so far as it relates to the claim to recover money already paid should be dismissed.<sup>55</sup>

The approach taken by Chief Justice Griffith in 1910 is consistent with the statement of principle by Lord Goff of Chieveley in 1991, when he said in *Lipkin Gorman v. Karpnale Ltd.*:<sup>56</sup>

[T]he defence [of change of position] is available to a person whose position has so changed that it would be inequitable in all the

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50. See *Thomas v Mowbray* (2007) 233 CLR 307, 479 (Austl.); [2007] HCA 33 ("Phrases like 'just and equitable' and words like 'reasonable' require difficult judgments to be made in particular cases. Those judgments are to be made, however, in the context of deciding the rights and duties of identified parties.").

51. *Austl. Broad. Corp. v Lenah Game Meats Pty Ltd.* (2001) 208 CLR 199 (Austl.); [2001] HCA 63.

52. *Id.* at 227.

53. *Campbell v Kitchen & Sons Ltd.* (1910) 12 CLR 515 (Austl.); [1910] HCA 50.

54. *Id.* at 531.

55. *Id.* at 525; see also *R v Brown* (1912) 14 CLR 17, 25 (Austl.); [1912] HCA 6 ("The action for money had and received law whenever the defendant had received money which in justice and equity belonged to the plaintiff and when nothing remained to be done except pay over the money.").

56. *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.).

circumstances to require him to make restitution, or alternatively to make restitution in full.<sup>57</sup>

His Lordship saw the defence as likely to be available only on comparatively rare occasions.<sup>58</sup> Lord Goff's views were referred to with apparent approval by Justice Dawson in *David Securities*.<sup>59</sup> They were repeated by the Privy Council in *Dextra Bank*.<sup>60</sup>

However, in *Lipkin Gorman* Lord Goff had gone on to identify as a benefit from the recognition of change of position as a defence the taking of "a more generous approach . . . to the recognition of the right to restitution."<sup>61</sup> The broader that right, the greater the need for a system of defences to over-broad claims. Is it to be the case, for example, that expenditure by the defendant is a sufficient change of position if the defendant has acted in "good faith" in making that expenditure? There may be some tension in the more recent English authorities<sup>62</sup> between, on the one hand, the treatment of "good faith" on the part of the defendant as, of itself, a sufficient answer by a defendant, and, on the other, a view that even if not dishonest some defendants should not escape liability for money had and received.

#### IV. Payment Over and Estoppel

From the long line of cases dealing with the action for money had and received there appear sub-categories of a "change of position" defence. Examples include cases of "payment over" and "payment" by agents to their principals, of which *Buller v. Harrison*,<sup>63</sup> discussed in *Australia and New Zealand Banking Group Ltd. v Westpac Banking Corp.*,<sup>64</sup> is an early example. In the latter decision, the High Court said that if the matter

57. *Id.* at 580.

58. *See id.* (noting this defence is "likely to be available only on comparatively rare occasions").

59. *See David Sec. Pty Ltd. v Commonwealth Bank of Austl.* (1992) 175 CLR 353, 405–06 (Austl.); [1992] HCA 48 (quoting Lord Goff's previous opinions).

60. *See Dextra Bank & Trust Co. v. Bank of Jam.*, [2002] 1 All E.R. (Comm.) 193 (P.C.) 204 (discussing the availability of the change of position defence).

61. *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) 581.

62. *See, e.g., Abou-Rahmah v. Abacha*, [2007] 1 All E.R. (Comm.) 827 at 839–41 (Rix, L.J.).

63. *Buller v. Harrison*, (1777) 98 Eng. Rep. 1243 (K.B.); 2 Cowp 565.

64. *See Austl. & N. Z. Banking Group Ltd. v Westpac Banking Corp.* (1988) 164 CLR 662, 681–83 (Austl.); [1988] HCA 17 (providing a discussion of *Buller v. Harrison*).

