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Restitution: Change of position

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Status: **Law Stated date 15 April 2024** | Jurisdiction: **England, Wales**

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A note providing an overview of unjust enrichment and examining the defence of change of position, explaining its theoretical basis and the requirements for a successful defence.

Change of position is a defence to a claim in unjust enrichment. It is concerned with situations in which the defendant's circumstances have changed detrimentally so that it would be unjust to require them to repay money received at the claimant's expense. This note helps you understand when and how a defendant can rely on this defence. It also provides a brief overview of unjust enrichment claims and examines the basic nature of the change of position defence.

Overview of unjust enrichment

Unjust enrichment is a relatively new and constantly developing area of English private law. However, the various claims we now recognise as based on the principle of unjust enrichment are not new. The following causes of action and remedies are well established:

- Money had and received.
- Quantum meruit.
- Quantum valebat.
- Subrogation.
- Trusts arising by law.
- Equitable liens.

Historically, however, these causes of action and remedies were often treated as anomalies that did not quite fit into the existing categories of English private law.

All this began to change in 1991 when the House of Lords recognised that a claim for money had and received was based on the principle against unjust enrichment (*Lipkin Gorman (a firm) v Karpnale [1991] 2 AC 548 HL*). Courts have subsequently reached the same conclusion in relation to:

- Certain forms of subrogation (*Banque Financière de la Cité v Parc (Battersea) Ltd [1999] 1 AC 221 HL*).
- Claims for a quantum meruit (for example, *Benedetti v Sawiris [2013] UKSC 50 (Supreme Court)* see Legal update, Relevance of subjective devaluation or revaluation when calculating the value of unjust enrichment (Supreme Court) and *Chief Constable for Greater Manchester Police v Wigan Athletic FC [2009] 1 WLR 1580 CA*).
- Other claims for restitution of non-monetary benefits (*Cressman v Coys of Kensington (Sales) Ltd [2004] 1 WLR 2775 CA*).

Basic requirements for unjust enrichment claim

In all unjust enrichment claims, the court must consider four questions:

- Has the defendant benefitted or been enriched?
- Was the unjust enrichment at the expense of the claimant?
- Was the enrichment unjust?
- Is there any specific defence available to the defendant, such as change of position?

(*Barton v Gwyn-Jones [2023] UKSC 3 (25 January 2023), Lady Rose JSC, paragraph 77, judgment*).

This note deals with the fourth question and, in particular, with change of position, which is the most important defence for defendants to claims in unjust enrichment. For more details on restitution claims generally, see Practice note, Remedies: Restitution.

The nature of the defence

Change of position is concerned with a situation where the defendant's circumstances have changed for the worse. It was first recognised as a defence to claims in unjust enrichment by Lord Goff in Lipkin Gorman. However, he refused to provide a comprehensive

description of the various elements to the defence. Instead, he stated the principle as follows:

> "At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full." (*Lipkin Gorman, Lord Goff of Chieveley, page 580C*.)

It is possible to read Lord Goff's statement as though he intended that the defence should be based on broad notions of fairness or equity as between the claimant and the defendant. This is how Lord Goff's statement was interpreted by Munby J in *Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663*:

> "We need, if I may say so, always to bear in mind that, at the end of the day, the simple question that has to be asked in every case, and in the final analysis it is the only potentially determinative question that ever has to be asked, is this: Has the position of the payee so changed that it would be inequitable in all the circumstances to require him to make restitution, alternatively to make restitution in full? ... There is, in my judgment, no need to gloss or refine it. Indeed, any attempt to do so is likely to be not merely unnecessary but fraught with potential difficulty"(*paragraph 56*).

Similar comments were made in *Vaught v Tel Sell UK Ltd [2005] EWHC 2404 paragraphs* 172 to 176 and in *Niru Battery Manufacturing Co v Milestone Trading Ltd [2004] 1 All ER 193* by the Court of Appeal. Seen this way, change of position is simply an enquiry into whether it would be fair in all the circumstances to require restitution.

However, to suggest that the defence is purely discretionary would be wrong as a matter of principle and is not supported by the balance of the authorities in this area. This approach gives little guidance to the practitioner advising a client as to how the defence will apply in any given case, other than that the court will approach each case on its own facts. It also risks a different outcome in similar cases depending on an individual judge's perceptions of where the equity lies. It is fundamental to legal analysis that like cases are treated alike.

This also involves a misreading of Lord Goff's speech in Lipkin Gorman. Earlier in his speech, he stated:

> "[t]he recovery of money in restitution is not, as a general rule, a matter of discretion for the court ... where recovery is denied, it is denied on the basis of legal principle". (*Lipkin Gorman, page 578C-G*.)

This shows that Lord Goff cannot have intended to reintroduce a discretion through the back door by recognising a change of position defence. Rather, he intended to state the defence broadly so that courts could subsequently develop the principles to decide when it will be inequitable to require a defendant to make restitution (*Philip Collins Ltd v Davis [2000] 3 All ER 808 Jonathan Parker J page 827; Scottish Equitable plc v Derby [2001] 3 All ER 818 Robert Walker LJ page 828d, Simon Brown LJ page 832c-e*; and *Standard Bank London Ltd v Canara [2002] EWHC 1574 Moore-Bick J page 90*).

Theoretical basis for the defence

It is necessary to explain the theoretical basis for the defence in order to understand the principles that have been developed to date and to suggest solutions in those areas not covered by authority.

Protecting the defendant's freedom to make spending decisions

One view is that the defence exists to ensure that people are free to dispose of wealth that appears to be theirs (*Birks, Unjust Enrichment (2nd edition, 2005), page 209*). On this view, the defence responds to the simple question: why should a defendant have to pay back money that they spent because they thought it was theirs?

