IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S163 of 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

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification for publication

1. These written submissions are in a form suitable for publication on the internet.

Part II: Issues

2. Whether the first respondent ("**Hills**") ought to have been required to make restitution to the appellant ("**AFSL**") or whether it is inequitable in the circumstances for it to be required to do so.

3. Whether it was necessary in the particular circumstances of this case to ascribe a specific monetary value to the detriment occasioned by Hills on the faith of the receipt.

Part III: Judiciary Act 1903, s 78B

4. The respondent considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

Part IV: Material facts

5. Hills manufactured and supplied equipment. One of its customers was TCP, to which it supplied equipment on credit. Hills stopped TCP's account in July 2009 and pressed TCP for payment of arrears: CA[18]. Hills dealt primarily with Mr Skarzynski, one of TCP's directors. On 21 August 2009, and again on 24 August 2009, Mr Skarzynski assured Hills he would reduce TCP's debt by arranging payment of $308,000 on 25 August 2009: CA[19], [20].

Filed on behalf of the First Respondent, Hills Industries Limited, by:

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6. In order to reduce TCP's indebtedness to Hills, Mr Skarzynski procured AFSL to pay the amount of $308,000 to Hills on the basis of a fraudulently prepared invoice: CA[22]. Hills had no knowledge of that fraud until April 2010: CA[22].

7. AFSL and TCP entered into a lease agreement under which TCP was to make monthly payments to AFSL in respect of the (non-existent) equipment the subject of the invoice: CA[24]. AFSL made no inquiry of Hills concerning the invoice or the goods purportedly the subject of the invoice. AFSL did not seek to take delivery of the goods or check that any goods had been delivered: CA[207].

8. The amount of $308,000, received on 25 August 2009, was applied by Hills in accordance with its agreement with TCP to discharge TCP's debt: CA[28].

9. If the payment had not been received on that day, Hills would have instructed lawyers, sent a letter of demand and commenced recovery proceedings in a reasonably short period of time against TCP and the guarantors, Mr Skarzynski and Mr Musico: CA[19], [29], [176]. Consistently with what Hills had been contemplating before it discharged TCP's debt, those lawyers would have been instructed to seek security or alternative repayment arrangements: CA[29]. The opportunities which were or might have been available to Hills, as a creditor of TCP, included the obtaining of security from third parties, such as from Mrs Skarzynski over the family home: CA[165].

10. In the circumstances which in fact occurred and because of them, Hills did not take the recovery action it was contemplating. Instead, it re-opened TCP's account and continued to supply equipment to TCP on credit, for some of which it was ultimately not paid: CA[28]. When Hills became aware of the fraud in April 2010, there was an amount of $21,739.03 owing from TCP to Hills: CA[176].

11. From 25 August 2009 through to late February 2010, TCP made payments to AFSL under its rental agreements: CA[36], [37]. It received $55,314.60 by such payments: CA[177].

12. On 26 October 2009, Mr Sofi, a company director of AFSL, sent an email to Mr Skarzynski asking why: (1) an invoice TCP had sent to Mr Sofi purporting to be from Ironmark contained different account details to a previous invoice (and asking whose account it was); (2) the invoice specified "seamless plasmas" rather than "projectors"; and (3) the invoice had apparently been created by TCP: 3Blue1457. The invoice attached to the email was a word document entitled "ironmark version 5". Mr Sofi formed the view that the invoice had been created by TCP.[1]

13. On 28 October 2009, Mr Sofi became aware that finance for TCP had been rejected by GHS Financial Services Pty Limited (through whom Mr Sofi had tried to facilitate finance for TCP)[2] because a court writ had been reported, finance credit references with Capital and Macquarie were considered marginal and "bank statements indicate company has cash flow problems – not being able to meet existing commitments with a number of dishonours being recorded": 3Blue1459.

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1 Transcript 28 March 2011 T18.20.

2 Transcript 28 March 2011 T15.41.

14. On 3 November 2009, Mr Skarzynski, Mr Musico and 3D World provided to AFSL secured guarantees, securing TCP's obligations under its then existing rental agreements with AFSL (which included those concerning Hills and Bosch): CA[39].

15. In late February 2010, Hills remained unaware that there had been a fraud perpetrated on it or that TCP's financial position was or had become hopeless.

16. Mr Sofi described the payments being made by TCP to AFSL from late December 2009, through to February 2010, as "irregular": CA[42]. In early February 2010, the number of defaults of TCP in its payment obligations to AFSL increased: CA[43]. AFSL became concerned after receiving from Mr Skarzynski an equipment list which did not coincide with AFSL's own records: CA[43]. Hills remained unaware of any of this.

17. In early February 2010, Mr Skarzynski requested to change the list of equipment on the annexures of the rental agreements. Mr Sofi was concerned and sought, on 15 February 2010, advice as to where the equipment was located: 1Blue31-32[137] – [141].

18. On 17 February 2010, Mr Musico informed AFSL that TCP's financial position was hopeless; that he (Mr Musico) had not signed some of the rental agreements; that TCP owed money to the Australian Taxation Office; that the banks had frozen all of TCP's facilities; and that he (Mr Musico) believed TCP was "in the hole for about 10 million bucks": CA[44], [163].

19. On 17 February 2010, Mr Sofi rang Mr Skarzynski noting allegations had been made against him in relation to the agreements and seeking a meeting the next day: 1Blue34[148]. On 18 February 2010, a solicitor acting for Mr Musico said she had advised him not to attend the meeting, that "there are some issues with these blokes" and suggested that Mr Sofi obtain a mortgage over Mrs Skarzynski's property: 1Blue35[149].

