IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No s163/2013

BETWEEN:

Australian Financial Services and Leasing Pty Limited
(ACN 105 657 681)
Appellant

and

Hills Industries Limited
(ACN 007 573 417)
First Respondent

Bosch Security Services Pty Limited
(ACN 068 450 171)
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: SOLICITORS' CERTIFICATE

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. The case concerns the nature of the defence of change of position to a claim for restitution where monies have been paid as a result of mistake. The appellant paid substantial funds to each of the respondents in the belief that it was acquiring equipment to lease to a third party. The third party was indebted to the respondents and perpetrated a fraud on both the appellant and respondents. The Trial Judge found there had been no negligent failure in regard to the commercial practice of either the appellant or respondents, and that finding was not challenged in the Court of Appeal.

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3. There was no dispute that the payments had been made by the appellant in consequence of a mistake on its part, and that no equipment existed which it would acquire by virtue of the payments. The appellant was thus prima facie entitled to restitution of the sums paid, subject to defences raised by the respondents.

4. In the Court of Appeal all three Judges (Bathurst CJ, Allsop P and Meagher JA) upheld the change of position defence. Allsop P found that there was also a defence of consideration for the payments. Both Allsop P and Meagher JA based their decision on both a narrow and broad version of the change of position defence. Bathurst CJ concurred in the broad change of position defence accepted by Allsop P and Meagher JA.

5. The respondents established that they had taken certain actions, and changed their position in consequence of receipt of the payments. Chiefly, they discharged debts from the third party, abandoned recovery action, or determined not to pursue recovery action against the third party. Hills also engaged in some further trading with the third party, although on a limited basis. Nevertheless, neither of the respondents established that they had suffered any quantifiable loss in consequence of their change of position.

6. The appellant contends that the chief issue raised in the appeal is whether in regard to the change of position defence to a claim for restitution of monies paid under a mistake, where the change of position is a loss of opportunity, or loss of property or rights, the defendant ought show, as best it can, the value of the lost rights or opportunity, and the defence operates only to the extent of that value.

7. The appellant accepts that in some circumstances, such as the present matter, the process of quantification will not be precise, and to the extent that one is concerned with the loss of a chance, may involve the application of probability.

8. In the present matter the evidence that was before the Primary Judge strongly suggested that the debts discharged, recovery actions abandoned, or not pursued by the respondents, were worthless.

9. Additionally, to the extent that the Court treated the respondents as having dealt with the money by notionally paying it away and receiving it back in satisfaction of the debts the third party had accumulated on its account, the Court failed to address what had happened in substance with the monies received from the appellant. Those monies never left the respondents' accounts (except for some relatively small sums dealt with by way of adjustment). In keeping the monies in purported satisfaction of a worthless cause of action, the appellants should be found to have been unjustly enriched.

Part III: SECTION 78B OF THE *JUDICIARY ACT*

10. The appellant does not consider that any notice needs to be given in compliance with s.78B of the *Judiciary Act 1903*.

Part IV: CITATION OF THE AUTHORISED REPORT

11. The citation of the authorised report of the Primary Judge is:-

Australian Financial Services & Leasing Pty Limited v Hills Industries Limited & Ors [2011] NSWSC 267

The citation of the authorised report of the Court of Appeal is:-

Hills Industries Limited & Ors v Australian Financial Services; and
Leasing Pty Limited; Australian Financial Services; and
Leasing Pty Limited v Bosch Security Systems Pty Limited
2010 [NSW] NSWCA 380

Part V: STATEMENT OF RELEVANT FACTS

12. The matter involves a restitutionary claim by the Applicant, Australian Financial Services and Leasing Pty Ltd (**AFSL**), against a number of manufacturers and suppliers of commercial and industrial equipment. This appeal is from the whole of the judgment of the NSW Court of Appeal made against AFSL, in favour of two of the manufacturers, Hills Industries Ltd (**Hills**) and Bosch Security Systems Pty Ltd (**Bosch**). The claim against the third defendant, Jetobravo Pty Ltd (**Jetobravo**), was settled after the judgment was handed down at first instance.