However, there are two problems with this view. First, it is probably the case that the defence applies beyond circumstances in which the defendant has made an active decision to change his position (for example, where money is stolen from him). In that type of case, there is simply no spending decision to protect. Secondly, the defence does not apply to every spending decision (see Must the expenditure be "extraordinary"? below). In short, a spending decision is neither necessary nor sufficient.

Disenrichment

The better view is that the defence identifies situations where the defendant has lost the enrichment (see *Burrows, The Law of Restitution, (Oxford University Press, 3rd edition, 2011, page 526)*. Liability in unjust enrichment is generally strict. There is no need for the claimant to establish that the defendant acted wrongfully in order to succeed. It is sufficient for the claimant to show that the defendant was unjustly enriched at the claimant's expense. This might at first sight seem surprising, but it is justified because the defendant is not worse off by having to make restitution. They have received a benefit that ought not to have been theirs and must do no more than return it. However, this explanation does not hold if the defendant would be worse off if required to make restitution. This is where

the change of position defence applies. It identifies situations where the defendant's circumstances have changed for the worse as a result of receiving the relevant enrichment, and ensures the defendant is not liable to make restitution to the extent that it would make them worse off.

Requirements for the defence

Subsequent authorities have developed Lord Goff's broad statement in Lipkin Gorman so that it is possible to identify three elements to the change of position defence. If all three elements are established, the defence will succeed. If one of them is not, the defence will fail. There is no discretion to allow the defence to succeed even though two out of the three elements are established in a given case.

The general rule

It will be inequitable to require the defendant to make restitution if the defendant can prove that:

- Their circumstances have changed detrimentally.
- The change of circumstances was caused by receipt of the enrichment.
- They are not disqualified from relying on the defence.

A detrimental change of circumstances

The defendant must prove that their circumstances have changed detrimentally (*Scottish Equitable Plc v Derby [2001] 3 All ER 369 CA Robert Walker LJ; Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663 Mummery LJ*). What does 'detriment' mean in this context?

Spending money

The most obvious example of a detrimental change of circumstance is the expenditure of money by the defendant. However, not all expenditure counts.

Must the expenditure be "extraordinary"?

Rule 1:

There is no requirement that expenditure is 'extraordinary' provided that the expenditure was caused by receipt of the enrichment.

Lord Goff noted in Lipkin Gorman:

> "... the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things" (*Lipkin Gorman, page 580F-H*).

On this basis, it might be said that there is a rule that financial expenditure must be extraordinary before it will qualify as a relevant change of circumstance. However, the better view is that Lord Goff's statement illustrates the need for there to be a causal link between the expenditure and receipt of the enrichment. It does not impose a further requirement that the expenditure must in some way be out of the ordinary.

Example

A mistakenly overpays B in instalments over a period of six years. B has a relaxed approach to their finances and tends to spend more than they earn. As a result of having more money than they would otherwise have been entitled to, B allows their everyday expenditure to become more extravagant. A discovers the mistake and seeks restitution from B.

Held: B is entitled to a change of position defence in respect of half the total overpayment because B spent money that they would not otherwise have spent if they had had less money available to them. B is not entitled to a defence in relation to the remaining half because they tended to spend more than they earned, so they would likely have spent that amount in any event (*Philip Collins Ltd v Davis [2000] 3 All ER 808*).

Paying off debts

Rule 2:

As a general rule, paying off a debt will not be a detrimental change of circumstances.

A debt must always be repaid at some point. It follows that a defendant who uses money to pay off debts will not necessarily be any worse off if they are subsequently ordered to repay the money (*Scottish Equitable plc v*

Derby [2001] 3 All ER 818 CA Robert Walker LJ; RBC Dominion Securities Inc v Dawson (1994) 111 DLR (4th) 230 Supreme Court of Newfoundland Cameron JA). The defendant has simply swapped one debt (their loan) for another (a liability in unjust enrichment to repay the same amount to the claimant) leaving their overall financial position no worse than it had been before receiving the enrichment.

However, paying off a debt may sometimes be detrimental. For example, the defendant may:

- Pay off a debt that is at an unusually low interest rate and give up the opportunity to borrow at a particularly low rate (*Scottish Equitable plc v Derby [2001] 3 All ER 818 CA, Robert Walker LJ*).
- Give up a job as a result of paying off a debt (*Gertsch v Atsas [1999] NSWSC 898*).

In these cases, although the debt would inevitably have to be repaid at some point, the defendant has incurred a detriment that would make them worse off if they were required to make restitution in full.

Examples

- C mistakenly overpays D £172,451 and as a result D spends £41,671 paying off a mortgage on their family home.

  Held: D has no change of position defence in relation to the £41,671 because 'in general it is not a detriment to pay off a debt which has to be paid off sooner or later' (*Scottish Equitable plc v Derby [2001] 3 All ER 818 CA Robert Walker LJ paragraph 35*).

- E mistakenly overpays F and as a result F decides to pay off the debts on their credit card account and to repay certain other debts owed to family members.

  Held: F is not entitled to a change of position defence because 'the payment of a debt in these circumstances cannot be said to be to [F]'s detriment' (*RBC Dominion Securities Inc v Dawson (1994) 111 DLR (4th) 230, Supreme Court of Newfoundland, Cameron JA*).

- G makes a mistaken payment to H. As a result, H clears a debt owed by H to J. J had loaned the money to H for a business project. H and J were friends, and J would have looked sympathetically upon any request by H for time to pay or other indulgence if H's business project was unsuccessful.