20. Armed with that knowledge, on 19 February 2010, AFSL gave Mr Skarzynski a form of mortgage (and guarantee) over Mrs Skarzynski's property at Strathfield (the family home) for Mrs Skarzynski to execute: 1Blue37[155]. The mortgage and various acknowledgements were executed by Mrs Skarzynski on 23 February 2010: 4Blue1806 – 1813; CA[45] – [46]. The mortgage secured the performance by TCP of its obligations under six rental agreements, including that concerning Hills[3] and that concerning Bosch[4]: 4Blue1807; CA[46].

21. By March 2010, when AFSL began to serve letters of demand upon TCP and others including Mr and Mrs Skarzynski, enquiries began to be made about the existence and whereabouts of the goods supposed to be leased under the lease agreements. In mid-March 2010, it became evident to AFSL that Mr Musico was denying ever having executed guarantees. On 19 March 2010, AFSL terminated its rental agreements with TCP and demanded sums under the rental agreements consequent upon termination: CA[47].

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[3] Rental Agreement Number 2009/08/008.

[4] Rental Agreement Number 2009/09/03.

22. By at least late March or the first week of April 2010, it became apparent to AFSL that there had been no goods purchased by it in consideration of the payments made and that it had been the victim of a fraud by Mr Skarzynski: CA[6], [48].

23. It was not until about 6 April 2010 that AFSL revealed to Hills what it knew concerning the likely fraud which had been perpetrated on Hills and AFSL. Demands for repayment were made by AFSL on that date: CA[49].

24. On 14 April 2010, AFSL served a demand and s 57(2)(b) *Real Property Act* 1900 notice on Mrs Skarzynski. She acknowledged executing the mortgage on 20 April 2010:[5] 1Blue50[218].

25. On 24 May 2010, AFSL commenced proceedings in the Supreme Court of New South Wales against Mrs Skarzynski, Mr Skarzynski and Mr Musico: 4Blue1769. AFSL claimed that TCP had breached the rental agreements and that each of the defendants was liable, Mrs Skarzynski by reason of the mortgage and guarantee and the others by reason of guarantees they had earlier provided.

26. The proceedings the subject of this appeal were commenced against Hills, Bosch and Jetobravo Pty Limited on 28 May 2010: Red1. AFSL made claims for money had and received and for knowing receipt.

27. At trial before Einstein J, AFSL was unsuccessful against Hills and Bosch in its knowing receipt claims. However, it succeeded against Hills on its claim for money had and received.

28. At the time of trial and at the time of the hearing of the appeal, approximately $512,000 had been paid into the Supreme Court of New South Wales, being the net proceeds of sale of Mrs Skarzynski's property to await resolution of the proceedings commenced by AFSL against Mrs Skarzynski and other proceedings brought by AFSL against other entities which had lodged caveats over the property: CA[53]. At the time of trial, AFSL had also recovered some moneys in respect of those lease agreements which did not concern Hills, Bosch or Jetobravo.[6] Ultimately, AFSL recovered the whole $512,000 (and accrued interest): *Australian Financial Services and Leasing Pty Limited v All Up Finance Pty Limited* [2012] NSWSC 1004 (27 September 2012). This judgment was obtained between the hearing of the appeal (10 and 11 May 2012) and the decision on appeal being delivered (4 December 2012).

29. On appeal, Allsop P concluded there were three bases on which restitution should not be required:

    29.1. Hills' discharge of TCP's debt gave rise to a defence of bona fide discharge or discharge for good consideration: CA[109], [143] – [145].

    29.2. Hills had a defence of change of position constituted by, in substance: (a) its "payment away" of the funds it had received and (b) its receipt back of those funds in discharge of TCP's debt: CA[139], [145], [147].

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5 And later admitted that in her defence of proceedings commenced by AFSL: 4Blue1783[3].

6 Transcript 31 March 2011, T245.30.

29.3. Hills had a defence of change of position, based upon "a wider view of the facts", such that it would be inequitable to order repayment (CA[148] – [166]), that change of position being constituted by the conduct of Hills in (CA[156], [165]):

a. discharging the debt owed by TCP;

b. ceasing to take available steps to seek recovery of the debt;

c. advancing further credit and continuing to do business with the debtor for up to six months; and

d. not taking steps or opportunities which were potentially available including obtaining security from third parties such as from Mrs Skarzynski over the Strathfield property, which were instead arrogated to the benefit of AFSL.

30. Meagher JA:

30.1. concluded that Hills had a complete change of position defence because the discharge by Hills of TCP's debt on the faith of the receipt was equivalent to paying the funds away to TCP for no consideration and receiving them back in consideration for the discharge of the debt: CA[201], [209], [214]. In this respect, both Meagher JA and Allsop P reached the same conclusion (see paragraph 29.2 above); and

30.2. agreed with the conclusions of Allsop P at CA[148] – [166] that there was a complete change of position defence based on a wider view of the facts. His Honour added[7] at CA[216] an amplification, and a further aspect, of the detriment suffered by Hills, respectively:

a. Hills lost the opportunity to pursue remedies in enforcement proceedings in discharging the debt owed by TCP and resuming commercial relations with it; and

b. Hills suffered detriment in being placed in the position of being unable to demonstrate what would or may have happened had that opportunity been pursued.

31. Bathurst CJ agreed with the conclusions of Allsop P at CA[148] – [166] that there was a complete change of position defence based on a wider view of the facts: CA[1].

Part V: Constitutional provisions

32. The appellant's statement that there are no relevant constitutional provisions, statutes or regulations is accepted.

Part VI: Argument in response to appellant's argument

33. In an action for money had and received, the payee's obligation is to make restitution, unless it would be inequitable for this to be required of the payee: *Moses v Macferlan* (1760) 97 ER 676; *Dale v Sollet* (1767) 98 ER 112; *Campbell v Kitchen & Sons Ltd and Brisbane Soap Co Ltd* (1910) 12 CLR 515 at 531 (Barton J) and 525 (Griffith CJ);

[7] Bathurst CJ and Allsop P agreed at CA[1], [4], [165].

Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 at 579F, 580F (Lord Goff of Chieveley); *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 at [29], [30], [49] – [56]; Hon Justice W.M.C. Gummow, *Moses v Macferlan: 250 years on* (2010) 84 ALJ 756 at 762.

34. The recipient of a mistaken payment "is entitled to raise by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust": *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.8; see also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [30].

35. One circumstance in which it might be inequitable to require restitution is where the payee has relevantly changed his position on the faith of the receipt.[8] In the present case it was inequitable to order restitution:

35.1. AFSL's claim was based upon it having made a mistake. The law regards the payment as not voluntary in the sense that the transaction was materially different to that which the payer intended. It is this which renders the enrichment relevantly unjust. In conducting itself in the manner in which it did, Hills likewise operated under mistake. It operated under a mistaken belief that it had received payment for TCP's debt, that it was entitled to retain the payment received and that it had no liability to AFSL to repay the amount. If it had known of AFSL's mistake (or the fraud which had been committed), it would not have discharged TCP's debt or foregone recovery action; nor would it have occasioned the other detriment identified below.[9]

35.2. By the time Hills was made aware (by AFSL) of AFSL's mistake, the detriment which Hills suffered was irreversible: there was no point reinstating TCP's debt because any opportunity for recovery had become hopeless, in significant part because those opportunities had been taken by AFSL after Hills had discharged TCP's debt. The appellant confuses, at AS[62], the question of whether the discharge of debt was reversible with whether the *detriment* was reversible. The detriment was irreversible because, even if TCP's debt was reinstated, it was no longer possible to put Hills back into the position it would have been in had AFSL not made the mistaken payment.

36. The appellant argues that:

36.1. Hills' detriment was of "minimal value" or "worthless" (at AS[8], [55], [69]);

36.2. it is always necessary to make a finding as to a specific monetary value (such as ten cents in the dollar, at AS[75]) when adjudicating a change of position defence based on discharge of a debt or loss of opportunity (at AS[42]).

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[8] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385; *Citigroup Pty Ltd v National Australia Bank Ltd* [2012] 82 NSWLR 391 at [67], per Barrett JA.

[9] In this case, the defence is not dissimilar to the estoppel by representation which would arise if the recipient of money changed his position on the faith of the representation made by the payer to the effect that the money was the recipient's to keep – cf: *Grundt v Great Boulder Pty Gold Mines Ltd* (1938) 59 CLR 641 at 674-5, per Dixon J, referring to *Holt v Markham* [1923] 1 KB 504.

37. Both arguments should be rejected.

Hills' detriment was not of "minimal value"

38. The critical issue before the Court of Appeal was the detriment suffered by Hills as a consequence of it receiving AFSL's mistaken payment. Having conducted a careful factual analysis[10] in "order to appreciate the nature and complexity of the task of unravelling for the purposes of any change of position defence the hypothetical state of affairs" (CA[11]) which would have subsisted but for the mistaken payment, the Court of Appeal identified at least four aspects of detriment or change in position:

38.1. First, Hills discharged the debt of $308,000 owed to it by TCP: CA[156].

38.2. Secondly, Hills re-opened TCP's account and continued to trade with TCP, advancing further credit and receiving payments from TCP for a further six months: CA[28], CA[156]. There was a balance of $21,739.03 owing by TCP to Hills from these further dealings when the fraud was discovered: CA[28], [176].

38.3. Thirdly, Hills ceased taking the steps – engaging lawyers and seeking security or alternative repayment arrangements – which were proposed to be taken by Hills immediately before receiving the mistaken payment, and which would have been taken if the payment had not been made: CA[29], [156], [165], [216].

38.4. Fourthly, Hills was placed in the position of being unable to demonstrate what would or may have happened had it continued on its then proposed course of pursuing TCP and its associates; and Hills was unable to prove definitively how much debt (if not all) would have either been repaid over the 6 month period or secured, because that involved a complex unravelling of completely hypothetical dealings between numerous parties: CA[216] (Meagher JA), [1] (Bathurst CJ), [164] (Allsop P).

39. The appellant's assertion at AS[8], [69] that what Hills gave up was "worthless" or of "minimal value" (at AS[55]) is wrong:

39.1. First, Hills gave up its debt of $308,000 on 25 August 2009. That debt was valuable when discharged. If AFSL had not made the payment, Hills would have sought recovery of the full amount of its debt ($313,000) and security: CA[29], [156], [165]. Mrs Skarzynski was evidently prepared to support her husband and his business. In this regard:

- AFSL later took advantage of Mrs Skarzynski's willingness to support her husband and his business by obtaining a mortgage over the family home once it became aware in April 2010 of TCP's precarious financial position and suspicious of its dealings with TCP.

- The mortgage secured payment under the leases between TCP and AFSL relevant to the Hills and Bosch transactions (as well as others). AFSL

[10] That factual analysis involved overturning some of the Trial Judge's factual conclusions: CA[29]; CA[176].

ultimately recovered $512,000 which covered the amount of TCP's debt to Hills (and the amount the subject of the Bosch transaction), demonstrating that the opportunity (and mortgage) was valuable.

- Hills did not seek such a mortgage. Hills had no occasion to pursue Mr Skarzynski, TCP or any of its associates because it had discharged TCP's debt. It had no occasion to ask for security from Mr Skarzynski or any other person. Hills did not have available to it, at any relevant time, the information which AFSL had which suggested it was prudent to obtain a mortgage and that one might be obtained from Mrs Skarzynski. AFSL's mistake thus put AFSL in a position of significant advantage to the detriment of Hills.

- The mistaken payment put AFSL in a position where it could (and did) arrogate to itself the opportunity which Hills would have (or at least might have) pursued were it not for AFSL's mistake and to do so without competition from Hills.