13. AFSL is a business financier. In 2009 AFSL was the victim of a fraud committed by an individual named Mr Skarzynski who concocted false invoices for the purchase of equipment from Hills and Bosch[1], amongst others, and presented those invoices to AFSL as the basis for obtaining finance from AFSL for the purchase of certain industrial equipment. When it was presented with the concocted invoices AFSL, not knowing they were concocted, paid Hills and Bosch pursuant to the terms of the invoices by electronic funds transfers[2]. AFSL also entered into a leaseback agreement in respect of the goods referred to in the invoices with a company owned and controlled by Mr Skarzynski[3]. Under these agreements AFSL purportedly owned the equipment, but leased it to Mr Skarzynski's companies[4]. The names of Mr Skarzynski's companies who entered into these lease agreements with AFSL were relevantly, Total Concept Projects (Australia) Pty Ltd (**TPC**) and Total Concept Productions (Australia) Pty Ltd (**TPC2**).

14. Each of Hills and Bosch has acknowledged that the invoices AFSL received were fraudulent and were not created by them. Each of Hills and Bosch also acknowledged that the equipment referred to in the invoices never existed. The money paid by AFSL was transferred to Hills and Bosch, and then credited by those companies to the accounts Mr Skarzynski and his companies had with Hills and Bosch. As part of the fraudulent scheme, Mr Skarzynski had advised Hills and Bosch that payments were being made at his direction in order to repay debts he owed to those entities.

15. At the time AFSL transferred money to both Hills and Bosch, AFSL understood it was purchasing equipment for the purpose of leasing back to its customer. The sums transferred were for significant amounts (on 25 August 2009, AFSL transferred $308,000 to Hills; on 3 September 2009, AFSL transferred $198,000 to Bosch). At the time the transfers were made, AFSL sent a remittance advice to each of Hills and Bosch outlining the amounts paid and referring to the invoice numbers to which the payments related[5]. Neither of the amounts paid to either Hills or Bosch correlated exactly with the amount of indebtedness that Mr Skarzynski had with Hills and Bosch at the time of the transfer.

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[1] Blue Appeal Book at 54 and 84.
[2] Blue Appeal Book at 66 and 87 (Bank Statements); at 69 and 89 (Remittances).
[3] Blue Appeal Book at 55 (Rental Agreement for Hills equipment); at 76 (Rental Agreement for Bosch equipment).

16. AFSL entered into lease agreements with TPC and TPC2 in respect of the concocted invoices of Hills and Bosch in or about August and September 2009. Some payments were made by TPC and TPC2 under the lease agreements with AFSL in late 2009, and early 2010. On 17 February 2010, AFSL was advised that Mr Skarzynski's companies were in serious financial difficulty[6]. By late March, early April 2010, AFSL discovered that it had been defrauded[7]. It was also apparent at this time that the invoices on which they had relied to transfer the money to Hills and Bosch were concocted, and that the equipment referred to in those invoices (which AFSL had understood they had purchased, and now owned) never existed.

10 17. On 6 April 2010, AFSL's solicitors made a demand on Hills and Bosch for the immediate repayment of the money paid to them by AFSL in August and September, respectively, referring to the concocted invoices and the fact that AFSL's remittance advices refer to invoices that Hills and Bosch had not created and ought to have known were not genuine[8]. Both Hills and Bosch refused to repay the money they had received by AFSL's mistake[9].

18. On 12 April 2010[10], the CBA appointed receivers to Mr Skarzynski's companies, and on 5 July 2010[11] a liquidator was appointed to Mr Skarzynski's companies and on 22 July 2010[12] and 1 September 2010[13] a sequestration order was made in relation to the estate of Mr Skarzynski and Mr Musico respectively, both directors of TCP and TCP2. The
20 reports prepared by Mr Skarzynzki and Mr Musico's trustees in bankruptcy[14], and NSW Land and Property Searches[15] for these individuals show that they had no assets of any substance, but had significant debts. Accounts lodged with ASIC in 2010 and 2011 by the liquidator for TCP[16] and TCP2[17], and various other reports prepared about the

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[4] Blue Appeal Book at 55 (clause 1) and 76 (clause 1).
[5] Blue Appeal Book at 69 and 89.
[6] Blue Appeal Book at 32 para [143] – [145].
[7] Blue Appeal Book at 41 para [170] – [180].
[8] Blue Appeal Book at 46 [186] and at 496-497.
[9] Blue Appeal Book at 410 and 548.
[10] Blue Appeal Book at 1649 and 1663.
[11] Blue Appeal Book at 1649 and 1663.
[12] Blue Appeal Book at 1645 at 2071.
[13] Blue Appeal Book at 1644 and 1598.
[14] Blue Appeal Book 2068-2091 and 1594-1643.
[15] Blue Appeal Book at 1400-1401.
[16] Blue Appeal Book at 1667-1668 and 1687-1688 and 1689-1699.

companies in 2010[18], showed as well that those entities had no assets of any substance, but had significant debts. This was the only evidence before the Primary Judge on the question of the value of any claim that either Hills or Bosch may have had against either of Mr Skarzynksi or Mr Musico, or the entities associated with them. It showed any claim that may have been pursued against these individuals or entities in 2009 or 2010 by either Hills or Bosch was totally worthless. This was also the view, ultimately, of the Primary Judge[19].