  Held: H is not entitled to rely on the change of position defence because J 'would have been entitled to insist upon repayment' of the debt on its due date. The fact that 'the identity of the creditor changes, and the debtor may not have such an easy ride, is simply one of the vicissitudes of life' (*Wards Solicitors v Hendawi [2018] EWHC 1907 (Ch), paragraph 31*).

Buying assets with a re-sale value

Rule 3:

Buying an asset will not be a detrimental change of circumstances to the extent that the asset has a re-sale value and a reasonable person in the position of the defendant could sell the asset without disproportionate expense or difficulty.

Case law differs over whether the defence should be available where the defendant uses money to buy an asset with a re-sale value. In Lipkin Gorman, Lord Templeman took the view that if money was used to buy a car, the change of position defence would only be available to the extent that the re-sale value of the car was less than the money received (*Lipkin Gorman, page 560D*). By contrast, in *RBC Dominion Securities Inc v Dawson (1994) 111 DLR (4th) 230*, the Supreme Court of Newfoundland held that the defence was available to a defendant who used the money to buy house-hold furniture, even though the furniture was a benefit to the defendant.

The better view is that the defendant should not be entitled to a change of position defence to the extent that an asset, which they would not otherwise have bought, confers a benefit upon them. In this case, the defendant is not disenriched to that extent and would not be worse off by having to make restitution. The court should therefore follow Lord Templeman's view in *Lipkin Gorman*.

However, this solution only works if the asset confers a financial benefit upon the defendant. It is unlikely to cause difficulty if the defendant sells the asset before trial. For example, in *Credit Suisse (Monaco) SA v Attar [2004] EWHC 374 (Comm)*, a change of position defence was rejected where the defendant used the money to purchase shares which had appreciated in value and were sold before trial.

However, what if the defendant keeps the asset and does not want to sell it? This question has not yet been resolved by the courts but, when it arises, the law needs to strike a balance between the objective value of the

asset and the defendant's subjective desire not to realise it. The appropriate balance is to say that the objective value will be taken if a reasonable person in the position of the defendant could sell the asset without disproportionate expense or difficulty and thereby realise the value. If this is right, it should follow that the asset ought to be valued on the date when it could reasonably be sold.

In *Banca Intesa Sanpaolo SPA & Anor v Comune Di Venezia [2022] EWHC 2586 (Comm) (14 October 2022)*, Foxton J considered that the surviving value of an asset which has not yet been sold would be brought into account when establishing the extent of any change of position,. subject to any complications that might arise from difficulties in realising the value of the asset. He also considered that the date for determining the extent of the defendant's change of position was the date of the claimant's demand for repayment. The fact that the value of the asset might subsequently increase was therefore not a sufficient reason to refuse the defence (*paragraphs 423-424, judgment*). For more information, see Legal update, Banks have a change of position defence where Italian swap transactions are void (High Court).

Recoverable payments to third parties

Rule 4:

Paying money to a third party will not be a detrimental change of circumstances to the extent that a reasonable person in the position of the defendant could recover the money from the third party, without disproportionate expense or difficulty.

If the defendant pays money to a third party but has a legal right to recover it, can the defendant rely on having spent the money to establish a change of position defence, or must the value of the legal right to recover it from the third party also be taken into account? This issue has not been dealt with comprehensively in case law,

In *Investment Trust Companies (In Liquidation) v Revenue and Customers Commissioners [2017] UKSC 29*, Lord Reed held that a defendant who paid money to HMRC was unable to raise a change of position defence, because the change of position was "reversible": the defendant could recover the money from HMRC by bringing a claim under the VAT Act 1994 (*paragraph 73*). However, in what circumstances will the availability of a claim against a third party be sufficient to render the change of position "reversible"?

In principle, the solution should be the same as was adopted in Buying assets with a re-sale value: the value of the claim against the third party should be taken into account if a reasonable person in the position of the defendant could realise it without disproportionate expense or difficulty. This approach is consistent with the authorities on mitigation of loss in contract and tort. A damages claimant is not expected to undertake difficult or uncertain litigation against a third party to mitigate their loss (*Pilkington v Wood [1953] Ch 770, page 777*). It is difficult to see why an unjust enrichment defendant should be expected to do so to reverse their change of position.

The legal and practical difficulties of litigation and the prospects of recovery from the third party should be considered. For example, the defendant may not be obliged to pursue litigation if there is little chance of recovery from the third party (*Atkinson v Varma [2021] EWHC 2027 (Ch)* paragraphs 74-77). However, they will need to produce evidence to explain what efforts they have made to recover the money.

Example

G argued that paying tax to the Commissioners for Inland Revenue was a relevant change of position.

Held: G's defence failed because 'the liability to tax should not in my view be allowed as a defence except to the extent that [G] is unable to recover the tax' and the court had no evidence before it on whether the tax was recoverable (*Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862* Knox J page 904).

Other changes of circumstance

Rule 5:

A non-pecuniary change of circumstance can be detrimental and the court will have to do the best it can to put a financial value on this.

Spending money is an obvious example of a situation where the defendant would be financially worse off if required to make restitution. In principle, the same is true where the defendant parts with goods (*National Westminster Bank plc v Somer International (UK) Ltd [2002] QB 1286 CA*) or performs services as a result of receiving the enrichment, since both have financial value. It is also likely that other changes of circumstance

will count even though they do not obviously make the defendant financially worse off. For example, the defence will apply where:

- A defendant becomes ill as a result of receiving an enrichment (*Scottish Equitable plc v Derby [2001] 3 All ER 818 CA Robert Walker LJ at paragraph 32*).
- A defendant's divorce is linked to receipt of an enrichment (*Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663 Munby J at paragraphs 65-66*).