- The evidence indicated that Mr Skarzynski had represented to the third defendant before the third defendant received a payment from AFSL on 9 October 2009 that the house in Mrs Skarzynski's name would be refinanced or sold to pay everyone back.[11] There is no reason to think this may not have occurred if Hills had pressed for repayment of its debt, instead of discharging it upon the faith of its receipt of AFSL's mistaken payment.

39.2. Secondly, the evidence demonstrated that TCP paid further amounts to Hills for further goods and was supplied further goods on credit: CA[28], [176]. TCP may well have paid off debt rather than purchase further goods. Further, it was not until many months after August 2009 that the companies and individuals were no longer able to fund their activities. There is no reason to suppose that – had Hills pursued TCP or its directors in August 2009 as it would have (which would have been months before AFSL took action) – the companies or their directors would not have sought to repay Hills' debt before insolvency or bankruptcy.

39.3. Thirdly, the evidence demonstrated that TCP was able to make numerous lease payments totalling over $128,000 to AFSL: CA[36] – [38]. The funds available to TCP to make those payments to AFSL may have been paid to Hills rather than to AFSL if Hills had continued to insist that TCP's debt to Hills be repaid or if Hills had retained lawyers to enforce payment. Further, it is likely that TCP had funds apart from the $128,000 paid to AFSL in respect of the three transactions the subject of the proceedings which might have been applied to the repayment of TCP's debt to Hills.

40. Hills' detriment was irreversible by the time AFSL notified it of the fraud. By that time, April 2010, that part of Hills' detriment which can be described as loss of opportunity *had become* worthless. To a large extent those opportunities had become worthless because they had been taken by AFSL without competition from Hills, which

[11] Transcript 30 March 2011 at T11.10 – 15, T12.45, T13.49 – T14.47, T21.44 – T22.14; Exhibit P9 4Blue2159, 2165.

– by reason of AFSL's mistake – abandoned its pursuit of recovery of TCP's debt. The fact that the opportunity was not worthless was proved by the steps taken by AFSL which ultimately saw it recover under Mrs Skarzynski's mortgage.

Not always necessary to value detriment

41. The appellant asserts that it is necessary to ascribe a specific monetary value to the detriment suffered by Hills in so far as that detriment is constituted by the discharge of TCP's debt to Hills or the loss of opportunity before it can found a relevant change of position: AS[42]. No direct authority is cited for this proposition.

42. The appellant assimilates (at AS[70] – [76]) the treatment of the quantification of damages in claims for loss of chance in tort, contract,[12] and misleading conduct[13] cases with the question of whether there is sufficient detriment for the defence of change of position. Those situations are clearly different to the present case:

    42.1. In negligence, breach of contract and misleading conduct cases, the plaintiff is seeking an award of damages for loss. The Court must identify a specific sum to make the award of damages; difficulties in assessment do not bar recovery. In respect of events which have occurred, the Court must reach conclusions on the balance of probabilities; in respect of the future, however, the Court has to evaluate the chance of a hypothetical event occurring.[14] The issue in such cases is not one of balancing the equities between two competing parties as to whether a payment should or should not be retained. Further, even in these cases, it is recognised that there are "cases where considerations of justice or the limitations of curial method render ultimate findings, about what would have been or will be, impracticable or inappropriate".[15]

    42.2. Change of position is a "defence"[16] with equitable roots and influences.[17] Questions of detriment or loss in the defence of change of position do not necessarily call for a precise quantification of the value of the detriment, particularly where loss of opportunity is concerned. The Court of Appeal correctly recognised that the defence could not be restricted purely to monetary and expenditure based considerations or to "proof of sums certain as irretrievably lost": CA[151], [153] and [154].

43. It is not clear why there should be "consistency" (AS[70]) between the principles applying to the assessment of damages for loss caused by a breach of a common law obligation, such as contract or tort with a defence to a claim for restitution on the basis

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[12] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

[13] *Sellars v Adelaide Petroleum NL* (1992) 179 CLR 332 decided that loss of an opportunity to obtain a commercial advantage is a "loss or damage" within the meaning of s 82(1) of the *Trade Practices Act 1974* (Cth).

[14] *Davies v Taylor* [1974] AC 207 at 212-213, per Lord Reid.

[15] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 118.5, per Deane J.

[16] See *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.9.

[17] The defence of change of position, although a common law defence to an action for money had and received, is deeply rooted in equity unlike causes of action in negligence or for breach of contract. See Allsop P at CA[151] and the cases there cited.

of the defendant's unjust enrichment.[18] The assessment of damages for loss caused by a defendant's wrongdoing and the question of whether it is inequitable to require a defendant to make restitution of an enrichment, deal with quite different matters and engage quite different considerations. Concepts such as remoteness of damage and mitigation of damage are inapplicable to restitutionary remedies.[19] Nor is the causal inquiry the same.

44. A better analogy is afforded by the law's treatment of detriment for the purposes of estoppel by representation.[20] The claimant's action or inaction must be such that, if the assumption upon which he or she proceeded were shown to be wrong, the consequence would be to make the claimant's original act or failure to act a source of real, actual prejudice. The real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption that led to it were deserted: *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674-675, per Dixon J. In *Grundt* at 675, Dixon J cited *Holt v Markham* [1923] 1 KB 504, in which a claim for money had and received was unsuccessful because the employee recipient of overpayments had altered his position by treating the money as his own and spending it. The employer had created or encouraged the belief that the money was the payee's and was estopped from claiming it was paid under a mistake.

45. For the law of estoppel, the detriment need not consist of expenditure of money or other quantifiable financial disadvantage so long as it is something substantial: *Commonwealth v Verwayen* (1990) 170 CLR 394 at 416, 448-449, 461-462; *Donis v Donis* (2007) 19 VR 577 at 583 [20]. In the case of a lost chance, there will be sufficient detriment capable of founding an estoppel if the chance that has been lost is real, and not fanciful or unrealistic; the importance of keeping a party to its representation or encouragement is all the stronger where it has been relied upon to abandon a course of conduct which could possibly have led to a different outcome: *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 at [5].