19. In April and May 2010, AFSL commenced proceedings in Queensland and NSW against various parties associated with TC and TCP2[20]. The proceedings in Queensland came to nothing – the action was worthless because of the existence of prior registered mortgages over property that was owned in Queensland by the judgment debtor. In the NSW proceedings against Mrs Skarzynski (Mr Skarzynski's wife), and another creditor, All-Up Finance Pty Ltd, AFSL was able to recover an amount being the net proceeds from the sale of her property[21].

20. On 28 May 2010, AFSL commenced proceedings for recovery of the money paid to Hills and Bosch by mistake in the NSW Supreme Court.

Proceedings before the Primary Judge, Einstein J

21. AFSL's claim against Hills and Bosch (and Jetobravo) was heard in the Commercial List of the NSW Supreme Court in March and April 2011 by Einstein J (**the primary judge**).

22. The primary judge gave judgment on 5 April 2011. In his judgment the primary judge found that, so far as the claim against Hills and Jetobravo were concerned, AFSL was entitled to restitution of the amount paid to them, less some deductions in respect of rental payments made by TCP and GST paid by TCP. So far as the claim against Bosch was concerned, the primary judge dismissed AFSL's claim with costs.

23. In each of the claims against the three defendants the primary judge found that AFSL

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[17] Blue Appeal Book at 1700-1711 and 1712-1713 and 1714-1715.
[18] Blue Appeal Book at 1716-1754.
[19] Judgment of Einstein J at [76].
[20] Blue Appeal Book at 1350 and 1351.

had made out its cause of action and that it had a *prima facie* right of restitution against them. In respect of the claims against Hills and Jetobravo, the primary judge dismissed all the defences relied upon by them at the trial. The primary judge gave judgment for AFSL for the amounts claimed against Hills and Jetobravo, less some deductions for rental payments and GST.

24. In its Defence to the claim for restitution Hills relied upon a number of defences, including the defence of change of position. Before the primary judge Hills argued in support of its change of position defence that at the time of receiving payment from AFSL it had suffered the following detriment: (i) it had forgone its decision to take recovery action against TCP or its directors and lost its opportunity to do so, and (ii) it had advanced further goods to TCP for which it was not paid[22].

25. The primary judge rejected Hills defence of change of position[23]. The primary judge concluded that forgoing a decision to take action was too speculative, in the context of the precarious state of the financial position of TCP, and the *"extent to which it was unlikely that given TCP's debts and other creditors Hills would have been able to recover significant sums from TCP."*[24]

26. So far as Bosch was concerned, the primary judge upheld its defence of change of position and found that the *prima facie* entitlement of AFSL to restitution from Bosch had been displaced[25]. Like Hills, Bosch relied upon a number of defences to show that restitution would be unjust in the circumstances. Only its change of position defence was successful. The primary judge held that in relation to Bosch that it could establish *"real detriment by way of actual extinguishment of [a] legal claim to TCP's property."*[26] Bosch claimed that at the time of receiving the payment from AFSL, it was a judgment creditor of the TCP companies, Mr Skarzynski and Mr Musico. Bosch had obtained default judgments in the NSW Local Court against these entities and individuals, and upon receiving money from AFSL it consented to orders setting aside these default

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[21] [2012] NSWSC 1004 at [92].
[22] Judgment of Einstein J at [65].
[23] Judgment of Einstein J at [77].
[24] Judgment of Einstein J at [76].
[25] Judgment of Einstein J at [151].
[26] Judgment of Einstein J at [150].

judgments[27].

27. In coming to his conclusions on Bosch's defence of change of position, the primary judge rejected AFSL's argument that Bosch was in no different position to Hills at the time of receipt of the payment from AFSL. His Honour accepted AFSL's argument that at the time of receipt of the payment in September 2009 any claim against TCP or TCP2, or Mr Skarzynski for that matter, was worthless or of no value as the companies and Mr Skarzynski were of no value as they owned no assets. Although Bosch agreed to set aside the judgments it had obtained against the TCP companies and directors in September 2009, nevertheless those judgments were worthless.