In such cases, the court will have to do the best it can to place a financial value on the relevant change of circumstance. This is a difficult exercise, but is commonly undertaken in personal injury law and a similar approach would be appropriate here.

Causation

The 'but-for' test

Rule 6:

A defendant must prove that, but for receipt of the enrichment, they would not have suffered the detrimental change of circumstances.

The mere fact that the defendant has suffered a detriment after receiving an enrichment is not in itself sufficient to enable them to resist a claim in unjust enrichment. It is clear that the defendant must show a causal connection between receipt of the benefit and the change of circumstance relied upon (*Scottish Equitable plc v Derby [2001] 3 All ER 818 CA Robert Walker LJ at paragraph 31 and Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663 Mummery LJ at paragraph 43*). The cases differ on the correct causation test. It has been said that the question is whether the change of circumstances was:

- 'Referable' to receipt of the enrichment (*Philip Collins Ltd v Davis Jonathan Parker J at page 827h*).
- Caused by receipt of the enrichment on 'at least a 'but-for' test' (*Scottish Equitable plc v Derby [2001] 3 All ER 818 CA Robert Walker LJ at paragraph 31*).
- 'Relevant[ly] connect[ed]' with the payment (*Commerzbank AG v Gareth Price-Jones [2003] EWCA Civ 1663, Mummery LJ at paragraph 43*).

The better view is that the defendant must at least show that, but for the payment, their circumstances would not have changed (*Scottish Equitable plc v Derby [2001] 3 All ER 818 CA Robert Walker LJ at paragraph 31*).

The more difficult question is whether there are any further requirements beyond 'but-for' causation. Some cases have suggested that the defendant must also show reliance, in that the defendant's circumstances changed because they believed that they were entitled to the payment (*David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 109 ALR 57 High Court of Australia and Storthoaks Rural Municipality v Mobil Oil Canada Ltd (1975) 55 DLR (3d) 1, Supreme Court of Canada Martland J page 13*). This has become known as the 'narrow' view of change of position (*Burrows, The Law of Restitution (Oxford University Press, 3rd edition, 2011, page 528*)).

The problem with this view is that it rules out detrimental changes of circumstance that occur independently of any action or decision by the defendant. The most obvious example of this is if the enrichment was stolen from the defendant by a third party. In this example, the defendant could never show that his belief that he was entitled to keep the money caused the theft. The theft had nothing to do with his state of mind. If reliance is required, the defendant would be entitled to no defence even though the money had been stolen from him. For this reason, many academics prefer a broader or 'wide' version of the defence that does not require reliance (for example, *Burrows, The Law of Restitution (Oxford University Press, 3rd edition, 2011, page 529*)).

Professor Burrows' view was endorsed by the Court of Appeal in *Scottish Equitable plc v Derby [2001] 3 All ER 818 CA* by Robert Walker LJ. The "wide" approach was followed more recently in *T & L Sugars Ltd v Tate & Lyle Industries Ltd [2015] EWHC 2696 (Comm) paragraphs 136-137* and *Wards Solicitors paragraph 33*. It is likely that when this issue arises directly for decision it will be held that detrimental reliance is generally not necessary.

Anticipatory change of position

Rule 7:

A defendant can rely on a detrimental change of circumstance that occurs before receipt of the enrichment, but only if the defendant can show reliance, in that the change of circumstance would not have occurred but for their expectation that the enrichment would be received.

There is one exception to the proposed general rule that reliance is not necessary. It is now clear that a defendant can rely on a change of position even though the relevant detrimental change of circumstances occurred before receipt of the payment (*Dextra Bank and Trust Co Ltd v Bank of Jamaica [2002] 1 All ER (Comm) 193 PC*). This may seem inconsistent with the proposition that the change of circumstance must have been caused by

receipt of the payment. How can the effect (the change of circumstance) come before the cause (receipt of the money)? However, the defendant can show causation if they can establish that they relied on the anticipated receipt when changing their position (see *Birks, Unjust Enrichment (Oxford University Press, 2nd edition, 2005, page 212*).

See also *Banca Intesa Sanpaolo SPA & Anor v Comune Di Venezia [2022] EWHC 2586 (Comm) (14 October 2022)* , in which Foxton J held that defendant banks could rely on a change of position defence in response to a claim for repayment of monies paid out by the claimant under a swap transaction, which was later found to be void. The banks had entered into hedging swaps under which they were obliged to make payments to third parties if they received payments from the claimant under the swap transactions.

Foxton J observed that it did not matter that the banks' change of position involved a legal commitment to make payments, rather than actual payments, in anticipation of future receipt of payments from the claimant. It was difficult to see how this made a difference to the availability of the defence (*paragraph 409*). (See also Legal update, Banks have a change of position defence where Italian swap transactions are void (High Court)). The Court of Appeal agreed, obiter, that a change of position defence, was, in principle, available (Legal update, Italian local authority had capacity to enter into swaps (Court of Appeal)).

Examples

- H received a cheque from I worth US$2,999,000. Prior to receiving the cheque, H paid its agents the face value of the cheque in order to enable them to buy it from I.

  Held: H's payment to its agents was a change of position even though it occurred before receipt of the cheque (*Dextra Bank and Trust Co Ltd v Bank of Jamaica [2002] 1 All ER (Comm) 193 PC*).

- J placed a winning bet with money owned by K at L's casino. L paid out three times the value of the bet in winnings to J who spent the money. J then placed several more bets with K's money at L's casino, so that overall L had received more money than they had paid out in winnings.