46. A further analogy is provided by the change in position of an agent who "before the mistake was discovered ... paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund": *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263 at 265, per Lord Atkinson, cited with approval in *ANZ Banking Group v Westpac Banking Corporation* (1998) 164 CLR 662 at 684.4.[21]

47. A series of cases recognise that loss of opportunity can constitute sufficient change in position to operate as a defence. In *Morgan Guaranty Trust Co of New York v*

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[18] As demonstrated by *Tabet v Gett* (2010) 240 CLR 537, seeking "consistency" where it is not warranted leads to error: the principles dealing with recovery of damages for breach of contract offer no appropriate analogy to whether loss of chance is damage for the purposes of a cause of action in negligence: at [47], per Gummow ACJ.

[19] See, for example: *Kleinwort Benson v South Tyneside MBC* [1994] 4 All ER 972.

[20] Cf: *Citigroup Pty Ltd v National Australia Bank Ltd* [2012] 82 NSWLR 391 at [130] – [136], per Barrett J.

[21] See also: *Citigroup Pty Ltd v National Australia Bank Ltd* [2012] 82 NSWLR 391 at [119].

Outerbridge (1990) 66 DLR (4th) 517,[22] a lawyer, upon receipt of a mistaken payment from a bank, credited the amount to his client's account for fees owed. On the basis that his fees had been paid, the lawyer released his files to his client's new lawyer. Osborne J at [132] concluded that the release of the files "deprived the defendant of leverage that would have been immeasurably important in securing the payment of the amount in issue" and that it was reasonable to infer that the client would have paid the amount had the lawyer been able to exercise his solicitor's lien.

48. In *Toronto Dominion Bank v Bank of Montreal* (1995) 22 OR (3d) 362, the change of position defence succeeded in respect of a mistaken payment made to a bank which was owed money by its customer. MacPherson J noted that it could not be known for certain what would have occurred in the absence of the mistaken payment, but the recipient bank almost certainly would have made different decisions to those in fact made. One of those different decisions was that it "might have attempted to realize sooner, and with better results, on its security" (at [43]). No precise amount was sought to be ascribed to the loss of that opportunity.

49. In *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318, a worker would have applied for and received sickness benefits or an invalid pension had he not been in receipt of workers' compensation payments which were retrospectively terminated. The worker did not point to any expenditure on the faith of the receipt, but to a foregone opportunity which he would have taken. Bell J concluded (at [33], [35]) that the defence was made out, there being nothing to suggest that the weekly workers' compensation payments were in excess of the payments the worker might otherwise have received from the Department of Social Security.

50. In *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 (referred to by Allsop P at CA[161]), the recipient of a mistaken payment from his employer was unsuccessful in his change of position defence. The recipient payee changed his position because of his erroneous interpretation of an earlier letter rather than on the faith of any mistaken payment (at [44], [83]-[84]). Further, even if his change of position had been sufficiently causally connected with the mistaken payment, his decision not to seek alternative employment (where he would have been paid a similar amount or less)[23] was not sufficient detriment: at [39], [40], per Mummery LJ. Nevertheless, the Court of Appeal addressed the question whether a change of position had to be constituted by a reduction in assets or measurable in pecuniary terms. Mummery LJ considered that missed opportunities to make a gain do constitute relevant detriment. Thus, a rejection of an offer of a better paid job would have been a sufficient change in position: at [39]. See also Munby J at [71], [72]. Munby J at [65] emphatically rejected the argument that there can be no change of position sufficient to found a defence in the absence of "financial detriment" or "some detriment measurable in ... pecuniary terms". Mummery LJ at [39] also observed that it was not necessary to "produce precise financial calculations quantifying the amount of the reduction" where there has been a reduction in the assets of the recipient of an overpayment.

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[22] Referred to in *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318 at [27], [28], per Bell J.

[23] See: *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 at [35].

51. In *Moore v The National Mutual Life Association of Australasia Ltd* [2011] NSWSC 416, Dr Moore had received income protection payments which he subsequently had to return. Ball J held (at [104], [105]) that a defence of change of position applied for a number of reasons, including that Dr Moore would have received some payments from Centrelink (but less than he did receive under the income protection policy), it was "possible" that he might have attempted to obtain some form of employment (how much he would have earned was a matter of speculation) and that if he had not received the payments he would have had to make adjustments to his living expenses which he did not in fact make. Ball J did not attempt to quantify the various aspects of detriment; rather, he concluded that the combination of them was sufficient.

52. In *New England Mutual Life Insurance Company v Hastings* (1990) 733 F.Supp 516, payments were incorrectly made into the defendant's pension fund. The payment played an important role in the defendant's decision that he could afford to leave his employment and had made a significant impact on his life. The defence was made out "because his subsequent change of position cannot be reversed nor can the status quo be restored" (at 521).

53. It has long been recognised that, although the burden is on the payee to establish the defence, the standard of proof required takes into account that when the payee received the payment he had no expectation that he might thereafter have to prove what he did and why: *Philip Collins Ltd v Davis* [2000] 3 All ER 808 at 827; *RBC Dominion Securities Inc v Dawson* (1994) 111 DLR (4^{th}) 230 at [39]; *Scottish Equitable plc v Derby* [2001] 3 All ER 818 at [33]. Further, the standard of proof must, in cases such as the present, take into account that the Court must hypothesise what would have but did not occur.[24]

54. If AFSL had not made the payment, Hills would not have incurred the detriment identified in paragraph 38 above. It would have sought recovery and security: CA[29], [156], [165]. Mrs Skarzynski was evidently prepared to support her husband and his business. AFSL took advantage of that fact by obtaining a mortgage over the family home and the ultimate monetary benefit of it (in an amount of $512,000). By April 2010, when it was first alerted to the fraud, Hills no longer had any real or valuable opportunity to pursue TCP, its directors or third parties such as Mrs Skarzynski. By that time, valuable security in the form of Mrs Skarzynski's mortgage had been secured by AFSL. Hills, on the other hand, had not pursued any recovery action because:

    54.1. AFSL made the mistaken payment of $308,000 on 25 August 2009;

    54.2. Hills discharged TCP's debt and thereafter conducted itself on the basis that it was entitled to receipt, that the debt was discharged and that it did not have to repay the payment; and

    54.3. Hills no longer had occasion to pursue recovery and did not have information available to it (which AFSL did), which indicated to AFSL a valuable opportunity (which was ultimately realised by AFSL) to secure repayment of TCP's indebtedness to AFSL.