"needs to be expressed" in terms of change of position (or detriment), the payment by the agent to the principal of the money received on behalf of the principal of itself was the relevant change of position (or detriment).<sup>65</sup>

Other examples of sub-categories of "change of position" may include cases where the conduct of the parties has created a species of mutual relation which disentitles the plaintiff from recovery.<sup>66</sup> One such case may be where the recipient has acted to its detriment in reliance upon representations or other conduct of the payer, and to the extent that reliance is relieved. *Holt v. Markham*<sup>67</sup> is such an instance. There the demobilised RAF officer succeeded in showing that the payment agents of the Air Council were estopped by their representations, that he was entitled to the money paid to him, from alleging he had been overpaid by their mistake. But that is not to deny that it may be inequitable to require payment by the defendant even without an estoppel against the plaintiff.

In *Scottish Equitable, PLC v. Derby*,<sup>68</sup> Lord Justice Robert Walker referred to the estoppel cases suggesting detrimental reliance, not just detriment, would be essential, and preferred a "wide view" which looks to "a change of position, causally linked to the mistaken receipt, which makes it inequitable for the recipient to be required to make restitution."<sup>69</sup>

Two points, with respect, may be made here. First, as his Lordship recognised, criteria fixing upon causal connection present further questions as to adoption of one or more of competing theories of causation in the law to reduce to legal certainty a question to which a conclusive answer might not otherwise be given.<sup>70</sup> Secondly, while in some cases it may be inequitable to require reversal of the payment to the defendant if, on an overall view of the defendant's state of affairs at a later date, the defendant is no longer enriched because the benefit from the impugned payment has been "cancelled out," that will not necessarily always be so.

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65. *Id.* at 682; see also *Port of Brisbane Corp. v ANZ Sec. Ltd. (No 2)* [2003] 2 Qd R 661, 677 [26] (McPherson, J.A.).

66. See *Durrant v Ecclesiastical Comm'rs* (1880) 6 QBD 234, 236 ("This and other similar cases proceed upon the ground of some mutual relation between the parties . . .").

67. See *Holt v. Markham* [1923] KB 504 at 511 (Eng.) ("[C]onsequently the plaintiffs are estopped from alleging the payment was made under a mistake of fact.").

68. *Scottish Equitable, PLC v. Derby*, [2001] 3 All E.R. 818 (C.A.).

69. *Id.* at 826–27.

70. See *Amaca Pty Ltd. v Ellis* (2010) 240 CLR 111, 137 (Austl.); [2010] HCA 5 ("[D]espite this uncertainty, the courts must, and do, 'reduce to legal certainty [a question] to which no other conclusive answer can be given.'").

### V. *David Securities and Change of Position*

The subject of change of position received consideration in the joint reasons in *David Securities*, but the Court had been presented with limited argument; the availability of any defence not being for immediate decision on the appeal. Their Honours saw the essential question as being whether "the defendant has acted to his or her detriment on the *faith of the receipt*."<sup>71</sup>

Further consideration may be required of the expression "on the faith of the receipt." The phrase, "on the faith of," as Lord Sumner observed in *R E Jones Ltd. v. Waring and Gillow Ltd.*,<sup>72</sup> is not a proposition clear in itself; it may only mean "acting in the belief" or "because of," or it may bespeak regularity in business practice, or the derivation of knowledge by the recipient.<sup>73</sup>

The statement in *David Securities* received some elaboration by the New South Wales Court of Appeal in *State Bank of New South Wales Ltd. v Swiss Bank Corp.*<sup>74</sup> This was that "knowledge derived otherwise than from the payer cannot be relevant in deciding whether a change of position by the payee occurred on the faith of the receipt."<sup>75</sup> However, whilst not doubting the actual result in that case, to adopt that statement as a defining principle may be to replace by a restricted formula what is the more general inquiry: Whether in the circumstances of the case it would be inequitable to require repayment of the receipt.