  Held: L could set the winnings on the first bet against the receipts from the later bets and was only required to repay the difference between the total receipts and total winnings (Lipkin Gorman).

Disqualification from the defence

A claimant will not be entitled to invoke the change of position defence if one of the following disqualifications applies.

Bad faith

Rule 8:

The defence cannot be invoked by a defendant who fails to act in good faith in a way that is causally related to the change of circumstance relied upon.

The defence is not open to a defendant who acts in bad faith when changing their position (Lipkin Gorman, Lord Goff, pages 579-580). Dishonesty is an obvious example of bad faith, but in this context the two are not synonymous (*Niru Battery Manufacturing Co v Milestone Trading Ltd [2004] 1 All ER (Comm) 193 CA Clarke LJ and Sedley LJ paragraphs 163, 179-180*).

At first instance in *Niru*, Moore-Bick J suggested that bad faith meant 'a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty' (*Niru Battery Manufacturing Co v Milestone Trading Ltd [2002] 2 All ER (Comm) 705, paragraph 135*). On appeal, his judgment was upheld, but the Court of Appeal preferred to ask the broader question whether the defendant's conduct made it 'inequitable' or 'unconscionable' to allow them to rely on the defence (*Sedley LJ and Clarke LJ paragraphs 183 and 149*).

Whichever approach is taken, it appears that 'bad faith' or 'unconscionable' conduct does not extend to negligence so that a careless defendant can still invoke the defence (*Dextra Bank and Trust Co Ltd v Bank of Jamaica [2002] 1 All ER (Comm) 193 PC, paragraphs 40-46*).

Therefore, it is necessary to distinguish bad faith or unconscionable conduct from mere carelessness. Some examples of bad faith are:

- A defendant who consciously changes their position despite knowing that the payment was made by mistake (*Cressman v Coys of Kensington (Sales) Ltd [2004] 1 WLR 2775, Mance LJ paragraph 41*).
- A defendant who knows the facts which justify the claimant's right to restitution, even if the defendant does not know that those facts give the claimant a right to recover the money (*Lipkin Gorman Lord Goff, paragraphs 580C-D and Niru Battery Manufacturing Co v Milestone Trading Ltd [2004] 1 All ER (Comm) 193 CA Sedley LJ paragraph 183*).

A more difficult situation is where the defendant suspects the payment may have been made by mistake,

but is not sure. In *Niru*, Moore-Bick J indicated that such a defendant may not act in good faith if they have 'good reason' to suspect the payment is made by mistake and fail to make enquiries of the payor (*Niru Battery Manufacturing Co v Milestone Trading Ltd [2002] 2 All ER (Comm) 705*). However, a defendant who suspected money may have been received through money laundering was held to have acted in good faith because he had carried out the checks required by law and thereafter concluded there was no risk (*Abou-Rahmah v Abacha [2007] 1 All ER (Comm) 827 CA*). It follows that the steps required will depend on the context of the case and the extent of the defendant's suspicions.

Niru was considered by the High Court in this context in *Webber v Department for Education [2014] EWHC 4240 (Ch)*. In *Webber*, the court found that if a person appreciated that the payment they were receiving may be an overpayment or that the payer may be mistaken, and could make a simple enquiry of the payer to check whether this was so but chose not to do so, there was nothing wrong in concluding that the defence was not open to them. They knew there was a risk they may not be entitled to the money, but were willing to take that risk. If it turned out that the payment was indeed an overpayment, it would be inequitable or unconscionable for such a person to deny restitution by relying on a change of position defence (*paragraph 62*). For more details, see Legal update, Change of position defence not available in action for recovery of overpayment where member "turned a blind eye" (High Court).

See also *Tecnimont Arabia Ltd v National Westminster Bank Plc [2022] EWHC 1172 (Comm)*, where the claimant, as a result of a mistake induced by fraud, transferred money to the defendant bank, who in turn paid the money away on the instructions of the fraudster. The claimant's unjust enrichment claim against the bank failed, because:

- The bank's enrichment was not at the claimant's expense.
- The bank was, in any event, entitled to a change of position defence.

  The Court found that there was nothing in the design or operation of the bank's anti-fraud systems, or the bank's conduct, that would make it inequitable or unconscionable for the bank to rely on the change of position defence (*paragraphs 193, 212, judgment*).

Examples

- M bought a car from N but, by mistake, N also transferred to M a personalised number plate. N asked for it back but M refused and thereafter gave the number plate to their girlfriend. M argued that they had given it away and so changed their position.

  Held: M did not act in good faith when they gave the number plate away because they knew N wanted it back (*Cressman v Coys of Kensington (Sales) Ltd [2004] 1 WLR 2775 CA*).
- O paid P US$5.8 million under a documentary credit in the mistaken belief that a valid bill of lading had been presented. P, through its manager, suspected that O was making a mistake but made no further enquiries before it paid the money away.

  Held: P did not make enquiries despite suspecting that O had made a mistake, and therefore did not act in good faith when it paid the money away (*Niru Battery Manufacturing Co v Milestone Trading Ltd [2004] 1 All ER (Comm) 193 CA*).

Illegality

Rule 9:

The defence cannot be invoked if the defendant's change of circumstance involved the commission of a criminal offence, unless the offence can be characterised as trivial or de minimis.

The defendant cannot invoke change of position if their conduct involved the commission of a criminal offence (*Barros Mattos Jnr v MacDaniels Ltd [2004] 3 All ER 299*). In *Barros Mattos*, Laddie J considered that 'there is no room for any discretion by the court in favour of one party or the other'. Any form of illegality would automatically disqualify the defendant from invoking change of position provided it was not so minor as to be *de minimis*.