10 28. The primary judge rejected the argument (based on the evidence tendered at trial) that each of the TCP companies and the directors of those companies, Mr Skarzynski and Mr Musico, at the time of Hills and Bosch receiving the payment from AFSL, had no assets against which any claim or judgment cold be enforced by either Hills or Bosch. Further, neither Hills nor Bosch (each of whom had the onus to establish their change of position defence and displace the prima facie position) adduced any evidence to the contrary. Indeed, the primary judge found that the financial position of TCP was *"precarious"* at the time the payment was by Hills made in August 2009 – one month before the payment was made to Bosch, in September 2009[28].

29. The primary judge concluded (wrongly, it is submitted by AFSL) that the payment
20 Bosch received from AFSL was payment in satisfaction of the rights it had against the TCP companies and its directors (namely, the default judgments) and that this extinguishment of a legal claim was *"real detriment"*, unlike the position of Hills who was not a judgment creditor at the time it received payment from AFSL.

Appeal Proceedings in the NSW Court of Appeal

30. AFSL appealed against the findings of the primary judge regarding the change of position defence of Bosch. Hills, likewise, appealed against the findings of the primary judge regarding the change of position defence of Hills.

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[27] Judgment of Einstein J at [122]-[130].
[28] Judgment of Einstein J at [76].

31. In its judgment the Court of Appeal upheld Hills appeal and dismissed AFSL's appeal. Each Court of Appeal judge gave separate judgments and separate reasons for their decisions. Ultimately, Bathurst CJ agreed with Allsop P on what Allsop P described as Hills' and Bosch's 'Change of position based on a wider view of the facts' at paragraphs [148] to [166][29].

32. Meagher JA agreed with those conclusions. His Honour also found at paragraph [216] that Hills and Bosch had a complete defence to the claims for recovery because what each did was equivalent to paying the funds away for no consideration and this was done on the faith of the receipt. Meagher JA treated this as a further change of position defence.

The NSW Court of Appeal's decision regarding the change of position defence of Hills and Bosch

33. Commencing at paragraph [148], Allsop P sets out his Honour's analysis of the law of change of position in Australia. His Honour considers in detail what the scope of the defence is in Australia, and, as outlined in paragraph [151], whether the defence was limited to a more precise and specific requirement for identifying expenditure (or loss), or whether it extended to a more flexible and broad consideration of the matter.

34. At paragraph [153], his Honour observes there are difficulties in using purely monetary and expenditure-based considerations to decide upon change of position. At paragraph [155] Allsop P accepts that on the authority of *David Securities* at 385 that the detriment must be on the faith of the receipt, and that it was a defence only available to someone whose position has so changed as to make it inequitable in all the circumstances to require restitution.

35. After consideration of the situation generally of payee and payer in commerce, in paragraph [160], his Honour concludes (erroneously it will be submitted below) that *David Securities* does not limit the defence of change of position, by requiring the defendant to point to expenditure or financial commitment, which can be ascribed to the mistaken payment.

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[29] Court of Appeal judgment at [1].

36. In paragraphs [163] through to [165], Allsop P rejects the arguments of AFSL that neither Hills nor Bosch could prove, the onus being on them, that the foregone opportunity of suing TCP or its directors was worth anything, or that they would have been better of in monetary terms.

37. In his analysis, Allsop P, was prepared to accept firstly, and unlike the primary judge, that both Hills and Bosch were in the same position vis-à-vis TCP in late 2009 in relation to any steps those companies had taken to recover their debts from TCP and the directors of TCP. Secondly, Allsop P was prepared to conclude (at paragraph 165]) that on the faith of the receipt both Hills and Bosch gave up *"both the debts owed by TCP companies by way of discharge a real and potentially valuable commercial opportunity to enforce or secure payment from their trade debtors"*. His Honour concluded that in these circumstances it would be unjust between these commercial parties to order restitution of the sums received.

38. For this reason Bathurst and Allsop P agreed to dismiss AFSL's appeal and upheld Hills appeal, both with costs.

PART VI: OUTLINE OF APPELLANT'S ARGUMENT

The Issues

39. The Court of Appeal accepted that the payments the subject of the proceedings were the result of a mistake and there was a prima facie obligation on the respondents to make restitution. The entire focus of the decision was thus upon whether or not a defence had been made out. Although Allsop P concluded that a defence of good consideration had been made out, that was not joined in by either Bathurst CJ or Meagher JA.