### VI. *The Definition of "Change of Position"*

There is much to be said for the view favouring the general proposition respecting "change of position" which is exemplified in Section 65 of the Restatement Third. Overdefinition and dissection of the phrase "change of position" may only serve to divert attention from what is the central question, whether it would be an inequitable result for the claimant to

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71. *David Sec. Pty Ltd. v Commonwealth Bank of Austl.* (1992) 175 CLR 353, 385 (Austl.); [1992] HCA 48 (emphasis added).

72. *R E Jones Ltd. v. Waring and Gillow Ltd.*, [1926] AC 670 (H.L.).

73. *Id.* at 692.

74. *State Bank of New S. Wales Ltd. v Swiss Bank Corp.* (1995) 39 NSWLR 350 (Austl.).

75. *Id.* at 355.

require repayment.<sup>76</sup> This caution applies particularly to the notion of "good faith" as sufficient support for a change of position defence.

In *Dextra Bank*, the Privy Council appears to have stipulated "good faith on the part of the recipient," without any attendant "fault" on the part of the recipient, as an appropriate, perhaps *the* appropriate, criterion for a defence of change of position.<sup>77</sup> There is a difficulty here. It is that, as Lord Goff emphasised in *Lipkin Gorman*, the law in this area may be expected to develop from case to case, but with regard to fundamental principle.<sup>78</sup>

Without more, a criterion of good faith on the part of the recipient does not supply a sufficient principled basis for that development. The term "good faith" is somewhat protean in character, and has a long-standing and wide usage in a variety of statute and general law settings.<sup>79</sup>

The term may be used to identify a state of mind, irrespective of the quality or character of the inducing causes or circumstances, so that an honest but careless party may be acting in good faith. But it may also require the exercise of caution and diligence to be expected of a person of ordinary prudence placed in the situation in question.<sup>80</sup> Where the question is whether it would be inequitable for a defendant to retain money had and received to the use of the plaintiff, the "good faith" of that defendant is better assessed in the latter fashion.

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76. See *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.) 374–75 (discussing interpretation of "just and equitable").

77. *Dextra Bank & Trust Co. v. Bank of Jam.*, [2002] 1 All E.R. (Comm.) 193 (P.C.) 205–07.

78. See *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) 580 (discussing the development of this defence on a case by case basis).

79. See *Sec'y, Dept. of Educ., Emp't, Training & Youth Affairs v Prince* (1997) 152 ALR 127, 130 ("[T]he term 'good faith' . . . is a protean one having longstanding usage in a variety of statutory and . . . common law contexts."); *Bropho v Human Rights & Equal Opportunity Comm'n* (2004) 135 FCR 105, 129–31 (analysing the concept of "good faith" in the legal setting).

80. See *Bankstown City Council v Alamo Holdings Pty Ltd.* (2005) 223 CLR 660, 674 (Austl.); [2005] HCA 46 (noting examples "in the law where 'good faith' is used as a criterion requiring some state of mind or knowledge"); *Cannane v J Cannane Pty Ltd.* (In liq) (1998) 192 CLR 557, 596 (Austl.); [1998] HCA 26 (discussing the "objective construction of [good faith] by the introduction of such concepts as an absence of reasonable caution and diligence"); *Mid Density Devs. Pty Ltd. v Rockdale Municipal Council* (1993) 44 FCR 290, 298–99 ("On the other hand, 'good faith' may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence.").



No doubt, the nature of any business in the course of which the money was received may be important. Thus, in *Port of Brisbane Corp. v ANZ Sec. Ltd (No. 2)*,<sup>81</sup> Justice of Appeal McPherson observed:

A stockbroker who refused to receive or to deal with money from his client without first checking the client's title to it would soon find himself out of business. He is, after all, conducting a stockbroking business and not a detective agency. The same is true of a host of other activities, including the practice of accountants, solicitors and estate agents, in which funds are constantly being received from clients on trust to be applied for particular purposes. In many instances, the exigencies of the contemplated transaction would not permit a thorough, or indeed any, investigation as to the original source of the funds or their true ownership at the time of their receipt.<sup>82</sup>