Example

Q paid R US$8.05 million by mistake. In contravention of Nigerian foreign exchange legislation, R converted the dollars into Naira and then paid it away. Q sought restitution and R invoked change of position by having paid the money out.

Held: R could not invoke the change of position defence because the court could not take notice of the defendant's breach of Nigerian foreign exchange legislation (*Barros Mattos Jnr v MacDaniels Ltd [2004] 3 All ER 299*).

Risk runners

Rule 10:

The defence cannot be invoked by a defendant who voluntarily assumed the risk of repaying the benefit even if their circumstances changed for the worse.

A defendant who receives money under a loan knows that they will always have to pay the money back at some point in the future. Therefore, a defendant can never assert a change of position defence in response to a claim in unjust enrichment for repayment of the principal, or use value of the money (*Goss v Chilcott [1996] AC 788 PC*; *Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579 CA*). The precise reason why the defence fails in such cases is hard to pinpoint. It is normally asserted that the defendant knew they would have to repay the money and therefore 'took the risk' that they might have to repay it in the future (*Haugesund Kommune, Aikens LJ paragraph 125*).

Saying that the defendant 'took the risk' does not provide any real explanation of the reasons why the defence is ruled out in such cases. In a loan case it is quite straightforward because it is in the very nature of the transaction that the money must be repaid irrespective of how it is spent by the borrower. In such cases, there is no good reason to afford the defendant a change of position defence (*Banca Intesa Sanpaolo SPA and another v Comune Di Venezia [2022] EWHC 2586 (Comm) (14 October 2022), paragraph 399(ii)*).

It is not so straightforward where money is advanced on the understanding that the defendant will earn it by doing something in return. In that case, the enrichment is, to the knowledge of both parties, conditional on the defendant's due performance. However, both parties will be expecting the defendant to perform and may not think about the possibility that they will not (*Burrows, The Law of Restitution (Oxford University Press, 3rd edition, 2011, pages 545 to 547*).

It has been suggested that the change of position defence will not be available in such cases where the defendant spends the money for their own purposes (for example, a builder who spends an advance payment on a holiday), but may be available where the defendant spends money in preparation for performance (*Banca Intesa Sanpaolo SPA and another v Comune Di Venezia [2022] EWHC 2586 (Comm) (14 October 2022), paragraph 399(iii)-(iv)*).

Examples

- S advanced money to T under a loan. T drew the money down and paid it on to U. The loan was subsequently rendered invalid when U, acting on behalf of T, altered the mortgage deed. S sought restitution of the principal on the basis that there was a total failure of consideration. T asserted a change of position by paying the money on to U.

  Held: T was not entitled to a change of position defence because they knew the money would have to be repaid at some point (*Goss v Chilcott [1996] AC 788 PC*).

- V advanced money to W under a swap transaction that was held to be void under Norwegian law. W alleged it had changed its position when it lost most of the money it had received by making a terrible investment.

  Held: W 'took the risk' because the funds were advanced 'on the understanding ... that [W] had to repay the principal and interest'. Accordingly the change of position defence failed (*Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579 CA, Aikens LJ*).

Burden and standard of proof

Rule 11:

- The burden of proof on all elements of the defence is on the defendant.
- The defendant must give a 'full account' of how the enrichment was spent, but the court will take a relaxed approach to the evidence and will not require the defendant to match precise items of expenditure against individual receipts, particularly when the enrichment is received over time.

The burden of proof on all elements of the defence is on the defendant (*MGN v Horton [2009] EWHC 1690*). The defendant must show:

- (1) That they have changed their position to their detriment.
- (2) That they would not have done so but-for receipt of the enrichment (or the anticipation of receiving it).
- (3) That they acted in good faith.

The burden and standard of proof for issue (3) is likely to be the familiar civil standard. However, this is not so clear for issues (1) and (2). The defendant must give a 'full account' of how the enrichment was spent (*MGN Ltd v Horton [2009] EWHC 1690* and *Olympic Council of Asia v Novans Jets LLP [2021] EWHC 1063 (Comm)*, paragraph 57), but the court is prepared to take a fairly relaxed approach to the defendant's evidence to support his account of how it was spent and why the expenditure was caused by receipt of the enrichment. As a result, it is not always necessary to produce receipts, dates of purchase and precise amounts (*RBC Dominiion Securities Inc v Dawson (1994) 111 DLR (4th) 230, Supreme Court of Newfoundland, Cameron JA, page 240*). Similarly, Jonathan Parker J adopted a broad approach to quantifying the defendant's disenrichment in *Philip Collins Ltd v Davis [2000] 3 All ER 808*. His approach was endorsed by Robert Walker LJ in *Scottish Equitable plc v Derby [2001] 3 All ER 818*. Therefore, it is not necessary to match precise expenditure against receipts, particularly where payments are made over a period of time (*Lipkin Gorman*).

What types of claim does the defence apply to?

Restitution is not a cause of action. It is a remedy measured by looking at the benefit received by the defendant rather than the loss incurred by the claimant. As a remedy, it is available in response to a claim in unjust enrichment. Claims for breach of contract, certain torts and breaches of fiduciary duty can also give rise to a remedy measured by reference to the defendant's gain. It is necessary to consider whether change of position is a defence to all claims where the claimant seeks a restitutionary remedy or whether its scope is more limited.

The general rule is as follows:

General rule

Change of position is not applicable to all claims where the claimant seeks restitution:

- The defence applies to all unjust enrichment claims unless it is overridden by the policy underlying a particular unjust factor (see Unjust factors).
- The defence does not apply to claims based on civil wrongs.