40. The only ground receiving support from a majority of judges was the change of position defence. However, even the change of position defence was viewed as having two aspects. Both Allsop P and Meagher JA concluded that the fact that the moneys mistakenly paid by the appellant had been treated by the respondents as discharging a debt, constituted a change of position without the need for any inquiry into the value of the debt. It seems to inevitably follow from the reasoning of their Honours on this

aspect of the case that even had the debt been valueless it gave rise to a change of position defence to the whole of the appellant's claim. This point is referred to in the balance of these submissions as "the discharge argument".

41. Additionally, both Allsop P and Meagher JA concluded that there was a change of position defence from what is referred to as "a wider view of the facts". The abandonment of action by the respondents to seek recovery of the debts, consent to setting aside the judgment in the case of *Bosch,* and the consequent loss of opportunity to recover or secure the debt were all treated by each of their Honours as a change of position which gave rise to a complete defence to the appellant's claim. This argument is referred to hereafter as the "wider facts" argument. Allsop P and Meagher JA also eschewed any attempt to value the lost opportunities and rights which the respondents were found to have abandoned on the wider facts argument. Bathurst CJ joined only in this wider facts reason, not the discharge reason.

42. The appellants' central argument on this appeal is that the mere entry into transactions, or abandonment of opportunities, even if having a nominal or face value equal to or exceeding the sums claimed by the appellants, ought not to draw down a veil over the transactions or conduct, preventing inquiry into the value lost or forgone by the respondents. A Court presented with a change of position defence based on discharged debts or lost opportunities ought make a finding as to the value of those rights or opportunities and the defence ought operate only *pro tanto* to the extent of that value.

The Change of Position Defence: The Australian Law

43. This Court considered the change of position defence in *Australia & New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662 and *David Securities Pty Limited & Ors v The Commonwealth Bank of Australia* (1992) 175 CLR 353. Neither decision dealt directly with the present issues.

44. In *ANZ v Westpac* the central issue concerned whether payment over by an agent to its principal, constituted a good defence to an action against the agent for recovery of money under a fundamental mistake. The matter was decided largely on agency principles. The Court in effect determined that where the agent had paid the money

over, the agent ought not to be seen as the true recipient of the money who had been unjustly enriched, rather the recipient against whom action should lie for restitution would be the principal (see *ANZ v Westpac* p. 673.8 ff). In *ANZ v Westpac* the Court proceeded on the assumption that change of position could be a possible defence to a restitutionary claim and the detriment or change of position in the case, was constituted by the payment by the agent to the principal (at 682.5 and 684.2).

45. In reaching the conclusions just described in *ANZ v Westpac*, the Court nevertheless distinguished between a case where the payment over by the agent to the principal had involved a true parting with money, and cases where no physical payment was made but a credit entry had been made in the books of the agent in favour of the principal. In such an instance the Court noted that a question will arise as to whether the benefit of the payment has effectively passed to the third person and noted that:

> *"In answering that question, the Courts will pay regard to the substance rather than to the form of what has occurred. Thus, the cases indicate that a mere book entry which has not been communicated to the third party or which can be reversed without affecting the substance of transactions or relationships will ordinarily not suffice: see E G Buller v Harrison; Cox v Prentice; Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia. It must appear that the third party has effectively received the benefit of the payment with the consequence that the prima facie liability to make restitution has become his".* (at p. 674.5)

46. Following the decision in *ANZ v Westpac* the defence of change of position by a recipient of funds as a defence to a restitutionary claim was accepted by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. In *Lipkin Gorman* Lord Goff of Chieveley did not seek to articulate in detail the scope of the defence, considering that it would be a matter for development case by case [at p 580]. His Lordship noted that it was not an example of the defence of bona fide purchase, in particular because it operated to the extent of the change of position, and unlike bona fide purchase involved inquiry into the adequacy of consideration [at p 580H to 581]. His Lordship also referred to the acceptance of the defence in American law and judicial comments on it by this Court in the *ANZ* case.

47. In *David Securities Pty Limited v Commonwealth of Australia* this Court clearly approved and adopted the principle of change of position as a defence to a claim of restitution (at p. 384.6). The Court noted that the central element is that the defendant has acted to his or her detriment on the faith of the receipt [at p 385.7]. It noted that in Canada and the United States the common element wherever it was accepted is the requirement that the defendant: *"point to expenditure or financial commitment which can be ascribed to the mistaken payment"* (at p.385.9). The Court noted some jurisdictions which required a defendant to point to specific expenditure while others allowed a wider scope.