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[24] Cf: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 118.5, per Deane J; *Davies v Taylor* [1974] AC 207 at 212-213, per Lord Reid.

55. Here, that part of the detriment which was constituted by loss of opportunity was a real opportunity for Hills to recover *all* of its debt. Hills' detriment cannot be reversed by ordering repayment. The opportunity to recover all of its debt had been taken by AFSL (at a time when it was, at the least, deeply suspicious that Mr Skarzynski had perpetrated a fraud) before Hills was aware of any mistake.

56. The Court of Appeal recognised that a necessary consequence of the particular facts was that a precise quantification of one (significant) aspect of the detriment suffered by Hills could only occur through an examination of complex and hypothetical events which did not occur, rendering precise proof of losses difficult or impossible – see, for example: CA[11], [153], [162]-[165], [216]. That this in itself constituted detriment was emphasised by Meagher JA at [216] in observations with which Bathurst CJ agreed at [1] (and see Allsop P at [4], [165]). The Court recognised that in the particular circumstances of the case before it, it was not necessary to place a precise value on that aspect of Hills' detriment constituted by the loss of its commercial opportunity. To do so would require the making of hypothesis upon hypothesis and disentangling the financial affairs of a number of trade creditors over a lengthy period to determine what would have occurred on a hypothesised financial basis (together with the possible intervening acts of unrelated secured and unsecured third parties): CA[11], [164]. That conclusion was correct; the case provided an example of a situation in which – to adopt the words of Deane J in *Amann Aviation*[25] – it was both impracticable and inappropriate to place a monetary value on the lost opportunity.

57. That is particularly so here, where, as Allsop P observed, AFSL can be seen to be responsible to some real degree for its own predicament, both in the making of the mistake and in the time it took to retrieve the effects of the mistake: CA[153]. The difficulty in ascribing a precise monetary value to the lost opportunities stemmed from the timing and duration of AFSL's mistake, the length of that duration being inimical to the security of receipt of Hills: CA[165].

58. The present case was not a case like *Gertsch v Atsas* (1999) 10 BPR 18,431 in which the mistaken payments were spent by one payee, in part, on ordinary living expenses (which would have been incurred in any event and which cannot therefore constitute any change in position)[26] and in which that payee, Ms Hamilton, was unable to establish that, if she had remained in employment rather than returning to university, she would have earned at least as much as the mistaken payment.

59. That the defence of change of position can operate as a complete defence without the need to ascribe precise monetary values to all of the detriment suffered does not deny that the defence, in many situations, appropriately operates *pro tanto*. In *ANZ v Westpac*, for example, Westpac had "irretrievably paid out [only] $82,978.32 of the overpayment of $100,000".[27] Westpac could be returned to the position it would have been in but for ANZ's mistake if it repaid only part of the payment. In the present case, Hills could not be returned to the position it would have been in but for AFSL's mistake; it lost the opportunity to recover the whole of its debt. It would be inconsistent

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[25] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 118.5, per Deane J.

[26] See *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 386.1; *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318 at [32].

[27] *ANZ Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 684.9.

with the equitable influences which gave rise to the cause of action[28] and the broad terms in which the defence has been expressed to operate,[29] to conclude in those circumstances that a complete defence was not here made out. If TCP had only owed Hills $150,000 which debt Hills then had discharged, the defence would have operated *pro tanto*.

60. For these reasons, amongst others, the Court of Appeal correctly concluded it would be unjust between "these commercial parties in this commercial context" to order repayment: CA[165].

Part VII: Argument in respect of notice of contention

Contention 1(a), (d): Defence of bona fide discharge and good consideration

61. Although the defence of bona fide purchase failed on the facts in *Lipkin Gorman*, the House of Lords recognised the availability of the defence. The money Cass paid was pursuant to a void gaming contract. If he had been provided services under a valid contract, the defence would have operated and it would have been unnecessary to inquire into the sufficiency of the consideration: *Lipkin Gorman* at 580H-581A. In *ANZ v Westpac* at 673, the Court identified a defence to prima facie liability being: "the payment was made for good consideration such as the discharge of an existing debt".

62. Hills gave good consideration in the form of a bona fide discharge of TCP's debt. An amount of $313,000 was owed to Hills by TCP and $308,000 of that debt was discharged. Whether or not the case fell within Goff J's proposition 2(b):[30]

> "the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt"

the defence was made out for the reasons identified by Allsop P at CA[82] – [138], [143] – [145].[31]

63. It is accepted that AFSL did not intend to discharge TCP's debt to Hills; it intended to pay for goods. However, Hills and TCP did intend to discharge TCP's debt and that debt was in fact discharged. Hills and TCP thereafter conducted themselves on that basis. A recipient of funds who discharges an existing debt of a third party is not liable to repay the funds to the mistaken payer, irrespective of the intention of the payer as to

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[28] See: *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [15]-[16], [62]-[63], [76]-[100]; Hon Justice W.M.C. Gummow, *Moses v Macferlan: 250 years on* (2010) 84 ALJ 756.

[29] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.8; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [30].