Unjust factors

There is some academic uncertainty about when an enrichment obtained at the expense of the claimant will be 'unjust'. The predominant view is that enrichment will be 'unjust' if the claimant can bring himself within one or other of the recognised categories of claim in unjust enrichment (unjust factors). It is important to consider whether the change of position defence applies to each of the recognised unjust factors. There is no problem invoking the defence in relation to a claim based on mistake (*Philip Collins Ltd v Davis [2000] 3 All ER 808*) or a complete absence of consent to the transfer (*Lipkin Gorman*). However, there is considerable uncertainty in relation to the other unjust factors.

Total failure of consideration

Rule 12:

In principle, a defendant can invoke the change of position defence in response to a claim based on a total failure of consideration but in practice they will often be disqualified by Risk runners.

There is some doubt over whether the defendant can successfully rely on the defence if the unjust factor is a total failure of consideration. These cases are based on the fact that the enrichment received by the defendant was known to be conditional on an event occurring in the future (more often than not, counter performance by the defendant). Therefore, the defendant knows that the enrichment may have to be repaid in the future and it can be argued that if they subsequently change their position, they do so at their own risk. This reasoning led to the defence being ruled out in the loan cases considered above (*Goss v Chilcott [1996] AC 788 PC; Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579 CA*).

The more difficult question is whether the same reasoning applies to all total failure of consideration cases. This depends on whether knowledge that the enrichment is conditional is a sufficient basis on which to conclude that the defendant voluntarily assumed the risk that the enrichment may have to be repaid irrespective of a detrimental change of circumstance. This might be an obvious conclusion where the money was intended to be advanced under a loan agreement because repayment is the essence of a loan. The same is not true, however, of other forms of agreement where,

if the agreement is performed, the condition will be fulfilled and the defendant will be entitled to keep the enrichment. The correct solution is to recognise that the defence can be invoked, but will often fail if the defendant is a risk runner (see Risk runners).

In *Banca Intesa Sanpaolo SPA & Anor v Comune Di Venezia [2022] EWHC 2586 (Comm) (14 October 2022)*, Foxton J considered the availability of the change of position defence in circumstances where the parties shared a common understanding that they owed each other binding obligations under a swaps contract on the faith of which one of them changed their position, but it turned out that the swaps contract was void.

He considered that the idea that a change of position defence can never be available in a void contract case was unattractive. It paid little regard to the importance of protecting security of receipt and those who have conducted themselves on the basis of appearances, concerns which underlie the defence. He found that the banks' change of position was not wholly unrelated to the obligations arising under the swaps contract (unlike the builder who spends an advance payment on a holiday) but involved entering into contracts for the purpose of hedging their liabilities under the swaps contract. He was therefore satisfied that a change of position defence was available to the banks in this case, notwithstanding that the claimant's right to restitution arose from the fact that a condition of the payments it made (a legally enforceable right to counter payments) was not satisfied (*paragraphs 399 – 402, judgment*).

The Court of Appeal agreed, obiter, that a change of position defence was, in principle, available to the banks. The Court noted that this was not a case where the banks were risk runners, since the banks received money under the swaps contract believing them to be valid, so that the money was theirs to keep (*paragraph 195, judgment*). For more information, see Legal update, Italian local authority had capacity to enter into swaps (Court of Appeal).

Duress and undue influence

Rule 13:

In principle, a defendant can rely on the defence where the claim is based on duress or undue influence, but in practice they will often be disqualified by Bad faith.

Where the claimant relies on duress or undue influence, the defendant will generally be disqualified from the change of position defence. It will be very difficult for such a defendant to show that they changed their position in good faith when they extracted the enrichment from the claimant by threats or undue pressure. One exception to this general statement may be the three-party cases exemplified by the decision in *Royal Bank of Scotland plc v Etridge (No. 2) [2001] 4 All ER 449 HL*. There, the defendant bank was liable on the basis that it had constructive notice of the husband's undue pressure. Constructive notice is not itself a basis for a conclusion that the bank failed to act in good faith, and so it is arguable that the defence should apply there too.

Ultra vires receipts by public authorities

Rule 14:

A public authority cannot rely on the defence where the claim is based on an *ultra vires* exaction of tax or other financial levy.

A public body who acts ultra vires by exacting money without statutory authority must make restitution under the principle recognised in *Woolwich Equitable BS v IRC [1993] 1 AC 70 HL*. In *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2008] EWHC 2893 (Ch)*, Henderson J ruled that the defence was not open to a public authority in response to a claim under the Woolwich principle, and his conclusion was followed by Vos J in *Littlewoods Retail Ltd v Revenue and Customs Commissioners [2010] EWHC 1071 (Ch) (19 May 2010)*.

The conclusion in these cases is right, but the reasoning seems incorrect. Both cases were based on the conclusion that the public authority was a wrongdoer and was thereby disqualified by Lord Goff's dicta in *Lipkin Gorman* (see Restitution for civil wrongs). However, a public authority who receives tax that is not due does not always commit a civil wrong, which is what Lord Goff contemplated by this exception. As Henderson J subsequently explained, the correct justification for ruling out the defence in such cases is that 'to allow scope for the defence would unacceptably subvert, and be inconsistent with, the high principles of public policy which led to the recognition of the *Woolwich* cause of action as a separate one in the English law of unjust enrichment' (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2014] EWHC 4302 (Ch), paragraph 315*).