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48. In *David Securities* the defence of change of position had clearly arisen only in this Court, and the respondent had not been given an adequate opportunity to lead evidence that might have supported the defence [at p 386.6]. The Court thus did not proceed to a detailed explication of the defence [at p 386].

49. In a series of single judge decisions since the decision in *David Securities* the change of position defence has been applied in Australia, but generally in a fashion which requires some assessment of the value of the detriment said to flow from the change of position and this has applied also in those cases where the change is said to be a loss of
20 opportunity (see *Gertsch v Atsas* [1999] NSWSC 898 per Foster AJ; *Palmer v Blue Circle Southern Cement* (1999) 48 NSWLR 318 at 325 per Bell J; *Moore v National Mutual Life Association of Australia Limited* [2011] NSWSC 416 per Ball J at [100] to [102]).

50. Two aspects of the change of position defence that have been almost universally accepted in the modern cases both point to the importance of ascertaining the value or quantum of the detriment relied upon by the payee. Firstly, as pointed out in *David Securities* the defence operates, just because it shows that the enrichment of the recipient was not, in the circumstances, unjust (at p. 385) and see *Lipkin Gorman* at p.
30 579F per Lord Goff).

51. Secondly, and this is a further aspect of the first point, the action for restitution always operates *pro tanto*, so that the remedy is always allowed only to the extent that the

receipt is unjust. That the change of position defence operates by establishing that the defendant has not been enriched to the extent of the payment, led Professor Birks to characterise its central principle as "disenrichment"

52. Professor Birks suggested that the decided cases (up to 2005 at the date of the second edition of his work) could be explained by the principle that a defendant's liability to make restitution for unjust enrichment is extinguished to the extent that, and by reason of an event, which would not have happened, but for the enrichment, and which causes his wealth to be reduced (see *Unjust Enrichment* 2nd Edition, Peter Birks Oxford UP 2005 at 208).

53. The most recent decision of the United Kingdom Supreme Court concerning restitution again emphasises the centrality of the value of the enrichment, albeit in a somewhat different context, namely, the correct way of valuing services that have been provided, and whether in particular the defendant can establish that they had a lesser value than their market value (so called subjective devaluation) (see *Benedetti v Sawiris* [2013] 3 WLR 351 per Clark JSC [p. 360] per Reed JSC 96 to 98).

54. Although "disenrichment" analysis may prove problematic where money has been expended on services or ephemeral objects, it is submitted that it correctly describes the central core of the defence (see the discussion in "*The Change of Position Defence*" by Bant, Hart Publishing, Oxford 2009 at p.126ff; and see also the discussion in *Mason & Carter's Restitution Law in Australia* 2nd Edition, Mason Carter & Tollhurst – Lexis Nexis 2008 at p.863 and 865).

55. In the present instance the respondents seek to retain the payments made on the basis of the discharge of debts or forgone opportunities. Where, as in this case, evidence shows that those rights and opportunities were of minimal value it cannot be just to permit the respondents to retain the whole of the mistaken payments.

56. In Western Australia the *Property Law Act* 1969 provides statutory relief for a restitutionary remedy in regard to mistakes of law and for a change of position defence in s.125(1). The terms of that defence are consistent with the principle that it is a *pro*

tanto defence that operates only to the extent that it would be unjust in the circumstances to require restitution.

Security of Receipt

57. Allsop P considered the Court did not have to inquire into the value of the debts discharged when applying the discharge argument for change of position (at [142]). Meagher AJ came to a similar conclusion (at [211]). In part their Honours each considered that this was a doctrinal requirement rather than related to any forensic difficulty in ascertaining value. Both appear to have viewed the argument as operating in a fashion similar to discharge for value, or bona fide payee defences, in regard to which an inquiry into value would not usually be countenanced. Their Honours each saw the principle of security of receipt supporting their views that inquiry into value is not relevant.

58. However, there is an important distinction between the present matter, and one where bona fide purchase or discharge for value would be applicable. The very reasons that would make those defences, at least potentially applicable, would be the existence of some valid legal transaction between the payer and payee. Thus, had there been an enforceable contract between the appellant and respondents then even had there been a mistake, and payment by the plaintiff, the respondents would argue that they should be able to rely upon the transaction, where they take bona fide without notice.