[30] Goff J in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] 1 QB 677 at 695, apparently approved in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 380, 405. See also: *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] 1 QB 110 at 125D-126A, 127A-E, 132E-133C; *ANZ Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

[31] The trial judge accepted that the debt was discharged: J[79]. The sole basis upon which the trial judge rejected the defence was that there was no consideration "given to AFS[L]": J[79]. However, it has never been a requirement that "good consideration" in this context be consideration moving to the payer.

whether the payment was to be applied to discharge of that debt: *Spaulding v Kendrick* 172 Mass 71 (1898); *Smith v Knapp* 297 Mass 466 (1937); *Banque Worms v BankAmerica International* 77 N.Y.2d 362 (1991); *Clarke v Abou-Samra* [2010] SASC 205 at [83], per Kourakis J (as the Chief Justice then was).

64. Meagher JA concluded that the illustrations of the "bona fide payee" rule provided in the *Restatement Third* which do not fall within proposition 2(b), fall to be determined, in Australia, under the general change of position defence: at CA[199]. However, proposition (2)(b) merely describes one way that a discharge of debt can be brought about, namely if it is paid to discharge a debt owed to the payee; it does not purport to be an exhaustive description of when there has been a bona fide discharge or good consideration: Allsop P at CA[113], [116]; cf Meagher JA at CA[186], [189].

65. A defence of bona fide discharge or good consideration (recognised as available in *ANZ v Westpac* at 673), should operate whether or not the payer intends to discharge the debt. In both situations, the consideration given by the payee is the same. What is essential for there to be consideration or value is a discharge of the third party's debt by the payment: at CA[113]. The mistaken payer's uncommunicated intention does not affect the quality of the transaction between the payee and third party, being the transaction which is relevant to the defence. The defence of bona fide discharge or good consideration is concerned with the conduct of the payee, (generally[32]) from the moment of receipt, not with the conduct or intentions of the payer.

Contention 1(b), (c): Change of position constituted by discharge of TCP's debt or (a) payment away and (b) receipt in discharge

66. It is not strictly necessary for Hills to raise this matter as a ground of contention, as a majority of the Court of Appeal supported Hills' case as to change of position based on discharge of the debt. Moreover, the appellant's notice of appeal does not squarely address the matter given that ground 8 attacks the reasoning of Meagher JA but not that of Allsop P on the point. Allsop P and Meagher JA considered that, in applying the $308,000 to the discharge of TCP's debt to it, Hills, in effect, paid those funds away for no consideration and received them back in consideration for discharging the debt: CA[139] (Allsop P), [187] (Meagher JA).

67. Unlike Allsop P, Meagher JA considered that the notional payment away and receipt back did not of itself give rise to a defence of payment made for good consideration (see paragraph 64 above), but was relevant as a change of position: CA[209] (Meagher JA).

68. Both Allsop P and Meagher JA considered that, for the purposes of the change of position defence, it was not necessary to inquire into the adequacy of the consideration constituted by the discharge of the debt: CA[106], [142] (Allsop P), [210], [211] (Meagher JA). Each recognised that such an approach accorded with equity's refusal to inquire into the adequacy of consideration where the doctrine of bona fide purchase for value without notice applies. It also accords with the defence of bona fide discharge: *Lipkin Gorman* at 580H-581A.

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[32] Change of position in anticipation of a receipt is not relevant in this case – cf: *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at [38] and [39].

69. Valuable consideration is given when an existing debt is discharged. The giving up of the debt (or the right to sue on it) is valuable consideration: *Taylor v Blakelock* (1886) LR 32 Ch D 560 at 568.7 per Cotton LJ; at 570.3 per Bowen LJ. As noted by Meagher JA CA[211], Bowen LJ recognised that to invalidate a transaction under which the creditor had relinquished his right to payment by accepting payment "would be to lull creditors into a false security, and to unsettle business". Security of receipt and finality of business transactions are the policy considerations which underlie the defences of discharge for value or bona fide payee: CA[107] – [110], [211].

70. Because Hills' discharge of the debt was valuable consideration, it was not necessary for the purposes of the change of position defence to inquire into the value of the debt.

Contention 2: No right of recovery / other reasons for restitution to be refused

71. By 18 February 2010, it was, or should have been, obvious to AFSL that a fraud had been committed and it was plain that TCP could not perform the contract. It did not terminate the rental agreements until 19 March 2010, after it had obtained the mortgage and guarantee from Mrs Skarzynski (on 23 February 2010) under which she guaranteed TCP's performance of the rental agreements which AFSL must have known could not have been performed.

72. It is not correct to say that AFSL received no consideration in respect of the rental agreements or its dealings with Mr Skarzynski:

72.1. AFSL received the rental payments and other contractual rights; and

72.2. it obtained security from Mrs Skarzynski by affirming those rights (notwithstanding its knowledge as at 18 February 2010).

73. Because AFSL received consideration and has at all times conducted itself on the basis that its dealings with TCP (and its associates) were other than worthless, it cannot be said that any enrichment of Hills is at AFSL's expense.

74. Further, in affirming the transaction after 18 February 2010 (until 19 March 2010) and accepting the further consideration it received for not terminating the rental agreements, AFSL acted in a manner detrimental to Hills, diminishing Hills' ability to recover (from TCP, Mrs Skarzynski and the directors of TCP):

74.1. up until February 2010, AFSL was receiving rental payments, which represented cash which Hills might have been paid had it not been lulled into a false sense of security by AFSL's mistake; and

74.2. on 23 February 2010, AFSL obtained Mrs Skarzynski's guarantee and mortgage. Hills might have obtained that security six months earlier (or proceeds from a refinance through sale of that house), if it had pursued TCP and its directors as it would have had AFSL not made a payment by mistake.

75. AFSL ought not be entitled to recovery against Hills as if it received nothing of what it bargained for, when it did in fact receive substantial consideration which might instead have gone to Hills if the mistaken payment had not been made.