As a general rule, a public authority is entitled to restitution of ultra vires payments made by it under the principle recognised in *Auckland Harbour Board v*

The King [1924] AC 318. The *Woolwich* principle is about payments made to a public authority whereas the *Auckland* principle concerns payments made by it. The change of position defence is applicable to claims based on the Auckland principle (*Surrey CC v NHS Lincolnshire Clinical Commissioning Group [2020] EWHC 3550 (QB), paragraph 124*).

What categories of defendant?

Rule 15:

In principle, the defence is open to any category of defendant, but in practice a public authority will find it difficult to prove the defence on the facts.

The defence is open to all private individuals and companies. The more difficult question is whether a public authority can ever rely on it. The defence is automatically ruled out where the claim is based on the *Woolwich* principle (see Ultra vires receipts by public authorities), but has been held to be open to a public body where the claim is based on a mistake (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2008] EWHC 2893 (Ch) and Littlewoods Retail Ltd v Revenue and Customs Commissioners [2010] EWHC 1071 (Ch) (19 May 2010*).

This is not to say that it will be easy for a public body to establish the defence. As Lord Briggs and Lord Sales observed in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2021] UKSC 31 (23 July 2021)*, '*many public authority defendants, including the revenue, may be unlikely in practice to be able to rely on it' (paragraph 295)*. This is because most attempts by public authorities to invoke the change of position defence will fail on causation grounds. Overall levels of public spending are likely set in some way by reference to anticipated receipts. However, the sheer size of overall receipts means that it will be impossible for a public body to say that any particular expenditure was caused by a particular overpayment (*Littlewoods Retail Ltd v Revenue and Customs Commissioners [2010] EWHC 1071 (Ch) (19 May 2010)*). It will not be possible for the overpayment to have caused a generally increased spending of the type considered in *Philip Collins Ltd v Davis [2000] 3 All ER 808*. The overpayment will rarely make any difference at all.

In *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Her Majesty's Revenue and Customs [2016] EWCA Civ 1180*, the Revenue's attempt to rely on the change of position failed because it was unable to establish a causal link between the receipt of overpaid tax and public expenditure (see, in particular, *paragraph 311*). As Vos, Underhill and David Richards LJJ explained, in order to establish the defence successfully "*[t]he government needs to show, as a starting point, that "but for" these particular receipts, expenditure would not have been made or taxes would not have been reduced*" (*paragraph 310*). Similarly, in Surrey CC, it was held that the defendant public authority had not established that it had changed its position. Thornton J found that that the defendant had provided no evidence of its expenditure or budgets. Even making allowances for the passage of time, he said, the defendant's evidence simply amounted to "assertion and speculation". For more information, see Legal update, Council's private law claim for restitution against CCG for reimbursement of NHS continuing healthcare costs allowed (High Court).

Restitution for civil wrongs

Rule 16:

The defence is not open to a defendant who is otherwise liable to make restitution as a result of committing a civil wrong.

In *Lipkin Gorman*, Lord Goff said that the defence is 'not open to a wrongdoer'. He did not explain what he meant by this, but it seems he meant to rule out the possibility that the defence could be invoked where the claim was founded upon a civil wrong (*Burrows, The Law of Restitution, Oxford University Press, 3rd Ed, 2011, page 543*).

There is an important distinction between restitution of an unjust enrichment and restitution for wrongs. The first is based on the cause of action in unjust enrichment. The second is based on a civil wrong (for example, breach of contract or fiduciary duty) and the claimant seeks to recover damages measured by reference to the defendant's gain rather than the claimant's loss. In this case, the court is no longer concerned with an innocent defendant who must return a benefit that belongs to the claimant. Instead, the defendant has committed a recognised civil wrong and there is no justification for allowing them to avoid liability by relying on a change of circumstance. Therefore, change of position is not available as a defence to a claim for restitution where the cause of action is a civil wrong (*FM Capital Partners Ltd v Marino [2020] EWCA Civ 245*, Sir Jack Beatson (with whom Simler and Irwin LJJ agreed), *paragraph 44*).

Change of position and counter-restitution

Rule 17:

There is no inflexible rule that the defence of counter-restitution trumps the change of position defence. The priority between the defences of counter-restitution and change of position is to be determined on a case-by-case basis to produce a just outcome on particular facts.

Example

C paid £10,000 to D for a car worth £8,000. The car was destroyed in a fire whilst in C's possession. Subsequently, C realised that D had induced C to buy the car by making a misrepresentation. C wishes to rescind the contract and seek restitution from D.

There are two ways of characterising D's enrichment. On one view, D is enriched by £10,000. However, C's claim against D is subject to a counterclaim by D for £8,000. On another view, the principle of counter-restitution applies at the enrichment stage such that D is only enriched by £2,000.

The distinction matters because on the first approach C has a valid restitution claim against D for £10,000. D's counterclaim is defeated by C's change of position. The net result is that C gets restitution of £10,000 from D. In contrast, on the second approach, C is only entitled to restitution of £2,000 from D.

The choice between these approaches was considered by the Court of Appeal in *School Facility Management Ltd v Governing Body of Christ the King College [2021] EWCA Civ 1053*. It was argued that where benefits have been exchanged by the claimant and the defendant, the defendant's enrichment is to be identified by netting them off (*paragraph 26*). Albeit *obiter*, Popplewell LJ (with whom Dingemans and Nicola Davies LJJ agreed) held that there was no inflexible rule of priority between the defences of counter-restitution and change of position. The defences are to be applied on a case-by-case basis to produce a just outcome on particular facts (*paragraphs 31, 56 and 85*). For more information, see Legal update, Enrichment of claimant must be "sufficiently closely connected" with benefits to defendant for counter restitution claim (Court of Appeal).