59. The present case by contrast is not one in which there was any legally enforceable agreement or transaction between the parties. The plaintiff made the payments based on fraudulent invoices concocted by Skarzynski, and believed that it was acquiring equipment as purchaser to on-lease. The respondents believed in consequence of the fraudulent representations of Skarzynski that the appellant was indebted to the TCP companies and was paying money to Hills and Bosch on behalf of and in satisfaction of TCP's debt.

60. No goods existed that could be purchased by AFSL and leased by TCP, and AFSL was not indebted to any of the TCP companies, and was not paying money on their behalf. There was a fundamental common mistake and no valid contract existed. The case is analogous with one where money is simply paid into an account through inadvertence,

the intention having been to pay it to the account of someone else. Where a receipt is not associated with any valid transaction, it is difficult to see why the Court should see mere receipt alone as deserving of some degree of protection.

61. Once it is recognised that the present case is essentially one of bare receipt, not receipt associated with, or related to, a valid legal transaction, then it should be recognised that the defence of change of position is "enrichment related", and the inquiry should be into the net enrichment which it is just to demand be repaid by the payee (see the discussion above, and in *Mason & Carter's Restitution Law in Australia* at p. 865 [2415]).

62. The discharge of debt by the respondents in the present matter was, in any event, not one involving the actual payment of money. Rather, there was a notional payment away and payment back (per Allsop Part [141]). The debts discharged were those of TCP. It is difficult to see why any discharge procured by Skarzynski (a director of TCP) of which restitution might be ordered would not be reversible. Unless the transactions were irreversible they ought not to be found to have constituted a loss or detriment by the payee for the relevant sum (see *Alpha Wealth Financial Services Pty Limited v Franklin River Olive Co Limited* (2008) 66 ACSR 594 per Buss JA at 638 [202]).

63. Nevertheless, even if one assumes that there was a loss by the respondents of legal rights against the debtor companies, for the reasons given it was always relevant to inquire into the value of those legal rights.

Proving Detriment and Valuing Lost Opportunities and Legal Rights

64. When one turns to the wider facts argument, the change of position was constituted by conduct which could best be characterised as a loss of opportunities. As Hills and Bosch stopped taking action to enforce their debts (and in Bosch's case a judgment debt) or seeking security from the backers of debtor companies, they lost the opportunity that those actions might have yielded, at some stage, payments in part or in whole of the debts owed.

65. Neither Allsop P or Meagher AJ found on the balance of probabilities that any of the forgone opportunities would have made either of Hills or Bosch better off in monetary terms. Allsop P proceeded on the basis that it was sufficient that Hills and Bosch had given up: *"A real and potentially valuable commercial opportunity"* without a finding that it was established that Hills or Bosch would have been better off, or the extent to which they would have been better off (per Allsop P at [163] and [165]).

66. Meagher JA found it sufficient that they established abandonment of: *"A course of conduct that could possibly have led to an outcome which was the full satisfaction of the debts owed to them"* (at [216]).

67. It is respectfully suggested that these findings erroneously dispensed with the need for the respondents to prove, on the balance of probabilities, that there was in fact a requisite detriment, and the extent of that detriment. It must immediately be said that the appellant does not suggest the change of position need necessarily involve loss of a liquidated sum, or detriment by establishing actual financial expenditure, or that the appellant can demand that the valuation of lost opportunities be established with precision.

68. The change of position defence is of wide application in the field of restitution. In most instances there is no dispute but that the defence operates after a determination of the net loss or detriment suffered by the defendant (see for example the discussion in *"A Restatement of the English Law of Unjust Enrichment"* by Andrew Burrows, Oxford UP, 2012 at p.118 ff). Thus, if a payee had used the money received to buy property, that would not have been purchased but for the payment, the recipient ought to be seen to be enriched by the resale value of the property (see the discussion by Templeman LJ in *Lipkin Gorman* at p.560).

69. In the present case the respondents did not part with the money received. To all intents and purposes they retain the funds to the present day. However, they argue that they were caused to treat the debts from the TCP companies as discharged upon receipt of the moneys paid by the appellant. The proper way of viewing the matter is not one in which they are seen to have paid away the whole of the moneys and notionally

received them back. Rather, in treating the debts as discharged they ought be seen to have given up property on the strength of the receipt (namely the choses in action that constituted the debts). If that property (the debts) was worthless, they have given away nothing of value, while retaining the whole of the payments made by the appellant. It ought not to govern a finding as to whether the respondents were unjustly enriched that they used the money to acquire property in regard to which an ascertainment of net value would govern the outcome, as opposed to a discharge of a debt. Principle and consistency dictate that one ought, in all such instances, ascertain in practical terms, the true degree of enrichment of the payee.