76. Hills submitted to the Court of Appeal that, if AFSL recovered against Hills on the basis it was mistaken (and received no consideration) and also recovered against TCP, Mrs Skarzynski or the directors of TCP on the basis of the contractual arrangements entered into, there was a prospect of double recovery. That has now occurred. AFSL has recovered $512,000 under the mortgage given by Mrs Skarzynski: *Australian Financial Services and Leasing Pty Limited v All Up Finance Pty Limited* [2012] NSWSC 1004. In recovering that amount it necessarily affirmed and accepted its entitlement to the proceeds of the contractual arrangements, the efficacy of which it necessarily disputed in its claim for unjust enrichment. It necessarily disputed the efficacy of those arrangements because, at least to the extent AFSL received the consideration bargained for, any enrichment of Hills could not have been said by AFSL to have been at AFSL's expense.

77. Hills also submitted that AFSL must either:

77.1. first recover under its contractual rights before obtaining an order for restitution against the innocent recipient who has changed its position; or

77.2. establish the value of what it would recover under its contractual arrangements such that it only recovered an amount from the innocent recipient which it would not be inequitable to recover.

78. It would be inequitable to permit recovery from an innocent recipient who has changed his position on the faith of the receipt, whilst the mistaken payer insists on recovery under the contract under which the payment was made to obtain (double) recovery from others. That is especially so in circumstances where (a) Hills may well have obtained a mortgage from Mrs Skarzynski in August 2009 or repayment of its debt via a refinancing or sale of the Skarzynski home; and (b) AFSL's conduct has had the effect of depleting assets potentially available for Hills to pursue whatever rights it has against others, if Hills is ordered to repay amounts to AFSL (for example, AFSL sued Mr Skarzynski and Mr Musico who also gave guarantees to Hills: 2Blue 828).

79. In analysing whether an enrichment is unjust (or whether it would be inequitable for a payee to be required to make restitution or inequitable for a payer to pursue a claim[33]) it is necessary to examine the contractual relations between AFSL and others: *Lumbers v W Cook Builders Pty Ltd (in liquidation)* (2008) 232 CLR 635 at [37], [45], [46] (per Gleeson CJ), [77] (per Gummow, Hayne, Crennan and Kiefel JJ); *LMC Caravan GmbH & Co KG v GE Commercial Corporation (Australia) Pty Ltd* [2010] NSWCA 120 at [41], [42] (obiter per Allsop P). Where a payer has contractual (or other) rights against other parties in respect of the sum of money it seeks to recover and those rights have not been exhausted or, as here, were likely to be successful, it is important to pay attention to those rights. If it is permissible both to seek restitution from the innocent party and to pursue contractual damages for the loss against the wrongdoer and others, the existence of those contractual rights form a part of the factual context to a consideration of whether it would be inequitable to order restitution. In circumstances where Hills suffered prejudice and AFSL had contractual and other remedies against other parties, the inequity of requiring Hills to repay the amount to AFSL – notwithstanding Hills' change of position – is amplified.

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[33] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at [38].

Contention 3: The reductions of $55,314.60, $28,000 and $21,739.03

80. At J[82], the trial judge held that the restitution to AFSL should be reduced by:

80.1. $55,314.60 (being rental payments made by TCP to AFSL); and

80.2. $28,000 (being a GST input tax credit claimed by AFSL).

81. The trial judge considered that restitution should not be reduced by the amount of $21,739.03 (representing the amount Hills was out of pocket as a consequence of re-opening TCP's account and continuing to supply goods on credit, see CA[176]) on the erroneous basis that AFSL "received no benefit from" this further trading: J[83].

82. The Court of Appeal did not need to deal with these amounts. Nevertheless, it dealt briefly with the rental payments and the GST input tax credit at CA[167] and [217] – [218], Meagher JA expressing the view that there were significant difficulties in AFSL's way. The Court of Appeal did not deal with the amount of $21,739.03.

83. **The rental payments of $55,314.60**: AFSL, after paying the amount of $308,000 to Hills, received consideration from TCP in the amount of $55,314.60. Hills was not unjustly enriched at AFSL's expense at least in the amount of $55,314.60.

84. Further, in pursuing Hills for the full amount, AFSL in effect was purporting to elect to accept the fraud and not recover from TCP / Mr Skarzynski (or was asserting Hills' enrichment was not at its expense). Retention of the amount of $55,314.60 is inconsistent with such a stance. If Hills is to make restitution of the $308,000 it innocently received, AFSL should give credit for the amount it received pursuant to the fraud. That amount would have been available to Hills had AFSL not paid Hills $308,000 and had Hills pursued – as it would have – TCP and Mr Skarzynski.

85. **The GST input tax credit of $28,000**: At trial, AFSL conceded it had "claimed an input tax credit in the amount of $28,000 referable to the invoice from Hills".[34] It has never sought to remedy the incorrect claim for this input tax credit. Whilst AFSL challenged the trial judge's conclusion that restitution should be reduced by this amount, it abandoned that challenge on appeal to the Court of Appeal.

86. **Balance of trading account of $21,739.03**: There was no challenge to the evidence given by Hills (by Mr Brewer) that further goods were supplied to TCP on credit as a consequence of TCP's account being re-opened, nor to the quantification of the amount ($21,739.03) which had not been paid by TCP in respect of those further supplies. The trial judge rejected this defence on the basis that AFSL "received no benefit from these": J[83]. That was not the relevant issue. The issue was whether there was detriment to Hills such that it was inequitable for it to make restitution. The question of whether AFSL received a benefit was irrelevant to whether Hills suffered detriment. There clearly was detriment: Hills supplied goods to TCP for which Hills was not paid. It would not have done so if it had not received the payment of $308,000.

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[34] Transcript 28 March 2011 T27.8.

Part VIII: Estimate of oral argument

87. 2 Hours.

Dated: 11 October 2013

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