However, the protocols for the receipt and management of funds received by such individuals and institutions may be indicative of a standard of diligence expected of them by the law. A "responsible entity" which manages investment funds is required by the *Corporations Act 2001*<sup>83</sup> to establish a compliance plan setting out adequate measures to ensure compliance with that statute.<sup>84</sup>

Thus, it would not necessarily follow that because the recipient of moneys did not act in bad faith, it must have acted in good faith and it therefore would be inequitable to require the recipient to restore what it received. This appears to have been recognised by the English Court of Appeal in *Abou-Rahmah v. Abacha*.<sup>85</sup> The defendant bank there had carried on business in Nigeria. The plaintiffs paid monies to the bank on the instructions of fraudsters, for transfer to the account of a customer of the bank whose principals were participants in the fraud. The Court of Appeal expressed differing views as to whether, on the facts, the bank had made good a defence to the action for money had and received, Lord Justices Pill and Arden considering that it had done so and Lord Justice Rix the contrary. What is of considerable significance is that all members of the Court of Appeal proceeded on the footing<sup>86</sup> that a failure by the bank to act

81. *Port of Brisbane Corp. v ANZ Sec. Ltd. (No. 2)* [2003] 2 Qd R 661.

82. *Id.* at 673.

83. *Corporations Act 2001* (Cth) pt 5C.4 (Austl.).

84. *Financial Transaction Reports Act 1988* (Cth) (imposing certain reporting requirements on various entities).

85. *Abou-Rahmah v. Abacha*, [2007] 1 All E.R. (Comm.) 827.

86. *Id.* at 840–41, 855–56 (Rix and Pill, LJJ.) (citing *Niru Battery Mfg. Co. v. Milestone Trading Ltd.*, [2004] Q.B. 985 at 1003–04 (Eng.) (Clarke, LJ.)); *see also* *Jones v. Churcher*, [2009] 2 Lloyd's Rep. 94 at 103 (Eng.).

in a commercially acceptable way, albeit without dishonesty, could deny a defence of change of position.<sup>87</sup> Lord Justice Rix said:

It is not commercially acceptable for banks who suspect "in a general way" would-be customers of being involved in money laundering to open up accounts for them. There is no panacea in a standard, statutory, weekly report of all transactions of a stipulated size. The failure to make such a return would have been in itself unlawful and strong evidence of something very seriously amiss. The making of such a return does not make the opening of the account acceptable.

....

In sum, can it be said that a party who opens up an account for a prospective client who is suspected of lending himself to money laundering should have a defence of change of position just because he is unable to identify, and cannot be blamed for failing to identify as suspect, individual dishonest transactions? I think not.<sup>88</sup>

#### VII. Conclusions

In *Kleinwort Benson Ltd. v. Lincoln City Council*,<sup>89</sup> Lord Hope of Craighead referred to the writings of European scholars upon civilian systems as supporting a principle that it is unjust for the defendant to retain a benefit received at the expense of another, and without the intention that it be received, where there is lacking "any legal ground to justify its retention."<sup>90</sup> The formulation in Section 65 of the Restatement Third permits greater scope for the determination of a just result in the particular circumstances of the case.

Whether a taxonomy that fixes upon the absence of a legal ground to justify retention and that absolves any defendant who is no longer enriched, but who carelessly failed to appreciate the circumstances in which the payment came to be made to him, fairly reflects the understanding of modern civilian systems may be a matter for debate elsewhere.<sup>91</sup> The immediate point is that, given the characteristics of the action for money

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87. *Abou-Rahmah v. Abacha*, [2007] 1 All E.R. (Comm.) at 840–43 (Rix, LJ.), 851 (Arden, LJ.), 855–56 (Pill, LJ.).

88. *Id.* at 842, 844.

89. *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L.).

90. *Id.* at 408–09.

91. See THOMAS KREBS, *RESTITUTION AT THE CROSSROADS: A COMPARATIVE STUDY* 280–85, 288, 290, 297 (2001) (noting the current state of the "disenrichment" defence in Germany).

had and received, as understood 250 years after *Moses v. Macferlan*, there is no occasion to adopt such doctrine in Australia.