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Consistency with Related Legal Doctrines

70. The law is well familiar with circumstances in which the counter-factual elements in an action, may involve both probability, and forensic difficulties of proof, nevertheless these do not dispense the party bearing the onus from the need to establish the relevant matters. In such a situation the Court aids the process of proof through its application of the concept of probability, and by taking a broad brush approach.

71. Thus, where the value of a lost cause of action must be assessed for the purpose of determining damages in an action for professional negligence, the Court determines its
20 value taking into account relevant matters, including the prospects of any judgment given being satisfied, and the determination may be done with a "broad brush" approach: (see *Nikolaou v Papasavas* (1989) 166 CLR 394 at 404).

72. In *Sellars v Adelaide Petroleum* (1992) 179 CLR 332 the High Court recognised that in order to establish damages for a lost opportunity, it had to be established in that case, on the balance of probabilities, that the breach of contract caused a loss of a commercial opportunity which had *some* value (not being a negligible value): *Sellars* (at [355]). In *Sellars* the High Court held that the value of a lost opportunity was ascertained by reference to the degree of probabilities or possibilities that the chance
30 would have occurred had there been no breach of contract: *Sellars* (at [355]-[356]). The High Court found that the lost opportunity or chance had to be more than a speculative possibility and there must be a *"sound basis"* upon which the value of the chance is assessed.

73. In *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 this Court held that when assessing damages for future or potential events in personal injury cases courts should assess the degree of probability that an event would have occurred, or might occur, and adjust its award of damages to reflect the degree of probability: *Malec* (at [643]).

74. In *Sellars* the majority held that once it was recognised that the principle in *Malec* was based on a consideration of the difficulties associated with the proof and evaluation of future possibilities, as contrasted with proof of historical facts, "*there is no secure foundation for confining the principle to cases of any particular kind*": *Sellars* (at [355]).

75. If one assumes that Hills and Bosch had established that they lost the opportunity of taking action against their customers and guarantors, Mr Skarzynski and Mr Musico, and that it would have probably yielded only 10 cents in the dollar, this, in turn, would have raised directly the issue as to whether it ought nevertheless be a defence to the whole of the Applicant's claim. However, in this instance, no such determination of value was made by the Trial Judge in regard to the claim against Bosch, or by the Court of Appeal in regard to Hills and Bosch, nor any finding on the balance of probabilities that any detriment was suffered at all.

76. The Court of Appeal failed to conduct any analysis of the value of the lost commercial opportunities, in line with the *Sellars* principle. If they had undertaken that type of analysis they would have found that neither of the Respondents had proved on the balance of probabilities that the loss of opportunity relied upon (loss of ability to pursue trade debtors in late 2009, early 2010) had "some value". The evidence established that by March 2010 the TCP Companies had gone into administration (CA: [50]) and by July 2010 into liquidation: (CA: [54]), and its two directors, Mr. Musico and Mr. Skarzynski, had gone into bankruptcy in July 2010 and September 2010 respectively: (CA: [55-56]). The trial judge found that the TCP companies were in a precarious financial position: (TJ: [76]). Further, in the present case the Court of Appeal had before it evidence of what in fact occurred in the period to September 2010. There was no evidence other creditors entered into other similar arrangements

with Mrs. Skarzynski, the evidence is that the creditors of the TCP companies, and its directors, got no return from either the liquidation of the companies or bankruptcy of the directors.

Part VII: CONSTITUTIONAL PROVISIONS ETC

77. No constitutional provisions, statutes or regulations are relevant to this appeal.

Part VIII: ORDERS SOUGHT

The orders sought by the appellant are:-

a) The appeal should be allowed with costs;

10 b) In lieu of the orders made by the Court of Appeal in regard to Hills Industries Limited there be judgment for the appellant in the sum of $247,306.23 together with further interest from 23 June 2011 (the judgment date).

c) In regard to the matter involving Bosch Security Systems Pty Limited there be judgment in favour of the appellant in the sum of $144,426.00 together with interest from 4 September 2009 (the initial payment date).

d) In lieu of the orders made below in regard to costs, the respondents pay the appellant's costs in the proceedings before Einstein J. and in the Court of Appeal.

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Part IX: ESTIMATE OF TIME FOR APPELLANT'S ORAL ARGUMENT

78. The appellant estimates that it will require approximately 2 hours for the presentation of oral argument.

Dated: 20 September 2013

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